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VI. Civil Rights

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R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission

Ruling Below: *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc*, 884 F.3d 560 (6th Cir. 2018).

Overview: Aimee Stephens, who worked at R.G. & G.R. Funeral Homes, was fired when she told the funeral director of her transition from male to female and her intentions to dress as a woman while at work. After further investigation, the EEOC filed suit claiming that the Funeral home violated Title VII of the Civil Rights Act of 1964 by terminating Stephen's employment on the basis of her transgender or transitioning status and her refusal to conform to sex-based stereotypes and administering a discriminatory-clothing-allowance policy. The Funeral Home argues that it did not violate Title VII by requiring Stephens to comply with a sex-specific code, equally burdensome to both males and females. Alternatively, the Funeral Home should not be punished for their own sincerely held religious beliefs in violation of the Religious Freedom Restoration Act (RFRA).

Issue: Whether Title VII prohibits discrimination against transgender people based on (1) their status as transgender or (2) sex stereotyping under *Price Waterhouse v. Hopkins.*

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, *Plaintiff-Appellant*

v.

R.G. & G.R. HARRIS FUNERAL HOMES, INC., *Defendant- Appellee*

United States Court of Appeals, Sixth Circuit

Decided on March 7, 2018

[Excerpt; some citations and footnotes omitted]

MOORE, *Circuit Judge*:

Aimee Stephens (formerly known as Anthony Stephens) was born biologically male. While living and presenting as a man, she worked as a funeral director at R.G. & G.R. Harris Funeral Homes, Inc. ("the Funeral Home"), a closely held for-profit corporation that operates three funeral homes in Michigan. Stephens was terminated from the Funeral Home by its owner and operator, Thomas Rost, shortly after Stephens informed Rost that she intended to transition from male to female and would represent herself and dress as a woman while at work. Stephens filed a complaint with the Equal Employment Opportunity Commission ("EEOC"), which investigated Stephens's allegations that she had been terminated as a result of unlawful sex discrimination. During

the course of its investigation, the EEOC learned that the Funeral Home provided its male public-facing employees with clothing that complied with the company's dress code while female public-facing employees received no such allowance. The EEOC subsequently brought suit against the Funeral Home in which the EEOC charged the Funeral Home with violating Title VII of the Civil Rights Act of 1964 ("Title VII") by (1) terminating Stephens's employment on the basis of her transgender or transitioning status and her refusal to conform to sex-based stereotypes; and (2) administering a discriminatory-clothing-allowance policy.

The parties submitted dueling motions for summary judgment. The EEOC argued that it was entitled to judgment as a matter of law on both of its claims. For its part, the Funeral Home argued that it did not violate Title VII by requiring Stephens to comply with a sex-specific dress code that it asserts equally burdens male and female employees, and, in the alternative, that Title VII should not be enforced against the Funeral Home because requiring the Funeral Home to employ Stephens while she dresses and represents herself as a woman would constitute an unjustified substantial burden upon Rost's (and thereby the Funeral Home's) sincerely held religious beliefs, in violation of the Religious Freedom Restoration Act ("RFRA"). As to the EEOC's discriminatory-clothing-allowance claim, the Funeral Home argued that Sixth Circuit case law precludes the EEOC from bringing this claim in a complaint that arose out of Stephens's original charge of discrimination because the Funeral Home could not reasonably expect a clothing-allowance claim to emerge from an investigation into Stephens's termination.

The district court granted summary judgment in favor of the Funeral Home on both claims. For the reasons set forth below, we hold that (1) the Funeral Home engaged in unlawful discrimination against Stephens on the basis of her sex; (2) the Funeral Home has not established that applying Title VII's proscriptions against sex discrimination to the Funeral Home would substantially burden Rost's religious exercise, and therefore the Funeral Home is not entitled to a defense under RFRA; (3) even if Rost's religious exercise were substantially burdened, the EEOC has established that enforcing Title VII is the least restrictive means of furthering the government's compelling interest in eradicating workplace discrimination against Stephens; and (4) the EEOC may bring a discriminatory-clothing-allowance claim in this case because such an investigation into the Funeral Home's clothing-allowance policy was reasonably expected to grow out of the original charge of sex discrimination that Stephens submitted to the EEOC. Accordingly, we **REVERSE** the district court's grant of summary judgment on both the unlawful-termination and discriminatory-clothing-allowance claims, **GRANT** summary judgment to the EEOC on its unlawful-termination claim, and **REMAND** the case to the district court for further proceedings consistent with this opinion.

I. BACKGROUND

Aimee Stephens, a transgender woman who was "assigned male at birth," joined the Funeral Home as an apprentice on October 1,

2007 and served as a Funeral Director/Embalmer at the Funeral Home from April 2008 until August 2013. During the course of her employment at the Funeral Home, Stephens presented as a man and used her then-legal name, William Anthony Beasley Stephens.

The Funeral Home is a closely held for-profit corporation. Thomas Rost ("Rost"), who has been a Christian for over sixty-five years, owns 95.4% of the company and operates its three funeral home locations. Rost proclaims "that God has called him to serve grieving people" and "that his purpose in life is to minister to the grieving." To that end, the Funeral Home's website contains a mission statement that states that the Funeral Home's "highest priority is to honor God in all that we do as a company and as individuals" and includes a verse of scripture on the bottom of the mission statement webpage. The Funeral Home itself, however, is not affiliated with a church; it does not claim to have a religious purpose in its articles of incorporation; it is open every day, including Christian holidays; and it serves clients of all faiths. "Employees have worn Jewish head coverings when holding a Jewish funeral service." Although the Funeral Home places the Bible, "Daily Bread" devotionals, and "Jesus Cards" in public places within the funeral homes, the Funeral Home does not decorate its rooms with "visible religious figures . . . to avoid offending people of different religions." Rost hires employees belonging to any faith or no faith to work at the Funeral Home, and he "does not endorse or consider himself to endorse his employees' beliefs or non-employment-related activities."

The Funeral Home requires its public-facing male employees to wear suits and ties and its public-facing female employees to wear skirts and business jackets. The Funeral Home provides all male employees who interact with clients, including funeral directors, with free suits and ties, and the Funeral Home replaces suits as needed. All told, the Funeral Home spends approximately $470 per full-time employee per year and $235 per part-time employee per year on clothing for male employees.

Until October 2014—after the EEOC filed this suit—the Funeral Home did not provide its female employees with any sort of clothing or clothing allowance. Beginning in October 2014, the Funeral Home began providing its public-facing female employees with an annual clothing stipend ranging from $75 for part-time employees to $150 for full-time employees. Rost contends that the Funeral Home would provide suits to all funeral directors, regardless of their sex, but it has not employed a female funeral director since Rost's grandmother ceased working for the organization around 1950. According to Rost, the Funeral Home has received only one application from a woman for a funeral director position in the thirty-five years that Rost has operated the Funeral Home, and the female applicant was deemed not qualified.

On July 31, 2013, Stephens provided Rost with a letter stating that she has struggled with "a gender identity disorder" her "entire life," and informing Rost that she has "decided to become the person that [her] mind already is." The letter stated that Stephens "intend[ed] to have sex reassignment surgery," and explained that

"[t]he first step [she] must take is to live and work full-time as a woman for one year." To that end, Stephens stated that she would return from her vacation on August 26, 2013, "as [her] true self, Amiee [sic] Australia Stephens, in appropriate business attire." After presenting the letter to Rost, Stephens postponed her vacation and continued to work for the next two weeks. Then, just before Stephens left for her intended vacation, Rost fired her. Rost said, "this is not going to work out," and offered Stephens a severance agreement if she "agreed not to say anything or do anything." Stephens refused. Rost testified that he fired Stephens because "he was no longer going to represent himself as a man. He wanted to dress as a woman."

Rost avers that he "sincerely believe[s] that the Bible teaches that a person's sex is an immutable God-given gift," and that he would be "violating God's commands if [he] were to permit one of [the Funeral Home's] funeral directors to deny their sex while acting as a representative of [the] organization" or if he were to "permit one of [the Funeral Home's] male funeral directors to wear the uniform for female funeral directors while at work." In particular, Rost believes that authorizing or paying for a male funeral director to wear the uniform for female funeral directors would render him complicit "in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift."

After her employment was terminated, Stephens filed a sex-discrimination charge with the EEOC, alleging that "[t]he only explanation" she received from "management" for her termination was that "the public would [not] be accepting of [her] transition." She further noted that throughout her "entire employment" at the Funeral Home, there were "no other female Funeral Director/Embalmers." During the course of investigating Stephens's allegations, the EEOC learned from another employee that the Funeral Home did not provide its public-facing female employees with suits or a clothing stipend.

The EEOC issued a letter of determination on June 5, 2014, in which the EEOC stated that there was reasonable cause to believe that the Funeral Home "discharged [Stephens] due to her sex and gender identity, female, in violation of Title VII" and "discriminated against its female employees by providing male employees with a clothing benefit which was denied to females, in violation of Title VII." The EEOC and the Funeral Home were unable to resolve this dispute through an informal conciliation process, and the EEOC filed a complaint against the Funeral Home in the district court on September 25, 2014.

The Funeral Home moved to dismiss the EEOC's action for failure to state a claim. The district court denied the Funeral Home's motion, but it narrowed the basis upon which the EEOC could pursue its unlawful-termination claim. In particular, the district court agreed with the Funeral Home that transgender status is not a protected trait under Title VII, and therefore held that the EEOC could not sue for alleged discrimination against Stephens based solely on her transgender and/or transitioning status. Nevertheless, the district court determined that the EEOC had adequately

stated a claim for discrimination against Stephens based on the claim that she was fired because of her failure to conform to the Funeral Home's "sex-or gender-based preferences, expectations, or stereotypes."

The parties then cross-moved for summary judgment. With regard to the Funeral Home's decision to terminate Stephens's employment, the district court determined that there was "direct evidence to support a claim of employment discrimination" against Stephens on the basis of her sex, in violation of Title VII. However, the court nevertheless found in the Funeral Home's favor because it concluded that the Religious Freedom Restoration Act ("RFRA")precludes the EEOC from enforcing Title VII against the Funeral Home, as doing so would substantially burden Rost and the Funeral Home's religious exercise and the EEOC had failed to demonstrate that enforcing Title VII was the least restrictive way to achieve its presumably compelling interest "in ensuring that Stephens is not subject to gender stereotypes in the workplace in terms of required clothing at the Funeral home." Based on its narrow conception of the EEOC's compelling interest in bringing the claim, the district court concluded that the EEOC could have achieved its goals by proposing that the Funeral Home impose a gender-neutral dress code. The EEOC's failure to consider such an accommodation was, according to the district court, fatal to its case. . Separately, the district court held that it lacked jurisdiction to consider the EEOC's discriminatory-clothing-allowance claim because, under longstanding Sixth Circuit precedent, the EEOC may pursue in a Title VII lawsuit only claims that are reasonably expected to grow out of the complaining party's—in this case, Stephens's—original charge. The district court entered final judgment on all counts in the Funeral Home's favor on August 18, 2016, and the EEOC filed a timely notice of appeal shortly thereafter.

Stephens moved to intervene in this appeal on January 26, 2017, after expressing concern that changes in policy priorities within the U.S. government might prevent the EEOC from fully representing Stephens's interests in this case. The Funeral Home opposed Stephens's motion on the grounds that the motion was untimely and Stephens had failed to show that the EEOC would not represent her interests adequately. We determined that Stephens's request was timely given that she previously "had no reason to question whether the EEOC would continue to adequately represent her interests" and granted Stephens's motion to intervene on March 27, 2017. We further determined that Stephens's intervention would not prejudice the Funeral Home because Stephens stated in her briefing that she did not intend to raise new issues. Six groups of amici curiae also submitted briefing in this case.

II.DISCUSSION

A. Standard of Review

"We review a district court's grant of summary judgment de novo." Summary judgment is warranted when "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." In reviewing a grant of summary judgment, "we view all facts and any

inferences in the light most favorable to the nonmoving party." We also review all "legal conclusions supporting [the district court's] grant of summary judgment *de novo*."

B. Unlawful Termination Claim

Title VII prohibits employers from "discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin." "[A] plaintiff can establish a *prima facie* case [of unlawful discrimination] by presenting direct evidence of discriminatory intent." "[A] facially discriminatory employment policy or a corporate decision maker's express statement of a desire to remove employees in the protected group is direct evidence of discriminatory intent." Once a plaintiff establishes that "the prohibited classification played a motivating part in the [adverse] employment decision," the employer then bears the burden of proving that it would have terminated the plaintiff "even if it had not been motivated by impermissible discrimination."

Here, the district court correctly determined that Stephens was fired because of her failure to conform to sex stereotypes, in violation of Title VII. ("[W]hile this Court does not often see cases where there is direct evidence to support a claim of employment discrimination, it appears to exist here."). The district court erred, however, in finding that Stephens could not alternatively pursue a claim that she was discriminated against on the basis of her transgender and transitioning status. Discrimination on the basis of transgender and transitioning status is necessarily discrimination on the basis of sex, and thus the EEOC should have had the opportunity to prove that the Funeral Home violated Title VII by firing Stephens because she is transgender and transitioning from male to female.

1. Discrimination on the Basis of Sex Stereotypes

In *Price Waterhouse v. Hopkins*, a plurality of the Supreme Court explained that Title VII's proscription of discrimination "'*because of* . . . sex' . . . mean[s] that gender must be irrelevant to employment decisions. In enacting Title VII, the plurality reasoned, "Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." The *Price Waterhouse* plurality, along with two concurring Justices, therefore determined that a female employee who faced an adverse employment decision because she failed to "walk . . . femininely, talk . . . femininely, dress . . . femininely, wear make-up, have her hair styled, [or] wear jewelry," could properly state a claim for sex discrimination under Title VII—even though she was not discriminated against for being a woman *per se*, but instead for failing to be womanly enough.

Based on *Price Waterhouse*, we determined that "discrimination based on a failure to conform to stereotypical gender norms" was no less prohibited under Title VII than discrimination based on "the biological differences between men and women." And we found no "reason to exclude Title VII coverage for non sex-stereotypical behavior

simply because the person is a transsexual." Thus, in *Smith*, we held that a transgender plaintiff (born male) who suffered adverse employment consequences after "he began to express a more feminine appearance and manner on a regular basis" could file an employment discrimination suit under Title VII, because such "discrimination would not [have] occur[red] but for the victim's sex.." As we reasoned in *Smith*, Title VII proscribes discrimination both against women who "do not wear dresses or makeup" and men who do. Under any circumstances, "[s]ex stereotyping based on a person's gender non-conforming behavior is impermissible discrimination."

Here, Rost's decision to fire Stephens because Stephens was "no longer going to represent himself as a man" and "wanted to dress as a woman," falls squarely within the ambit of sex-based discrimination that *Price Waterhouse* and *Smith* forbid. For its part, the Funeral Home has failed to establish a non-discriminatory basis for Stephens's termination, and Rost admitted that he did not fire Stephens for any performance-related issues. We therefore agree with the district court that the Funeral Home discriminated against Stephens on the basis of her sex, in violation of Title VII.

The Funeral Home nevertheless argues that it has not violated Title VII because sex stereotyping is barred only when "the employer's reliance on stereotypes . . . result[s] in disparate treatment of employees because they are either male or female." According to the Funeral Home, an employer does not engage in impermissible sex stereotyping when it requires its employees to conform to a sex-specific dress code—as it purportedly did here by requiring Stephens to abide by the dress code designated for the Funeral Home's male employees—because such a policy "impose[s] equal burdens on men and women," and thus does not single out an employee for disparate treatment based on that employee's sex. In support of its position, the Funeral Home relies principally on *Jespersen v. Harrah's Operating Co.*, and *Barker v. Taft Broadcasting Co.*,. *Jespersen* held that a sex-specific grooming code that imposed different but equally burdensome requirements on male and female employees would not violate Title VII. *Barker*, for its part, held that a sex-specific grooming code that was enforced equally as to male and female employees would not violate Title VII. For three reasons, the Funeral Home's reliance on these cases is misplaced.

First, the central issue in *Jespersen* and *Barker*—whether certain sex-specific appearance requirements violate Title VII—is not before this court. We are not considering, in this case, whether the Funeral Home violated Title VII by requiring men to wear pant suits and women to wear skirt suits. Our question is instead whether the Funeral Home could legally terminate Stephens, notwithstanding that she fully intended to comply with the company's sex-specific dress code, simply because she refused to conform to the Funeral Home's notion of her sex. When the Funeral Home's actions are viewed in the proper context, no reasonable jury could believe that Stephens was not "target[ed] . . . for disparate treatment" and that "no sex stereotype factored into [the Funeral Home's] employment decision."

Second, even if we would permit certain sex-specific dress codes in a case where the issue was properly raised, we would not rely on either *Jespersen* or *Barker* to do so. *Barker* was decided before *Price Waterhouse*, and it in no way anticipated the Court's recognition that Title VII "strike[s] at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes." Rather, according to *Barker*, "[w]hen Congress makes it unlawful for an employer to 'discriminate . . . on the basis of . . . sex ...', without further explanation of its meaning, we should not readily infer that it meant something different than what the concept of discrimination has traditionally meant." Of course, this is precisely the sentiment that *Price Waterhouse* "eviscerated" when it recognized that "Title VII's reference to 'sex' encompasses both the biological differences between men and women, and gender discrimination, that is, discrimination based on a failure to conform to stereotypical gender norms." Indeed, *Barker*'s incompatibility with *Price Waterhouse* may explain why this court has not cited *Barker* since *Price Waterhouse* was decided.

As for *Jespersen*, that Ninth Circuit case is irreconcilable with our decision in *Smith*. Critical to *Jespersen*'s holding was the notion that the employer's "grooming standards," which required all female bartenders to wear makeup (and prohibited males from doing so), did not on their face violate Title VII because they did "not require [the plaintiff] to conform to a stereotypical image that would objectively impede her ability to perform her job." We reached the exact opposite conclusion in *Smith*, as we explained that requiring women to wear makeup does, in fact, constitute improper sex stereotyping. And more broadly, our decision in *Smith* forecloses the *Jespersen* court's suggestion that sex stereotyping is permissible so long as the required conformity does not "impede [an employee's] ability to perform her job," as the *Smith* plaintiff did not and was not required to allege that being expected to adopt a more masculine appearance and manner interfered with his job performance. *Jespersen*'s incompatibility with *Smith* may explain why it has never been endorsed (or even cited) by this circuit—and why it should not be followed now.

Finally, the Funeral Home misreads binding precedent when it suggests that sex stereotyping violates Title VII *only* when "the employer's sex stereotyping resulted in 'disparate treatment of men and women.'" This interpretation of Title VII cannot be squared with our holding in *Smith*. There, we did not ask whether transgender persons transitioning from male to female were treated differently than transgender persons transitioning from female to male. Rather, we considered whether a transgender person was being discriminated against based on "his failure to conform to sex stereotypes concerning how a man should look and behave." It is apparent from both *Price Waterhouse* and *Smith* that an employer engages in unlawful discrimination even if it expects both biologically male and female employees to conform to certain notions of how each should behave.

In short, the Funeral Home's sex-specific dress code does not preclude liability under Title VII. Even if the Funeral Home's dress

code does not itself violate Title VII—an issue that is not before this court—the Funeral Home may not rely on its policy to combat the charge that it engaged in improper sex stereotyping when it fired Stephens for wishing to appear or behave in a manner that contradicts the Funeral Home's perception of how she should appear or behave based on her sex. Because the EEOC has presented unrefuted evidence that unlawful sex stereotyping was "at least a motivating factor in the [Funeral Home's] actions," and because we reject the Funeral Home's affirmative defenses, we **GRANT** summary judgment to the EEOC on its sex discrimination claim.

2. Discrimination on the Basis of Transgender/Transitioning Status

We also hold that discrimination on the basis of transgender and transitioning status violates Title VII. The district court rejected this theory of liability at the motion-to-dismiss stage, holding that "transgender or transsexual status is currently not a protected class under Title VII." The EEOC and Stephens argue that the district court's determination was erroneous because Title VII protects against sex stereotyping and "transgender discrimination is based on the non-conformance of an individual's gender identity and appearance with sex-based norms or expectations"; therefore, "discrimination because of an individual's transgender status is *always* based on gender-stereotypes: the stereotype that individuals will conform their appearance and behavior—whether their dress, the name they use, or other ways they present themselves—to the sex assigned them at birth." The Funeral Home, in turn, argues that Title VII does not prohibit discrimination based on a person's transgender or transitioning status because "sex," for the purposes of Title VII, "refers to a binary characteristic for which there are only two classifications, male and female," and "which classification arises in a person based on their chromosomally driven physiology and reproductive function." According to the Funeral Home, transgender status refers to "a person's self-assigned 'gender identity'" rather than a person's sex, and therefore such a status is not protected under Title VII.

For two reasons, the EEOC and Stephens have the better argument. First, it is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex. The Seventh Circuit's method of "isolat[ing] the significance of the plaintiff's sex to the employer's decision" to determine whether Title VII has been triggered illustrates this point. In *Hively*, the Seventh Circuit determined that Title VII prohibits discrimination on the basis of sexual orientation—a different question than the issue before this court—by asking whether the plaintiff, a self-described lesbian, would have been fired "if she had been a man married to a woman (or living with a woman, or dating a woman) and everything else had stayed the same." If the answer to that question is no, then the plaintiff has stated a "paradigmatic sex discrimination" claim. Here, we ask whether Stephens would have been fired if Stephens had been a woman who sought to comply with the women's dress code. The answer quite obviously is no. This, in and of itself, confirms that Stephens's sex

impermissibly affected Rost's decision to fire Stephens.

The court's analysis in *Schroer v. Billington*, provides another useful way of framing the inquiry. There, the court noted that an employer who fires an employee because the employee converted from Christianity to Judaism has discriminated against the employee "because of religion," regardless of whether the employer feels any animus against either Christianity or Judaism, because "[d]iscrimination 'because of religion' easily encompasses discrimination because of a *change* of religion.'" By the same token, discrimination "because of sex" inherently includes discrimination against employees because of a change in their sex. Here, there is evidence that Rost at least partially based his employment decision on Stephens's desire to change her sex: Rost justified firing Stephens by explaining that Rost "sincerely believes that 'the Bible teaches that a person's sex (whether male or female) is an immutable God-given gift and that it is wrong for a person to deny his or her God-given sex,'" and "the Bible teaches that it is wrong for a biological male to deny his sex by dressing as a woman." As amici point out in their briefing, such statements demonstrate that "Ms. Stephens's sex necessarily factored into the decision to fire her."

The Funeral Home argues that *Schroer*'s analogy is "structurally flawed" because, unlike religion, a person's sex cannot be changed; it is, instead, a biologically immutable trait. We need not decide that issue; even if true, the Funeral Home's point is immaterial. As noted above, the Supreme Court made clear in *Price Waterhouse* that Title VII requires "gender [to] be irrelevant to employment decisions." Gender (or sex) is not being treated as "irrelevant to employment decisions" if an employee's attempt or desire to change his or her sex leads to an adverse employment decision.

Second, discrimination against transgender persons necessarily implicates Title VII's proscriptions against sex stereotyping. As we recognized in *Smith*, a transgender person is someone who "fails to act and/or identify with his or her gender"—i.e., someone who is inherently "gender non-conforming." Thus, an employer cannot discriminate on the basis of transgender status without imposing its stereotypical notions of how sexual organs and gender identity ought to align. There is no way to disaggregate discrimination on the basis of transgender status from discrimination on the basis of gender non-conformity, and we see no reason to try.

We did not expressly hold in *Smith* that discrimination on the basis of transgender status is unlawful, though the opinion has been read to say as much—both by this circuit and others. In *G.G. v. Gloucester County School Board*, for instance, the Fourth Circuit described *Smith* as holding "that discrimination against a transgender individual based on that person's transgender status is discrimination because of sex under federal civil rights statutes." And in *Dodds v. United States Department of Education*, we refused to stay "a preliminary injunction ordering the school district to treat an eleven-year old transgender girl as a female and permit her to use the girls' restroom" because, among other things, the school district failed

to show that it would likely succeed on the merits. In so holding, we cited *Smith* as evidence that this circuit's "settled law" prohibits "[s]ex stereotyping based on a person's gender non-conforming behavior," and then pointed to out-of-circuit cases for the propositions that "[a] person is defined as transgender precisely because of the perception that his or her behavior transgresses gender stereotypes," and "[t]he weight of authority establishes that discrimination based on transgender status is already prohibited by the language of federal civil rights statutes." Such references support what we now directly hold: Title VII protects transgender persons because of their transgender or transitioning status, because transgender or transitioning status constitutes an inherently gender non-conforming trait.

The Funeral Home raises several arguments against this interpretation of Title VII, none of which we find persuasive. First, the Funeral Home contends that the Congress enacting Title VII understood "sex" to refer only to a person's "physiology and reproductive role," and not a person's "self-assigned 'gender identity.'" But the drafters' failure to anticipate that Title VII would cover transgender status is of little interpretive value, because "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed." And in any event, *Smith* and *Price Waterhouse* preclude an interpretation of Title VII that reads "sex" to mean only individuals' "chromosomally driven physiology and reproductive function." Indeed, we criticized the district court in *Smith* for "relying on a series of pre-*Price Waterhouse* cases from other federal appellate courts holding that transsexuals, as a class, are not entitled to Title VII protection because 'Congress had a narrow view of sex in mind' and 'never considered nor intended that [Title VII] apply to anything other than the traditional concept of sex.'" According to *Smith*, such a limited view of Title VII's protections had been "eviscerated by *Price Waterhouse*." The Funeral Home's attempt to resurrect the reasoning of these earlier cases thus runs directly counter to *Smith*'s holding.

In a related argument, the Funeral Home notes that both biologically male and biologically female persons may consider themselves transgender, such that transgender status is not unique to one biological sex. It is true, of course, that an individual's biological sex does not dictate her transgender status; the two traits are not coterminous. But a trait need not be exclusive to one sex to nevertheless be a function of sex. As the Second Circuit explained in *Zarda*,

> Title VII does not ask whether a particular sex is discriminated against; it asks whether a particular "*individual*" is discriminated against "because of such *individual's* . . . sex." Taking individuals as the unit of analysis, the question is not whether discrimination is borne only by men or only by women or even by both men and women; instead, the question is whether an individual is discriminated against because of his or her sex.

Because an employer cannot discriminate against an employee for being transgender without considering that employee's biological sex, discrimination on the basis of transgender status necessarily entails discrimination on the basis of sex—no matter what sex the employee was born or wishes to be. By the same token, an employer need not discriminate based on a trait common to all men or women to violate Title VII. After all, a subset of both women and men decline to wear dresses or makeup, but discrimination against any woman on this basis would constitute sex discrimination under *Price Waterhouse.*

Nor can much be gleaned from the fact that later statutes, such as the Violence Against Women Act, expressly prohibit discrimination on the basis of "gender identity," while Title VII does not, because "Congress may certainly choose to use both a belt and suspenders to achieve its objectives." We have, in fact, already read Title VII to provide redundant statutory protections in a different context. In *In re Rodriguez*, for instance, we recognized that claims alleging discrimination on the basis of ethnicity may fall within Title VII's prohibition on discrimination on the basis of national origin, even though at least one other federal statute treats "national origin" and "ethnicity" as separate traits. Moreover, Congress's failure to modify Title VII to include expressly gender identity "lacks 'persuasive significance' because 'several equally tenable inferences' may be drawn from such inaction, 'including the inference that the existing legislation already incorporated the offered change.'" In short, nothing precludes discrimination based on transgender status from being viewed both as discrimination based on "gender identity" for certain statutes and, for the purposes of Title VII, discrimination on the basis of sex.

The Funeral Home places great emphasis on the fact that our published decision in *Smith* superseded an earlier decision that stated explicitly, as opposed to obliquely, that a plaintiff who "alleges discrimination based solely on his identification as a transsexual . . . has alleged a claim of sex stereotyping pursuant to Title VII." But such an amendment does not mean, as the Funeral Home contends, that the now-binding *Smith* opinion "directly rejected" the notion that Title VII prohibits discrimination on the basis of transgender status. The elimination of the language, which was not necessary to the decision, simply means that *Smith* did not expressly recognize Title VII protections for transgender persons based on identity. But *Smith*'s reasoning still leads us to the same conclusion.

We are also unpersuaded that our decision in *Vickers v. Fairfield Medical Center*, precludes the holding we issue today. We held in *Vickers* that a plaintiff cannot pursue a claim for impermissible sex stereotyping on the ground that his perceived sexual orientation fails to conform to gender norms unless he alleges that he was discriminated against for failing to "conform to traditional gender stereotypes in any observable way at work." *Vickers* thus rejected the notion that "the act of identification with a particular group, in itself, is sufficiently gender non-conforming such that an employee who so identifies would, by this very identification, engage in conduct that would enable him to

assert a successful sex stereotyping claim." The *Vickers* court reasoned that recognizing such a claim would impermissibly "bootstrap protection for sexual orientation into Title VII." The Funeral Home insists that, under *Vickers*, Stephens's sex-stereotyping claim survives only to the extent that it concerns her "appearance or mannerisms on the job, but not as it pertains to her underlying status as a transgender person.

The Funeral Home is wrong. First, *Vickers* does not control this case because *Vickers* concerned a different legal question. As the EEOC and amici Equality Ohio note, *Vickers* "addressed only whether Title VII forbids sexual orientation discrimination, not discrimination against a transgender individual." While it is indisputable that "[a] panel of this Court cannot overrule the decision of another panel" when the "prior decision [constitutes] controlling authority." After all, we do not overrule a case by distinguishing it.

Second, we are not bound by *Vickers* to the extent that it contravenes *Smith.* As noted above, *Vickers* indicated that a sex-stereotyping claim is viable under Title VII only if a plaintiff alleges that he was discriminated against for failing to "conform to traditional gender stereotypes *in any observable way at work*." The *Vickers* court's new "observable-at-work" requirement is at odds with the holding in *Smith*, which did not limit sex-stereotyping claims to traits that are observable in the workplace. The "observable-at-work" requirement also contravenes our reasoning in *Barnes v. City of Cincinnati*—a binding decision that predated *Vickers* by more than a year—in which we held that a reasonable jury could conclude that a transgender plaintiff was discriminated against on the basis of his sex when, among other factors, his "ambiguous sexuality and his practice of dressing as a woman *outside of work* were well-known within the [workplace]." From *Smith* and *Barnes*, it is clear that a plaintiff may state a claim under Title VII for discrimination based on gender nonconformance that is expressed outside of work. The *Vickers* court's efforts to develop a narrower rule are therefore not binding in this circuit.

Therefore, for the reasons set forth above, we hold that the EEOC could pursue a claim under Title VII on the ground that the Funeral Home discriminated against Stephens on the basis of her transgender status and transitioning identity. The EEOC should have had the opportunity, either through a motion for summary judgment or at trial, to establish that the Funeral Home violated Title VII's prohibition on discrimination on the basis of sex by firing Stephens because she was transgender and transitioning from male to female.

3. Defenses to Title VII Liability

Having determined that the Funeral Home violated Title VII's prohibition on sex discrimination, we must now consider whether any defenses preclude enforcement of Title VII in this case. As noted above, the district court held that the EEOC's enforcement efforts must give way to the Religious Freedom Restoration Act ("RFRA"), which prohibits the government from enforcing a religiously neutral law against an individual if that law substantially

burdens the individual's religious exercise and is not the least restrictive way to further a compelling government interest. The EEOC seeks reversal of this decision; the Funeral Home urges affirmance. In addition, certain amici ask us to affirm the district court's grant of summary judgment on different grounds—namely that Stephens falls within the "ministerial exception" to Title VII and is therefore not protected under the Act.

We hold that the Funeral Home does not qualify for the ministerial exception to Title VII; the Funeral Home's religious exercise would not be substantially burdened by continuing to employ Stephens without discriminating against her on the basis of sex stereotypes; the EEOC has established that it has a compelling interest in ensuring the Funeral Home complies with Title VII; and enforcement of Title VII is necessarily the least restrictive way to achieve that compelling interest. We therefore **REVERSE** the district court's grant of summary judgment in the Funeral Home's favor and **GRANT** summary judgment to the EEOC on the unlawful-termination claim.

a. Ministerial Exception

We turn first to the "ministerial exception" to Title VII, which is rooted in the First Amendment's religious protections, and which "preclude[s] application of [employment discrimination laws such as Title VII] to claims concerning the employment relationship between a religious institution and its ministers." "[I]n order for the ministerial exception to bar an employment discrimination claim, the employer must be a religious institution and the employee must have been a ministerial employee." "The ministerial exception is a highly circumscribed doctrine. It grew out of the special considerations raised by the employment claims of clergy, which 'concern[] internal church discipline, faith, and organization, all of which are governed by ecclesiastical rule, custom, and law.'"

Public Advocate of the United States and its fellow amici argue that the ministerial exception applies in this case because (1) the exception applies both to religious and non-religious entities, and (2) Stephens is a ministerial employee. Tellingly, however, the Funeral Home contends that the Funeral Home "is not a religious organization" and therefore, "the ministerial exception has no application" to this case. Although the Funeral Home has not waived the ministerial-exception defense by failing to raise it, the First Amendment's ministerial exception" because "[t]his constitutional protection is . . . structural"), we agree with the Funeral Home that the exception is inapplicable here.

As we made clear in *Conlon*, the ministerial exception applies only to "religious institution[s]." While an institution need not be "a church, diocese, or synagogue, or an entity operated by a traditional religious organization," to qualify for the exception, the institution must be "marked by clear or obvious religious characteristics." In accordance with these principles, we have previously determined that the InterVarsity Christian Fellowship/USA ("IVCF"), "an evangelical campus mission," constituted a religious organization for the purposes of the

ministerial exception. IVCF described itself on its website as "faith-based religious organization" whose "purpose 'is to establish and advance at colleges and universities witnessing communities of students and faculty who follow Jesus as Savior and Lord.'" In addition, IVCF's website notified potential employees that it has the right to "hir[e] staff based on their religious beliefs so that all staff share the same religious commitment." Finally, IVCF required all employees "annually [to] reaffirm their agreement with IVCF's Purpose Statement and Doctrinal Basis."

The Funeral Home, by comparison, has virtually no "religious characteristics." Unlike the campus mission in *Conlon*, the Funeral Home does not purport or seek to "establish and advance" Christian values. As the EEOC notes, the Funeral Home "is not affiliated with any church; its articles of incorporation do not avow any religious purpose; its employees are not required to hold any particular religious views; and it employs and serves individuals of all religions." Though the Funeral Home's mission statement declares that "its highest priority is to honor God in all that we do as a company and as individuals," the Funeral Home's sole public displays of faith, according to Rost, amount to placing "Daily Bread" devotionals and "Jesus Cards" with scriptural references in public places in the funeral homes, which clients may pick up if they wish. The Funeral Home does not decorate its rooms with "religious figures" because it does not want to "offend[] people of different religions." The Funeral Home is open every day, including on Christian holidays. And while the employees are paid for federally recognized holidays, Easter is not a paid holiday.

Nor is Stephens a "ministerial employee" under *Hosanna-Tabor*. Following *Hosanna-Tabor*, we have identified four factors to assist courts in assessing whether an employee is a minister covered by the exception: (1) whether the employee's title "conveys a religious—as opposed to secular—meaning"; (2) whether the title reflects "a significant degree of religious training" that sets the employee "apart from laypersons"; (3) whether the employee serves "as an ambassador of the faith" and serves a "leadership role within [the] church, school, and community"; and (4) whether the employee performs "important religious functions . . . for the religious organization." Stephens's title—"Funeral Director"—conveys a purely secular function. The record does not reflect that Stephens has any religious training. Though Stephens has a public-facing role within the funeral home, she was not an "ambassador of [any] faith," and she did not perform "important religious functions," rather, Rost's description of funeral directors' work identifies mostly secular tasks—making initial contact with the deceased's families, handling the removal of the remains to the funeral home, introducing other staff to the families, coaching the families through the first viewing, greeting the guests, and coordinating the families' "final farewell." The only responsibilities assigned to Stephens that could be construed as religious in nature were, "on limited occasions," to "facilitate" a family's clergy selection, "facilitate the first meeting of clergy and family members," and "play a role in building

the family's confidence around the role the clergy will play, clarifying what type of religious message is desired, and integrating the clergy into the experience." Such responsibilities are a far cry from the duties ascribed to the employee in *Conlon*, which "included assisting others to cultivate 'intimacy with God and growth in Christ-like character through personal and corporate spiritual disciplines.'" In short, Stephens was not a ministerial employee and the Funeral Home is not a religious institution, and therefore the ministerial exception plays no role in this case.

b. Religious Freedom Restoration Act

Congress enacted RFRA in 1993 to resurrect and broaden the Free Exercise Clause jurisprudence that existed before the Supreme Court's decision in *Employment Division v. Smith*, which overruled the approach to analyzing Free Exercise Clause claims set forth by *Sherbert v. Verner*. To that end, RFRA precludes the government from "substantially burden[ing] a person's exercise of religion even if the burden results from a rule of general applicability," unless the government "demonstrates that application of the burden to the person—(1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." RFRA thus contemplates a two-step burden-shifting analysis: First, a claimant must demonstrate that complying with a generally applicable law would substantially burden his religious exercise. Upon such a showing, the government must then establish that applying the law to the burdened individual is the least restrictive means of furthering a compelling government interest.

The questions now before us are whether (1) we ought to remand this case and preclude the Funeral Home from asserting a RFRA-based defense in the proceedings below because Stephens, a non-governmental party, joined this action as an intervenor on appeal; (2) if not, whether the Funeral Home adequately demonstrated that it would be substantially burdened by the application of Title VII in this case; (3) if so, whether the EEOC nevertheless demonstrated that application of a such a burden to the Funeral Home furthers a compelling governmental interest; and (4) if so, whether the application of such a burden constitutes the least restrictive means of furthering that compelling interest. We address each inquiry in turn.

i. Applicability of the Religious Freedom Restoration Act

We have previously made clear that "Congress intended RFRA to apply only to suits in which the government is a party." Thus, if Stephens had initiated a private lawsuit against the Funeral Home to vindicate her rights under Title VII, the Funeral Home would be unable to invoke RFRA as a defense because the government would not have been party to the suit. Now that Stephens has intervened in this suit, she argues that the case should be remanded to the district court with instructions barring the Funeral Home from asserting a RFRA defense to her individual claims. The EEOC supports Stephens's argument.

The Funeral Home, in turn, argues that the question of RFRA's applicability to Title VII suits between private parties "is a new and complicated issue that has never been a part of this case and has never been briefed by the parties." Because Stephens's intervention on appeal was granted, in part, on her assurances that she "seeks only to raise arguments already within the scope of this appeal," the Funeral Home insists that permitting Stephens to argue now in favor of remand "would immensely prejudice the Funeral Home and undermine the Court's reasons for allowing Stephens's intervention in the first place."

The Funeral Home is correct. Stephens's reply brief in support of her motion to intervene insists that "no party to an appeal may broaden the scope of litigation beyond the issues raised before the district court." Though the district court noted in a footnote that "the Funeral Home could not assert a RFRA defense if Stephens had filed a Title VII suit on Stephens's own behalf," this argument was not briefed by the parties at the district-court level. Thus, in accordance with Stephens's own brief, she should not be permitted to argue for remand before this court.

Stephens nevertheless insists that "intervenors . . . are permitted to present different arguments related to the principal parties' claims." But in *Grutter*, this court determined that proposed intervenors ought to be able to present particular "defenses of affirmative action" that the principal party to the case (a university) might be disinclined to raise because of "internal and external institutional pressures." Allowing intervenors to present particular defenses on the merits to judiciable claims is different than allowing intervenors to change the procedural course of litigation by virtue of their intervention.

Moreover, we typically will not consider issues raised for the first time on appeal unless they are "presented with sufficient clarity and completeness and [their] resolution will materially advance the process of th[e] . . . litigation." The merits of a remand have been addressed only in passing by the parties, and thus have not been discussed with "sufficient clarity and completeness" to enable us to entertain Stephens's claim.

ii. Prima Facie Case Under RFRA

To assert a viable defense under RFRA, a religious claimant must demonstrate that the government action at issue "would (1) substantially burden (2) a sincere (3) religious exercise." In reviewing such a claim, courts must not evaluate whether asserted "religious beliefs are mistaken or insubstantial." Rather, courts must assess "whether the line drawn reflects 'an honest conviction.'" In addition, RFRA, as amended by the Religious Land Use and Institutionalized Persons Act of 2000 ("RLUIPA"), protects "any exercise of religion, whether or not compelled by, or central to, a system of religious belief."

The EEOC argues that the Funeral Home's RFRA defense must fail because "RFRA protects religious exercise, not religious beliefs," and the Funeral Home has failed to "identif[y] how continuing to employ Stephens after, or during, her transition

would interfere with any religious 'action or practice.'" The Funeral Home, in turn, contends that the "very operation of [the Funeral Home] constitutes protected religious exercise" because Rost feels compelled by his faith to "serve grieving people" through the funeral home, and thus "[r]equiring [the Funeral Home] to authorize a male funeral director to wear the uniform for female funeral directors would directly interfere with—and thus impose a substantial burden on—[the Funeral Home's] ability to carry out Rost's religious exercise of caring for the grieving."

If we take Rost's assertions regarding his religious beliefs as sincere, which all parties urge us to do, then we must treat Rost's running of the funeral home as a religious exercise—even though Rost does not suggest that ministering to grieving mourners by operating a funeral home is a tenet of his religion, more broadly. The question then becomes whether the Funeral Home has identified any way in which continuing to employ Stephens would substantially burden Rost's ability to serve mourners. The Funeral Home purports to identify two burdens. "First, allowing a funeral director to wear the uniform for members of the opposite sex would often create distractions for the deceased's loved ones and thereby hinder their healing process (and [the Funeral Home's] ministry)," and second, "forcing [the Funeral Home] to violate Rost's faith . . . would significantly pressure Rost to leave the funeral industry and end his ministry to grieving people." Neither alleged burden is "substantial" within the meaning of RFRA.

The Funeral Home's first alleged burden—that Stephens will present a distraction that will obstruct Rost's ability to serve grieving families—is premised on presumed biases. As the EEOC observes, the Funeral Home's argument is based on "a view that Stephens is a 'man' and would be perceived as such even after her gender transition," as well as on the "assumption that a transgender funeral director would so disturb clients as to 'hinder healing.'" The factual premises underlying this purported burden are wholly unsupported in the record. Rost testified that he has never seen Stephens in anything other than a suit and tie and does not know how Stephens would have looked when presenting as a woman. Rost's assertion that he believes his clients would be disturbed by Stephens's appearance during and after her transition to the point that their healing from their loved ones' deaths would be hindered, at the very least raises a material question of fact as to whether his clients would actually be distracted, which cannot be resolved in the Funeral Home's favor at the summary-judgment stage. Thus, even if we were to find the Funeral Home's argument legally cognizable, we would not affirm a finding of substantial burden based on a contested and unsupported assertion of fact.

But more to the point, we hold as a matter of law that a religious claimant cannot rely on customers' presumed biases to establish a substantial burden under RFRA. Though we have seemingly not had occasion to address the issue, other circuits have considered whether and when to account for customer biases in justifying discriminatory employment practices. In particular, courts asked to determine whether customers' biases

may render sex a "bona fide occupational qualification" under Title VII have held that "it would be totally anomalous . . . to allow the preferences and prejudices of the customers to determine whether the sex discrimination was valid." District courts within this circuit have endorsed these out-of-circuit opinions.

Of course, cases like *Diaz, Fernandez*, and *Bradley* concern a different situation than the one at hand. We could agree that courts should not credit customers' prejudicial notions of what men and women can do when considering whether sex constitutes a "bona fide occupational qualification" for a given position while nonetheless recognizing that those same prejudices have practical effects that would substantially burden Rost's religious practice (i.e., the operation of his business) in this case. But the Ninth Circuit rejected similar reasoning in *Fernandez*, and we reject it here. In *Fernandez*, the Ninth Circuit held that customer preferences could not transform a person's gender into a relevant consideration for a particular position *even if* the record supported the idea that the employer's business would suffer from promoting a woman because a large swath of clients would refuse to work with a female vice-president. Just as the *Fernandez* court refused to treat discriminatory promotion practices as critical to an employer's business, notwithstanding any evidence to that effect in the record, so too we refuse to treat discriminatory policies as essential to Rost's business—or, by association, his religious exercise.

The Funeral Home's second alleged burden also fails. Under *Holt v. Hobbs*, a government action that "puts [a religious practitioner] to th[e] choice" of "'engag[ing] in conduct that seriously violates [his] religious beliefs' [or] . . . fac[ing] serious" consequences constitutes a substantial burden for the purposes of RFRA. Here, Rost contends that he is being put to such a choice, as he either must "purchase female attire" for Stephens or authorize her "to dress in female attire *while representing* [the Funeral Home] and serving the bereaved," which purportedly violates Rost's religious beliefs, or else face "significant[] pressure . . . to leave the funeral industry and end his ministry to grieving people." Neither of these purported choices can be considered a "substantial burden" under RFRA.

First, though Rost currently provides his male employees with suits and his female employees with stipends to pay for clothing, this benefit is not legally required and Rost does not suggest that the benefit is religiously compelled. In this regard, Rost is unlike the employers in *Hobby Lobby*, who rejected the idea that they could simply refuse to provide health care altogether and pay the associated penalty (which would allow them to avoid providing access to contraceptives in violation of their beliefs) because they felt religiously compelled to provide their employees with health insurance. And while "it is predictable that the companies [in *Hobby Lobby*] would face a competitive disadvantage in retaining and attracting skilled workers" if they failed to provide health insurance, the record here does not indicate that the Funeral Home's clothing benefit is necessary to attract workers; in

fact, until the EEOC commenced the present action, the Funeral Home did not provide any sort of clothing benefit to its female employees. Thus, Rost is not being forced to choose between providing Stephens with clothing or else leaving the business; this is a predicament of Rost's own making.

Second, simply permitting Stephens to wear attire that reflects a conception of gender that is at odds with Rost's religious beliefs is not a substantial burden under RFRA. We presume that the "line [Rost] draw[s]"—namely, that permitting Stephens to represent herself as a woman would cause him to "violate God's commands" because it would make him "directly involved in supporting the idea that sex is a changeable social construct rather than an immutable God-given gift," constitutes "an honest conviction." But we hold that, as a matter of law, tolerating Stephens's understanding of her sex and gender identity is not tantamount to supporting it.

Most circuits, including this one, have recognized that a party can sincerely believe that he is being coerced into engaging in conduct that violates his religious convictions without actually, as a matter of law, being so engaged. Courts have recently confronted this issue when non-profit organizations whose religious beliefs prohibit them "from paying for, providing, or facilitating the distribution of contraceptives," or in any way "be[ing] complicit in the provision of contraception" argued that the Affordable Care Act's opt-out procedure—which enables organizations with religious objections to the contraceptive mandate to avoid providing such coverage by either filling out a form certifying that they have a religious objection to providing contraceptive coverage or directly notifying the Department of Health and Human Services of the religious objection—substantially burdens their religious practice.

Eight of the nine circuits to review the issue, including this court, have determined that the opt-out process does not constitute a substantial burden. The courts reached this conclusion by examining the Affordable Care Act's provisions and determining that it was the statute—and not the employer's act of opting out—that "entitle[d] plan participants and beneficiaries to contraceptive coverage." As a result, the employers' engagement with the opt-out process, though legally significant in that it leads the government to provide the organizations' employees with access to contraceptive coverage through an alternative route, does not mean the employers are facilitating the provision of contraceptives in a way that violates their religious practice.

We view the Funeral Home's compliance with antidiscrimination laws in much the same light. Rost may sincerely believe that, by retaining Stephens as an employee, he is supporting and endorsing Stephens's views regarding the mutability of sex. But as a matter of law, bare compliance with Title VII—without actually assisting or facilitating Stephens's transition efforts—does not amount to an endorsement of Stephens's views. As much is clear from the Supreme Court's Free Speech jurisprudence, in which the Court has held that a statute requiring law schools to provide military and nonmilitary recruiters an equal opportunity to recruit

students on campus was not improperly compelling schools to endorse the military's policies because "[n]othing about recruiting suggests that law schools agree with any speech by recruiters," and "students can appreciate the difference between speech a school sponsors and speech the school permits because legally required to do so, pursuant to an equal access policy." Similarly, here, requiring the Funeral Home to refrain from firing an employee with different religious views from Rost does not, as a matter of law, mean that Rost is endorsing or supporting those views. Indeed, Rost's own behavior suggests that he sees the difference between employment and endorsement, as he employs individuals of any or no faith, "permits employees to wear Jewish head coverings for Jewish services," and "even testified that he is *not* endorsing his employee's religious beliefs by employing them."

At bottom, the fact that Rost sincerely believes that he is being compelled to make such an endorsement does not make it so. Accordingly, requiring Rost to comply with Title VII's proscriptions on discrimination does not substantially burden his religious practice. The district court therefore erred in granting summary judgment to the Funeral Home on the basis of its RFRA defense, and we **REVERSE** the district court's decision on this ground. As Rost's purported burdens are insufficient as a matter of law, we **GRANT** summary judgment to the EEOC with respect to the Funeral Home's RFRA defense.

iii. Strict Scrutiny Test

Because the Funeral Home has not established that Rost's religious exercise would be substantially burdened by requiring the Funeral Home to comply with Title VII, we do not need to consider whether the EEOC has adequately demonstrated that enforcing Title VII in this case is the least restrictive means of furthering a compelling government interest. However, in the interest of completeness, we reach this issue and conclude that the EEOC has satisfied its burden. We therefore **GRANT** summary judgment to the EEOC with regard to the Funeral Home's RFRA defense on the alternative grounds that the EEOC's enforcement action in this case survives strict scrutiny.

(a) Compelling Government Interest

Under the "to the person" test, the EEOC must demonstrate that its compelling interest "is satisfied through application of the challenged law [to] . . . the particular claimant whose sincere exercise of religion is being substantially burdened." This requires "look[ing] beyond broadly formulated interests justifying the general applicability of government mandates and scrutiniz[ing] the asserted harm of granting specific exemptions to particular religious claimants."

As an initial matter, the Funeral Home does not seem to dispute that the EEOC "has a compelling interest in the 'elimination of workplace discrimination, including sex discrimination.'" However, the Funeral Home criticizes the EEOC for "cit[ing] a general, broadly formulated interest" to support enforcing Title VII in this

case. According to the Funeral Home, the relevant inquiry is whether the EEOC has a "specific interest in forcing [the Funeral Home] to allow its male funeral directors to wear the uniform for female funeral directors while on the job." The EEOC instead asks whether its interest in "eradicating employment discrimination" is furthered by ensuring that Stephens does not suffer discrimination (either on the basis of sex-stereotyping or her transgender status), lose her livelihood, or face the emotional pain and suffering of being effectively told "that as a transgender woman she is not valued or able to make workplace contributions." Stephens similarly argues that "Title VII serves a compelling interest in eradicating all the forms of invidious employment discrimination proscribed by the statute," and points to studies demonstrating that transgender people have experienced particularly high rates of "bodily harm, violence, and discrimination because of their transgender status."

The Funeral Home's construction of the compelling-interest test is off-base. Rather than focusing on the EEOC's claim—that the Funeral Home terminated Stephens because of her proposed gender nonconforming behavior—the Funeral Home's test focuses instead on its defense (discussed above) that the Funeral Home merely wishes to enforce an appropriate workplace uniform. But the Funeral Home has not identified any cases where the government's compelling interest was framed as its interest in disturbing a company's workplace policies. For instance, in *Hobby Lobby*, the issue, which the Court ultimately declined to adjudicate, was whether the government's "interest in guaranteeing cost-free access to the four challenged contraceptive methods" was compelling—not whether the government had a compelling interest in requiring closely held organizations to act in a way that conflicted with their religious practice.

The Supreme Court's analysis in cases like *Wisconsin v. Yoder*, and *Holt* guides our approach. In those cases, the Court ultimately determined that the interests *generally* served by a given government policy or statute would not be "compromised" by granting an exemption to a particular individual or group. Thus, in *Yoder*, the Court held that the interests furthered by the government's requirement of compulsory education for children through the age of sixteen (i.e., "to prepare citizens to participate effectively and intelligently in our open political system" and to "prepare[] individuals to be self-reliant and self-sufficient participants in society") were not harmed by granting an exemption to the Amish, who do not need to be prepared "for life in modern society" and whose own traditions adequately ensure self-sufficiency. Similarly, in *Holt*, the Court recognized that the Department of Corrections has a compelling interest in preventing prisoners from hiding contraband on their persons, which is generally effectuated by requiring prisoners to adhere to a strict grooming policy, but the Court failed to see how the Department's "compelling interest in staunching the flow of contraband into and within its facilities . . . would be seriously compromised by allowing an inmate to grow a 1/2-inch beard."

Here, the same framework leads to the opposite conclusion. Failing to enforce Title

VII against the Funeral Home means the EEOC would be allowing a particular person—Stephens—to suffer discrimination, and such an outcome is directly contrary to the EEOC's compelling interest in combating discrimination in the workforce. In this regard, this case is analogous to *Eternal Word*, in which the Eleventh Circuit determined that the government had a compelling interest in requiring a particular nonprofit organization with religious objections to the Affordable Care Act's contraceptive mandate to follow the procedures associated with obtaining an accommodation to the Act because

> applying the accommodation procedure *to the plaintiffs in these cases* furthers [the government's] interests because the accommodation ensures that the plaintiffs' female plan participants and beneficiaries—who may or may not share the same religious beliefs as their employer—have access to contraception without cost sharing or additional administrative burdens as the ACA requires.

The *Eternal Word* court reasoned that "[u]nlike the exception made in *Yoder* for Amish children," who would be adequately prepared for adulthood even without compulsory education, the "poor health outcomes related to unintended or poorly timed pregnancies apply to the plaintiffs' female plan participants or beneficiaries and their children just as they do to the general population." Similarly, here, the EEOC's compelling interest in eradicating discrimination applies with as much force to Stephens as to any other employee discriminated against based on sex.

It is true, of course, that the specific harms the EEOC identifies in this case, such as depriving Stephens of her livelihood and harming her sense of self-worth, are simply permutations of the generic harm that is always suffered in employment discrimination cases. But *O Centro*'s "to the person" test does not mean that the government has a compelling interest in enforcing the laws only when the failure to enforce would lead to uniquely harmful consequences. Rather, the question is whether "the asserted harm of granting specific exemptions to particular religious claimants" is sufficiently great to require compliance with the law. Here, for the reasons stated above, the EEOC has adequately demonstrated that Stephens has and would suffer substantial harm if we exempted the Funeral Home from Title VII's requirements.

Finally, we reject the Funeral Home's claim that it should receive an exemption, notwithstanding any harm to Stephens or the EEOC's interest in eradicating discrimination, because "the constitutional guarantee of free exercise[,] effectuated here via RFRA . . . [,] is a higher-order right that necessarily supersedes a conflicting statutory right." This point warrants little discussion. The Supreme Court has already determined that RFRA does not, in fact, "effectuate . . . the First Amendment's guarantee of free exercise," because it sweeps more broadly than the Constitution demands. And in any event, the Supreme Court has expressly recognized that compelling interests can, at

times, override religious beliefs—even those that are squarely protected by the Free Exercise Clause. We therefore decline to hoist automatically Rost's religious interests above other compelling governmental concerns. The undisputed record demonstrates that Stephens has been and would be harmed by the Funeral Home's discriminatory practices in this case, and the EEOC has a compelling interest in eradicating and remedying such discrimination.

(b) Least Restrictive Means

The final inquiry under RFRA is whether there exist "other means of achieving [the government's] desired goal without imposing a substantial burden on the exercise of religion by the objecting part[y]." "The least-restrictive-means standard is exceptionally demanding," and the EEOC bears the burden of showing that burdening the Funeral Home's religious exercise constitutes the least restrictive means of furthering its compelling interests. Where an alternative option exists that furthers the government's interest "equally well," the government "must use it." In conducting the least-restrictive-alternative analysis, "courts must take adequate account of the burdens a requested accommodation may impose on nonbeneficiaries." Cost to the government may also be "an important factor in the least-restrictive-means analysis."

The district court found that requiring the Funeral Home to adopt a gender-neutral dress code would constitute a less restrictive alternative to enforcing Title VII in this case, and granted the Funeral Home summary judgment on this ground. According to the district court, the Funeral Home engaged in illegal sex stereotyping only with respect to "the clothing Stephens [c]ould wear at work," and therefore a gender-neutral dress code would resolve the case because Stephens would not be forced to dress in a way that conforms to Rost's conception of Stephens's sex and Rost would not be compelled to authorize Stephens to dress in a way that violates Rost's religious beliefs.

Neither party endorses the district court's proposed alternative, and for good reason. The district court's suggestion, although appealing in its tidiness, is tenable only if we excise from the case evidence of sex stereotyping in areas other than attire. Though Rost does repeatedly say that he terminated Stephens because she "wanted to *dress* as a woman" and "would no longer *dress* as a man," the record also contains uncontroverted evidence that Rost's reasons for terminating Stephens extended to other aspects of Stephens's intended presentation. For instance, Rost stated that he fired Stephens because Stephens "was no longer going to *represent himself* as a man," and Rost insisted that Stephens presenting as a female would disrupt clients' healing process because female clients would have to "share a bathroom with a man dressed up as a woman." The record thus compels the finding that Rost's concerns extended beyond Stephens's attire and reached Stephens's appearance and behavior more generally.

At the summary-judgment stage, where a court may not "make credibility determinations, weigh the evidence, or draw [adverse] inferences from the facts," the

district court was required to account for the evidence of Rost's non-clothing-based sex stereotyping in determining whether a proposed less restrictive alternative furthered the government's "stated interests equally [as] well." Here, as the evidence above shows, merely altering the Funeral Home's dress code would not address the discrimination Stephens faced because of her broader desire "to represent [her]self as a [wo]man." Indeed, the Funeral Home's counsel conceded at oral argument that Rost would have objected to Stephens's coming "to work presenting clearly as a woman and acting as a woman," regardless of whether Stephens wore a man's suit, because that "would contradict [Rost's] sincerely held religious beliefs."

The Funeral Home's proposed alternative—to "permit businesses to allow the enforcement of sex-specific dress codes for employees who are public-facing representatives of their employer, so long as the dress code imposes equal burdens on the sexes and does not affect employee dress outside of work," is equally flawed. The Funeral Home's suggestion would do nothing to advance the government's compelling interest in preventing and remedying discrimination against Stephens based on her refusal to conform at work to stereotypical notions of how biologically male persons should dress, appear, behave, and identify. Regardless of whether the EEOC has a compelling interest in combating sex-specific dress codes—a point that is not at issue in this case—the EEOC does have a compelling interest in ensuring that the Funeral Home does not discriminate against its employees on the basis of their sex. The Funeral Home's proposed alternative sidelines this interest entirely.

The EEOC, Stephens, and several amici argue that searching for an alternative to Title VII is futile because enforcing Title VII is itself the least restrictive way to further EEOC's interest in eradicating discrimination based on sex stereotypes from the workplace. We agree.

To start, the Supreme Court has previously acknowledged that "there may be instances in which a need for uniformity precludes the recognition of exceptions to generally applicable laws under RFRA." The Court highlighted *Braunfeld v. Brown*, as an example of a case where the "need for uniformity" trumped "claims for religious exemptions." In *Braunfeld*, the plurality "denied a claimed exception to Sunday closing laws, in part because . . . [t]he whole point of a 'uniform day of rest for all workers' would have been defeated by exceptions." *Braunfeld* thus serves as a particularly apt case to consider here, as it too concerned an attempt by an employer to seek an exemption that would elevate its religious practices above a government policy designed to benefit employees. If the government's interest in a "uniform day of rest for all workers" is sufficiently weighty to preclude exemptions, *see O Centro*, then surely the government's interest in uniformly eradicating discrimination against employees exerts just as much force.

The Court seemingly recognized Title VII's ability to override RFRA in *Hobby Lobby*, as the majority opinion stated that its decision should not be read as providing a "shield" to

those who seek to "cloak[] as religious practice" their efforts to engage in "discrimination in hiring, for example on the basis of race." As the *Hobby Lobby* Court explained, "[t]he Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal." We understand this to mean that enforcement actions brought under Title VII, which aims to "provid[e] an equal opportunity to participate in the workforce without regard to race" and an array of other protected traits, will necessarily defeat RFRA defenses to discrimination made illegal by Title VII. The district court reached the opposite conclusion, reasoning that *Hobby Lobby* did not suggest that "a RFRA defense can never prevail as a defense to Title VII" because "[i]f that were the case, the majority would presumably have said so." But the majority *did* say that anti-discrimination laws are "precisely tailored" to achieving the government's "compelling interest in providing an equal opportunity to participate in the workforce" without facing discrimination.

As Stephens notes, at least two district-level federal courts have also concluded that Title VII constitutes the least restrictive means for eradicating discrimination in the workforce.

We also find meaningful Congress's decision not to include exemptions within Title VII to the prohibition on sex-based discrimination. As both the Supreme Court and other circuits have recognized, "[t]he very existence of a government-sanctioned exception to a regulatory scheme that is purported to be the least restrictive means can, in fact, demonstrate that other, less-restrictive alternatives could exist." Indeed, a driving force in the *Hobby Lobby* Court's determination that the government had failed the least-restrictive-means test was the fact that the Affordable Care Act, which the government sought to enforce in that case against a closely held organization, "already established an accommodation for nonprofit organizations with religious objections." Title VII, by contrast, does not contemplate any exemptions for discrimination on the basis of sex. Sex may be taken into account only if a person's sex "is a bona fide occupational qualification reasonably necessary to the normal operation of [a] particular business or enterprise,"—and in that case, the preference is no longer discriminatory in a malicious sense. Where the government has developed a comprehensive scheme to effectuate its goal of eradicating discrimination based on sex, including sex stereotypes, it makes sense that the only way to achieve the scheme's objectives is through its enforcement.

State courts' treatment of RFRA-like challenges to their own antidiscrimination laws is also telling. In several instances, state courts have concluded that their respective antidiscrimination laws survive strict scrutiny, such that religious claimants are not entitled to exemptions to enforcement of the state prohibitions on discrimination with regard to housing, employment, medical care, and education. These holdings support the notion that antidiscrimination laws allow for fewer exceptions than other generally applicable laws.

As a final point, we reject the Funeral Home's suggestion that enforcing Title VII in this case would undermine, rather than advance, the EEOC's interest in combating sex stereotypes. According to the Funeral Home, the EEOC's requested relief reinforces sex stereotypes because the agency essentially asks that Stephens "be able to dress in a stereotypical feminine manner." This argument misses the mark. Nothing in Title VII or this court's jurisprudence requires employees to reject their employer's stereotypical notions of masculinity or femininity; rather, employees simply may not be discriminated against for a failure to conform. Title VII protects both the right of male employees "to c[o]me to work with makeup or lipstick on [their] face[s]," and the right of female employees to refuse to "wear dresses or makeup," without any internal contradiction.

In short, the district court erred in finding that EEOC had failed to adopt the least restrictive means of furthering its compelling interest in eradicating discrimination in the workplace. Thus, even if we agreed with the Funeral Home that Rost's religious exercise would be substantially burdened by enforcing Title VII in this case, we would nevertheless **REVERSE** the district court's grant of summary judgment to the Funeral Home and hold instead that requiring the Funeral Home to comply with Title VII constitutes the least restrictive means of furthering the government's compelling interest in eradicating discrimination against Stephens on the basis of sex. Thus, even assuming Rost's religious exercise is substantially burdened by the EEOC's enforcement action in this case, we **GRANT** summary judgment to the EEOC on the Funeral Home's RFRA defense on this alternative ground.

C. Clothing-Benefit Discrimination Claim

The district court erred in granting summary judgment in favor of the Funeral Home on the EEOC's discriminatory clothing-allowance claim. We long ago held that the scope of the complaint the EEOC may file in federal court in its efforts to enforce Title VII is "limited to the scope of the EEOC investigation reasonably expected to grow out of the charge of discrimination." The EEOC now urges us to hold that *Bailey* is incompatible with subsequent Supreme Court precedent and therefore no longer binding on this court. Because we believe that the EEOC may properly bring a clothing-allowance claim under *Bailey*, we need not decide whether *Bailey* has been rendered obsolete.

In *Bailey*, a white female employee charged that her employer failed to promote her on account of her sex, generally failed to promote women because of their sex, failed to pay equally qualified women as well as men, and failed to recruit and hire black women because of their race. While investigating these claims, the EEOC found there was no evidence to support the complainant's charges of sex discrimination, but there was reasonable cause to believe the company had racially discriminatory hiring and promotion practices. In addition, the EEOC learned that the employer had seemingly refused to hire one applicant on the basis of his religion. After failed efforts at conciliation, the EEOC initiated a lawsuit against the employer alleging both racial and religious discrimination. We held that the

EEOC lacked authority to bring an enforcement action regarding alleged religious discrimination because "[t]he portion of the EEOC's complaint incorporating allegations of religious discrimination exceeded the scope of the EEOC investigation of [the defendant employer] reasonably expected to grow out of [the original] charge of sex and race discrimination." We determined, however, that the EEOC was authorized to bring race discrimination claims against the employer because the original charge alleged racial discrimination against black applicants and employees and the charging party—a white woman—had standing under Title VII to file such a charge with the EEOC because she "may have suffered from the loss of benefits from the lack of association with racial minorities at work."

As we explained in *Bailey*, the EEOC may sue for matters beyond those raised directly in the EEOC's administrative charge for two reasons. First, limiting the EEOC complaint to the precise grounds listed in the charge of discrimination would undercut Title VII's "effective functioning" because laypersons "who are unfamiliar with the niceties of pleading and are acting without the assistance of counsel" submit the original charge. Second, an initial charge of discrimination does not trigger a lawsuit; it instead triggers an EEOC investigation. The matter evolves into a lawsuit only if the EEOC is unable "to obtain voluntary compliance with the law. . . . Thus it is obvious that the civil action is much more intimately related to the EEOC investigation than to the words of the charge which originally triggered the investigation."

At the same time, however, we concluded in *Bailey* that allowing the EEOC to sue for matters beyond those reasonably expected to arise from the original charge would undermine Title VII's enforcement process. In particular, we understood that an original charge provided an employer with "notice of the allegation, an opportunity to participate in a complete investigation of such allegation, and an opportunity to participate in meaningful conciliation discussions should reasonable cause be found following the EEOC investigation." We believed that the full investigatory process would be short-circuited, and the conciliation process thereby threatened, if the EEOC did not file a separate charge and undertake a separate investigation when facts are learned suggesting an employer may have engaged in "discrimination of a type other than that raised by the individual party's charge and unrelated to the individual party.

The EEOC now insists that *Bailey* is no longer good law after the Supreme Court's decision in *General Telephone Company of the Northwest, Inc. v. EEOC*. In *General Telephone*, the Supreme Court held that Rule 23 of the Federal Rules of Civil Procedure, which governs class actions, does not apply to enforcement actions initiated by the EEOC. As part of its reasoning, the Court found that various requirements of Rule 23—such as the requirement that "the claims or defenses of the representative parties [must be] typical of the claims or defenses of the class," FED. R. CIV. P. 23(a)(3)—are incompatible with the EEOC's enforcement responsibilities under Title VII:

> The typicality requirement is said to limit the class claims to those fairly encompassed by the named plaintiff's claims. If Rule 23were applicable to EEOC enforcement actions, it would seem that the Title VII counterpart to the Rule 23 named plaintiff would be the charging party, with the EEOC serving in the charging party's stead as the representative of the class. Yet the Courts of Appeals have held that EEOC enforcement actions are not limited to the claims presented by the charging parties. Any violations that the EEOC ascertains in the course of a reasonable investigation of the charging party's complaint are actionable. The latter approach is far more consistent with the EEOC's role in the enforcement of Title VII than is imposing the strictures of Rule 23, which would limit the EEOC action to claims typified by those of the charging party.

The EEOC argues that this passage directly contradicts the holding in *Bailey*, in which we rejected the EEOC's argument that it "can investigate evidence of any other discrimination called to its attention during the course of an investigation."

Though there may be merit to the EEOC's argument, we need not resolve *Bailey*'s compatibility with *General Telephone* at this time because our holding in *Bailey* does not preclude the EEOC from bringing a clothing-allowance-discrimination claim in this case.

First, the present case is factually distinguishable from *Bailey*. In *Bailey*, the court determined that allegations of religious discrimination were outside the scope of an investigation "reasonably related" to the original charge of sex and race discrimination because, in part, "[t]he evidence presented at trial by the EEOC to support its allegations of religious discrimination did not involve practices affecting [the original charger]." Here, by contrast, Stephens would have been directly affected by the Funeral Home's allegedly discriminatory clothing-allowance policy had she not been terminated, as the Funeral Home's current practice indicates that she would have received either no clothing allowance or a less valuable clothing allowance once she began working at the Funeral Home as a woman. And, unlike the EEOC's investigation of religious discrimination in *Bailey*, the EEOC's investigation into the Funeral Home's discriminatory clothing-allowance policy concerns precisely the same type of discrimination—discrimination on the basis of sex—that Stephens raised in her initial charge.

Second, we have developed a broad conception of the sorts of claims that can be "reasonably expected to grow out of the initial charge of discrimination." As we explained in *Davis v. Sodexho*, "where facts related with respect to the charged claim would prompt the EEOC to investigate a different, uncharged claim, the plaintiff is not precluded from bringing suit on that claim." And we have also cautioned that "EEOC charges must be liberally construed to determine whether . . . there was information given in the charge that reasonably should have prompted an EEOC investigation of [a] separate type of

discrimination." Here, Stephens alleged that she was fired after she shared her intention to present and dress as a woman because the Funeral Home "management [told her that it] did not believe the public would be accepting of [her] transition" from male to female. It was reasonable to expect, in light of this allegation, that the EEOC would investigate the Funeral Home's employee-appearance requirements and expectations, would learn about the Funeral Home's sex-specific dress code, and would thereby uncover the Funeral Home's seemingly discriminatory clothing-allowance policy. As much is clear from our decision in *Farmer v. ARA Services, Inc,* in which "we held that the plaintiffs could bring equal pay claims alleging that their union discriminated in negotiating pay scales for different job designations, despite the fact that the plaintiffs' EEOC charge alleged only that the union failed to represent them in securing the higher paying job designations." As we recognized then, underlying the *Farmer* plaintiffs' claim was an implicit allegation that the plaintiffs were as qualified and responsible as the higher-paid employees, and this fact "could reasonably be expected to lead the EEOC to investigate why different job designations that required the same qualifications and responsibilities used disparate pay scales." By the same token, Stephens's claim that she was fired because of her planned change in appearance and presentation contains an implicit allegation that the Funeral Home requires its male and female employees to look a particular way, and this fact could (and did) reasonably prompt the EEOC to investigate whether these appearance requirements imposed unequal burdens—in this case, fiscal burdens—on its male and female employees.

We therefore **REVERSE** the district court's grant of summary judgment to the Funeral Home on the EEOC's discriminatory-clothing-allowance claim and **REMAND** with instructions to consider the merits of the EEOC's claim.

III. CONCLUSION

Discrimination against employees, either because of their failure to conform to sex stereotypes or their transgender and transitioning status, is illegal under Title VII. The unrefuted facts show that the Funeral Home fired Stephens because she refused to abide by her employer's stereotypical conception of her sex, and therefore the EEOC is entitled to summary judgment as to its unlawful-termination claim. RFRA provides the Funeral Home with no relief because continuing to employ Stephens would not, as a matter of law, substantially burden Rost's religious exercise, and even if it did, the EEOC has shown that enforcing Title VII here is the least restrictive means of furthering its compelling interest in combating and eradicating sex discrimination. We therefore **REVERSE** the district court's grant of summary judgment in favor of the Funeral Home and **GRANT** summary judgment to the EEOC on its unlawful-termination claim. We also **REVERSE** the district court's grant of summary judgment on the EEOC's discriminatory-clothing-allowance claim, as the district court erred in failing to consider the EEOC's claim on the merits. We **REMAND** this case to the district court

for further proceedings consistent with this opinion.

“Supreme Court to Decide Whether Landmark Civil Rights Law Applies to Gay and Transgender Workers”

The New York Times

Adam Liptak

April 22, 2019

The Supreme Court announced on Monday that it would decide whether the Civil Rights Act of 1964 guarantees protections from workplace discrimination to gay and transgender people in three cases expected to provide the first indication of how the court’s new conservative majority will approach L.G.B.T. rights.

The Equal Employment Opportunity Commission has said the 1964 act does guarantee the protections. But the Trump administration has taken the opposite position, saying that the landmark legislation that outlawed discrimination based on race, religion, national origin and, notably, sex, cannot fairly be read to apply to discrimination based on sexual orientation or transgender status.

The three cases the court accepted are the first concerning L.G.B.T. rights since the retirement last summer of Justice Anthony M. Kennedy, a champion of gay rights. His replacement by the more conservative Justice Brett M. Kavanaugh could shift the court’s approach to cases concerning gay men, lesbians and transgender people.

Most federal appeals courts have interpreted Title VII of the Civil Rights Act to exclude sexual orientation discrimination. But two of them, in New York and Chicago, recently issued decisions ruling that discrimination against gay men and lesbians is a form of sex discrimination.

The Supreme Court agreed to hear the case from New York, Altitude Express Inc. v. Zarda, No. 17-1623, along with one from Georgia that came to the opposite conclusion, Bostock v. Clayton County, Ga., No. 17-1618.

The New York case was brought by a skydiving instructor, Donald Zarda, who said he was fired because he was gay. His dismissal followed a complaint from a female customer who had voiced concerns about being tightly strapped to Mr. Zarda during a tandem dive. Mr. Zarda, hoping to reassure the customer, told her that he was “100 percent gay.”

Mr. Zarda sued under Title VII and lost the initial rounds. He died in a 2014 skydiving accident, and his estate pursued his case.

Last year, a divided 13-judge panel of the United States Court of Appeals for the Second Circuit allowed the lawsuit to proceed. Writing for the majority, Chief Judge Robert A. Katzmann concluded

that "sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination."

In dissent, Judge Gerard E. Lynch wrote that the words of Title VII did not support the majority's interpretation.

"Speaking solely as a citizen," he wrote, "I would be delighted to awake one morning and learn that Congress had just passed legislation adding sexual orientation to the list of grounds of employment discrimination prohibited under Title VII of the Civil Rights Act of 1964. I am confident that one day — and I hope that day comes soon — I will have that pleasure."

"I would be equally pleased to awake to learn that Congress had secretly passed such legislation more than a half-century ago — until I actually woke up and realized that I must have been still asleep and dreaming," Judge Lynch wrote. "Because we all know that Congress did no such thing."

The arguments in the Second Circuit had a curious feature: Lawyers for the federal government appeared on both sides. One lawyer, representing the E.E.O.C., said Title VII barred discrimination against gay people. Another, representing the Trump administration, took the contrary view.

The Georgia case was brought by a child welfare services coordinator who said he was fired for being gay. The 11th Circuit, in Atlanta, ruled against him in a short, unsigned opinion that cited a 1979 decision that had ruled that "discharge for homosexuality is not prohibited by Title VII."

The justices also agreed to decide the separate question of whether Title VII bars discrimination against transgender people. The case, R.G. & G.R. Harris Funeral Homes v. Equal Employment Opportunity Commission, No. 18-107, concerns Aimee Stephens, who was fired from a Michigan funeral home after she announced in 2013 that she was a transgender woman and would start working in women's clothing.

"What I must tell you is very difficult for me and is taking all the courage I can muster," she wrote to her colleagues. "I have felt imprisoned in a body that does not match my mind, and this has caused me great despair and loneliness."

Ms. Stephens had worked at the funeral home for six years. Her colleagues testified that she was able and compassionate.

Two weeks after receiving the letter, the home's owner, Thomas Rost, fired Ms. Stephens. Asked for the "specific reason that you terminated Stephens," Mr. Rost said: "Well, because he was no longer going to represent himself as a man. He wanted to dress as a woman."

The United States Court of Appeals for the Sixth Circuit, in Cincinnati, ruled for Ms. Stephens. Discrimination against transgender people, the court said, was barred by Title VII.

"It is analytically impossible to fire an employee based on that employee's status as a transgender person without being motivated, at least in part, by the employee's sex," the court said, adding, "Discrimination 'because of sex' inherently includes

discrimination against employees because of a change in their sex."

John J. Bursch, a lawyer with Alliance Defending Freedom, which represents the funeral home, said the appeals court had impermissibly revised the federal law.

"Neither government agencies nor the courts have authority to rewrite federal law by replacing 'sex' with 'gender identity' — a change with widespread consequences for everyone," Mr. Bursch said in a statement. "The funeral home wants to serve families mourning the loss of a loved one, but the E.E.O.C. has elevated its political goals above the interests of the grieving people that the funeral home serves."

James D. Esseks, a lawyer with the American Civil Liberties Union, which represents Ms. Stephens and Mr. Zarda's estate, said the cases concern elementary principles of fairness.

"Most of America would be shocked if the Supreme Court said it was legal to fire Aimee because she's transgender or Don because he is gay," Mr. Esseks said in a statement. "Such a ruling would be disastrous, relegating L.G.B.T.Q. people around the country to a second-class citizen status."

There is a second issue in Ms. Stephens's case, one that could allow her to win however the Supreme Court might rule on whether Title VII applies to discrimination against transgender people. In 1989, the court said discrimination against workers because they did not conform to gender stereotypes was a form of sex discrimination.

The Sixth Circuit ruled for Ms. Stephens on that ground, too, saying she had been fired "for wishing to appear or behave in a manner that contradicts the funeral home's perception of how she should behave or appear based on her sex."

All three cases present the question of how courts should interpret statutes whose drafters might not have contemplated the sweep of the language they wrote.

In January, in a minor arbitration case, Justice Neil M. Gorsuch wrote that courts should ordinarily interpret statutes as they were understood at the time of their enactment. In a concurring opinion, Justice Ruth Bader Ginsburg said that was not always so.

"Congress," she wrote, "may design legislation to govern changing times and circumstances." Quoting from an earlier decision, she added: "Words in statutes can enlarge or contract their scope as other changes, in law or in the world, require their application to new instances or make old applications anachronistic."

"Trump Administration Asks Supreme Court to Permit Employment Discrimination Against Transgender Workers"

Time

Tara Law

August 17, 2019

The Trump administration's Department of Justice is asking the Supreme Court to set a legal precedent that would enable employers to fire employees because they are transgender.

The Department of Justice has submitted a brief to the Court Friday asking the Justices to rule that Title VII, a federal law that prohibits employment discrimination on the basis of sex, race, color, religion or national origin, does not protect transgender people. The department argued that they should throw out a lower court ruling that found that a funeral home that fired a transgender woman had discriminated against her.

The brief concerns R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission, one of three cases that the Supreme Court agreed to hear earlier this year that concern whether Title VII can be applied to LGBTQ workers.

In the case, the U.S. Court of Appeals for the 6th Circuit found that the owner of the funeral home, Thomas Rost, had violated the law when he fired Aimee Stephens, a transgender woman who worked for the company from 2007 to 2013. According to court documents, Stephens sent the company a letter in 2013 that said she struggled with a "gender identity disorder" and planned to begin to live as a woman, including by wearing the company's female uniform – a jacket and skirt – instead of a suit and tie.

The company argued that Stephens was fired because she refused to wear the company's dress code and argued that "[m]aintaining a professional dress code that is not distracting to grieving families is an essential industry requirement that furthers their healing process."

In its brief, the Department of Justice has argued in favor of the funeral home, arguing that Title VII only protects what it defines as "biological sex."

"In 1964 [when Title VII was enacted], the ordinary public meaning of 'sex' was biological sex. It did not encompass transgender status," the DOJ writes, clarifying, "In the particular context of Title VII—legislation originally designed to eliminate employment discrimination against racial and other minorities—it was especially clear that the prohibition

on discrimination because of “sex” referred to unequal treatment of men and women in the workplace.”

Chase Strangio, an American Civil Liberties Union attorney representing Stephens, told *HuffPo* that the case could weaken Title VII protections both for transgender people and other groups.

“People don’t realize that the stakes are extending not just the trans and LGB communities, but every person who departs from sex stereotypes: Women who want to wear pants in the workplace, men who want more childbearing responsibilities,” Strangio said.

“EEOC’s Trans Bias Win Exposes Shakiness of RFRA Defense”

Law360

Vin Gurrieri

March 8, 2018

The Sixth Circuit’s groundbreaking decision Wednesday that a funeral home owner’s religious beliefs didn't shield him from a U.S. Equal Employment Opportunity Commission suit claiming he illegally fired a transgender employee serves as a clear warning to employers that the Religious Freedom Restoration Act is a questionable tool to defend against trans discrimination suits, experts say.

In its ruling, the Sixth Circuit held that R.G. & G.R. Harris Funeral Homes Inc. violated Title VII by firing funeral director Aimee Stephens after she informed owner Thomas Rost that she was transitioning from male to female and wanted to dress in women’s clothing at work.

The panel also determined that Rost wasn't entitled to a defense under RFRA, a 1993 federal law that blocks the government from enforcing a religiously neutral law that “substantially burdens” people’s “religious exercise” unless that law is the least restrictive way to further a compelling government interest, which in this case was the EEOC’s interest in enforcing anti-discrimination laws.

Lynly Egyes, litigation director at the Transgender Law Center, said Wednesday that the advocacy group is “thrilled” with the Sixth Circuit’s decision since it affirms that transgender people are protected under Title VII.

“One of the things that’s also important about the Sixth Circuit’s case is that it also states that people can’t be fired under the facade of religious liberty,” Egyes said. “Title VII is very clear and the court’s decision was incredibly clear about people not being able to use religious liberty as a reason for firing transgender people.”

Denise M. Visconti of management-side firm Littler Mendelson PC said the Sixth Circuit took a similar position on the RFRA aspect of the decision, saying it “certainly does draw some lines” around the ability of employers to use the statute as a defense.

Under the ruling, Visconti said that simply employing someone who is transgender places no burden on someone’s religious exercise, and that even if such a burden did exist the elimination of discrimination is a compelling interest which would override a RFRA defense.

“I think given that the court covered both prongs, certainly within the Sixth Circuit, it places a very substantial limitation on

employers being able to utilize an RFRA defense or, more importantly, using RFRA as essentially a sword to justify discrimination," Visconti said. "I think this case certainly is a pretty clear road map suggesting to employers that this might not be a viable defense."

The ruling by the Sixth Circuit overturned a portion of U.S. District Judge Sean F. Cox's 2016 ruling that the EEOC's enforcement action burdened Rost's free exercise of religion and that Title VII's bar on discrimination based on sex, which the EEOC had argued let Stephens act and dress like a woman, was not the least restrictive means of protecting her rights. The lower court suggested that the EEOC could have achieved its goals by proposing that the funeral home adopt a gender-neutral dress code.

But far from being too restrictive of Rost's rights, Title VII's requirement that he tolerate Stephens' gender identity didn't "substantially" burden his religious beliefs, the Sixth Circuit said, rejecting Rost's argument that letting Stephens wear women's clothing would "create distractions" for the funeral home's customers "and thereby hinder their healing process," and that making Rost tolerate her transition would push him to leave the funeral industry and "end his ministry to grieving people."

Instead, the Sixth Circuit in part said that an individual asserting the RFRA defense can't rely on customers' presumed biases to establish a substantial burden under RFRA, and that "tolerating Stephens' understanding of her sex and gender identity is not tantamount to supporting it."

Jackson Lewis PC principal Michelle Phillips, whose practice focuses heavily on LGBT issues, said the Rost family in this case was too intractable toward Stephens and failed to even consider affording her an accommodation. Rost's firing of Stephens, Phillips said, was "basically blatant discrimination" and "on its face problematic."

"This is an important case because you have to strike a balance as an employer whether it's your own personal religious beliefs or the religious beliefs of others and you still have to come to some sort of an accommodation," Phillips said. "So, the rigidity of the employer in this case to me was one of the most important messages. You cannot have knee-jerk reactions and have to engage in the process of accommodation in good faith."

David Lopez of Outten & Golden LLP — the EEOC's general counsel when the case was filed in 2014 as one of the agency's first two lawsuits accusing an employer of sex discrimination against a transgender individual — said he was pleased with the decision and that the Sixth Circuit got it right.

"This is the latest in a series of groundbreaking decisions recognizing that Title VII's prohibitions on discrimination because of sex covers the LGBT community — in this case gender identity," Lopez said. "The RFRA part obviously was important because ... it was a new defense that was asserted in the context of this case that thankfully the Sixth Circuit rejected."

Phillips noted, however, that RFRA is likely to come up again in other cases before other circuits, and that the more recent judicial appointments by the Trump administration may serve as “a more receptive audience” for those religious liberty arguments.

“There is a movement of certain religious-based organizations that are going to continue using this ground, whether it’s upheld or not, at every opportunity they can as an insidious way to try and impact the law,” Phillips said.

But as to the broader implications of the case beyond the RFRA element, Phillips said its initial filing by the EEOC was “a clear signal ... that protection for transgender and gender nonconforming individuals are per se sex discrimination because they relate to preconceived notions of how men and women are expected to act in the workplace.”

Phillips pointed out that they filed the suit in a jurisdiction where there was no protection under state law for gender identity, noting that only 19 states plus Washington, D.C., grant such protection.

Fred Sultan of Gardere Wynne Sewell LLP said that while the RFRA portion of the Sixth Circuit’s ruling likely won’t have much impact for most employers since the statute won’t apply to them, the ruling still sends a strong message that all companies should be paying close attention to transgender rights in the workplace since the EEOC will enforce them.

“It reminds employers that they need to be training employees and supervisors to avoid discrimination based on sex stereotyping, and that includes gender identity,” Sultan said.

As far as whether other circuit courts will adopt a similar precedent to the Sixth Circuit that Title VII protects against bias based on transgender status, Sarah Riskin of Nilan Johnson Lewis PA said “that is certainly the trend.”

Riskin pointed out that the Second Circuit last week ruled that sexual orientation is protected under Title VII in a case known as Zarda, making it “two cases from two circuits that are favorable — on a broad scale — to LGBT plaintiffs, in only a few weeks' time.”

“It used to be that gender-identity claims could only be pursued as a sex-stereotyping claim, if at all,” Riskin said. “That trend has been shifting, though, and yesterday's decision is one more step towards a per se gender-identity discrimination claim in other circuits."

The case is EEOC v. R.G. & G.R. Harris Funeral Homes Inc., case number 16-2424, in the U.S. Court of Appeals for the Sixth Circuit.

“Title VII Doesn’t Protect Trans Workers, Funeral Home Says”

Law360

Danielle Nichole Smith

November 6, 2018

The funeral home asking the U.S. Supreme Court to overturn a Sixth Circuit ruling that federal law protects transgender workers from discrimination told the high court on Tuesday that the U.S. Department of Justice's recent brief adopting its stance showed that the case should be reviewed and reversed.

R.G. & G.R. Harris Funeral Homes Inc. said in its reply brief that the U.S. Equal Employment Opportunity Commission, which is represented by the Justice Department in the case, acknowledged that the Sixth Circuit wrongly held that the funeral home flouted Title VII of the Civil Rights Act and high court precedent when it fired Aimee Stephens, who the business said violated its sex-specific dress code.

However, the funeral home departed from the agency by arguing that the justices should consider the case regardless of whether they granted two petitions for certiorari on the related question of whether Title VII prohibits discrimination on the basis of sexual orientation.

The Justice Department said in its October brief that Title VII’s ban on bias “because of ... sex” doesn’t cover gender identity, as the Sixth Circuit ruled, because Congress didn’t intend to protect transgender workers when it passed the 1964 statute. Additionally, the Sixth Circuit wrongly found that the funeral home’s dress code enforcement was a form of sex-stereotyping prohibited by the high court’s 1989 Price Waterhouse v. Hopkins ruling, the agency said, since there weren't different burdens imposed on male and female workers.The Department of Justice's brief reversed the EEOC's earlier stance at the Sixth Circuit.

Still, even though the U.S. disagreed with the Sixth Circuit’s ruling, the Supreme Court shouldn’t consider the funeral home’s case if it denies the two cert petitions concerning sexual orientation discrimination in Altitude Express Inc. v. Zarda and Bostock v. Clayton County, the agency said. The question in those cases implicated a “much deeper and more entrenched circuit conflict” while the question in the funeral home’s appeal had been less addressed by the circuits, the agency contended.

But the funeral home disagreed Tuesday, saying that the Sixth Circuit fundamentally changed Title VII by saying that “sex” in itself was a stereotype and by replacing “sex” with “gender identity." And there shouldn’t be a circuit split on an important component of federal employment law, the funeral home said.

"The EEOC now admits that the interpretations of Title VII and Price Waterhouse that it persuaded the Sixth Circuit to adopt below are wrong as a matter of law, present important and recurring questions, and conflict with the law of other circuits," the funeral home said. "That alone warrants this court's review and reversal."

The funeral home also addressed Stephens' arguments urging the Supreme Court to deny its writ petition. Stephens had asserted that the Supreme Court didn't need to hear the funeral home's appeal over whether transgender status is protected under Title VII since the judgment in her favor was supported enough by the Sixth Circuit's findings regarding sex-stereotypes under Price Waterhouse.

Stephens also said that the funeral home wrongly asked the court to consider in its petition whether the Price Waterhouse ruling kept employers from applying sex-specific policies to its employees on the basis of sex rather than gender identity. That question hadn't been decided by the appeals court and she had been fired for more than just her intention not to comply with the funeral home's dress code, Stephens said.

The case wasn't the "right vehicle" for addressing any of the questions in the funeral home's petition, Stephens argued.

But Harris Funeral Homes contended on Tuesday that the Sixth Circuit had focused on whether the funeral home could make Stephens dress based on its notion of her sex, getting at the very question the funeral home raised in its petition. Stephens also wrongly argued that the funeral home engaged sex-stereotypes since reproduction-related physical differences aren't gender- based stereotypes, Harris Funeral Homes said, citing a court opinion.

And the Sixth Circuit had viewed the issues of transgender discrimination and sex-stereotyping under Title VII as "inextricably intertwined," the funeral home said.

The funeral home also argued that Stephens downplayed the circuit split regarding the issue, saying that the split "implicates at least five circuits and 40 years of jurisprudence" and required the attention of the Supreme Court.

Counsel and representatives for the parties didn't respond Tuesday to requests for comment.

R.G. & G.R. Harris Funeral Homes is represented by Kristen K. Waggoner, David A. Cortman, Gary S. Mccaleb, James A. Campbell, Jeana Hallock and John J. Bursch of the Alliance Defending Freedom.

The federal government is represented by Noel Francisco, Joseph Hunt, John Gore, Eric Treene, Charles Scarborough and Stephanie Marcus of the Department of Justice.

Stephens is represented by David Cole, Jay Kaplan, Daniel Korobkin, Michael Steinberg, John Knight, Gabriel Arkles, James Esseks and Louise Melling of the American Civil Liberties Union.

The case is R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment

Opportunity Commission et al., case number 18-107, before the U.S. Supreme Court.

“DOJ argues that law doesn’t protect transgender workers, opposing the EEOC”

ABA Journal

Lorelei Laird

October 26, 2018

When Aimee Stephens was fired from a Michigan funeral home, the federal Equal Employment Opportunity Commission took up her case, arguing that her employer could not legally fire her for transitioning from living publicly as a man to living as a woman.

But when *R.G. & G.R. Harris Funeral Home v. EEOC* landed at the U.S. Supreme Court, the Office of the Solicitor General argued the opposite—that no federal law forbids employers from firing employees solely for being transgender. In a brief filed October 24, the office argued that the federal prohibition of sex discrimination does not apply to discrimination based on gender identity. No lawyers from the EEOC put their names on the brief, the National Law Journal noted; Stephens is represented by the ACLU.

Although it’s unusual for one federal agency to oppose another, the solicitor general’s position is consistent with positions taken by the Justice Department under Attorney General Jeff Sessions. The DOJ had previously supported the EEOC’s position, but in 2017, Sessions released a memo arguing that Title VII does not protect workers from discrimination based on gender identity. That memo came months after DOJ argued before the New York-based 2nd U.S. Circuit Court of Appeals that Title VII also doesn’t apply to discrimination based on sexual orientation.

In that case, *Zarda v. Altitude Express*, the 2nd Circuit ultimately ruled in favor of the plaintiff, a skydiving teacher who was fired after a customer complained that he was gay. That created a split with the 11th Circuit, which ruled that Title VIII did not protect a plaintiff who was fired for revealing his sexuality, in *Bostock v. Clayton County Board of Commissioners*. Both cases are pending before the Supreme Court. In the brief on Stephens’s case, Solicitor General Noel Francisco argues that the Court should wait to take it up until a ruling in *Zarda*, *Bostock* or both. If it denies review in the other cases, the government argues that it should also deny review in this case.

ACLU attorney John Knight, representing Stephens, asked the court to deny review now, the National Law Journal says. His brief notes that the Supreme Court has already ruled that Title VII prohibits sex stereotyping, an issue in this case.

Stephens was hired at the funeral home when living as a man, but told her employer in 2013 that she intended to have sex reassignment surgery and live as a woman. After a vacation, she told her employer, she would return as a woman and dress according to the

home's dress code for women. Owner Thomas Rost fired Stephens. The DOJ's brief says Rost is a Christian who sincerely believes God commands people to adhere to their biological sexes. The district court ultimately ruled for the funeral home under the Religious Freedom Restoration Act; the 6th U.S. Circuit Court of Appeals reversed, finding Title VII applied and RFRA did not offer an exemption.

Former ABA President Linda Klein issued a press release in 2017 expressing disappointment in DOJ's new position, as expressed in *Zarda*.

Comcast Corp. v. National Association of African-American Owned Media

Ruling Below: *Nat'l Ass'n of African American-Owned Media v. Comcast Corp.*, 914 F.3d 1261 (9th Cir. 2018).

Overview: Comcast expressed interest in Entertainment Studios' programming and later reversed its position and gave network time to a lesser-known network. Comcast claimed that it lacked capacity to carry Entertainment Studios before choosing to give network time to the other programming. Comcast argues that its decision was prompted by ordinary business calculations. The National Association of African American-Owned Media argued that Comcast's decision was race-discrimination.

Issue: Whether the claim of race discrimination under 42 U.S.C Sec 1981 fails in the absence of but-for-causation.

NATIONAL ASSOCIATION OF AFRICAN-AMERICAN OWNED MEDIA, *Plaintiffs-Appellants*

v.

COMCAST CORPORATION, *Defendant- Appellee*

United States Court of Appeals, Ninth Circuit

Decided on February 4, 2019

[Excerpt; some citations and footnotes omitted]

SCHROEDER, SMITH, JR., and NGUYEN, *Circuit Judges*:

The panel unanimously votes to deny the petition for panel rehearing. Judge M. Smith and Judge Nguyen vote to deny the petition for rehearing en banc, and Judge Schroeder so recommends. The full court has been advised of the petition for rehearing en banc, and no judge of the court has requested a vote on it. The petition for panel rehearing and the petition for rehearing en banc are DENIED.

NATIONAL ASSOCIATION OF AFRICAN-AMERICAN OWNED MEDIA*, *Plaintiffs-Appellants
v.
COMCAST CORPORATION, Defendant- Appellee

United States Court of Appeals, Ninth Circuit

Decided on November 19, 2018

[Excerpt; some citations and footnotes omitted]

SCHROEDER, M. SMITH, and NGUYEN, *Circuit Judges*:

Plaintiffs-Appellants National Association of African American-Owned Media (NAAAOM) and Entertainment Studios Networks, Inc. (Entertainment Studios, and together with NAAAOM, Plaintiffs) appeal the district court's dismissal under *Rule 12(b)(6)* of their second amended complaint (SAC). We have jurisdiction under *28 U.S.C. § 1291*, and we reverse and remand.

Entertainment Studios, an African American-owned operator of television networks, sought for more than a decade to secure a carriage contract from Defendant-Appellee Comcast Corporation (Comcast), the largest cable television-distribution company in the United States. These efforts were unsuccessful, and Plaintiffs filed suit, claiming that Comcast's refusal to contract was racially motivated and in violation of *42 U.S.C. § 1981*. The district court thrice dismissed Plaintiffs' complaints, concluding in its third and final dismissal order that "not one fact added to the SAC is either antithetical to a decision not to contract with [Entertainment Studios] for legitimate business reasons or, in itself, indicates that the decision was racially discriminatory."

1. We conclude that the district court improperly dismissed Plaintiffs' SAC. As discussed at length in the contemporaneously filed opinion in *National Association of African American-Owned Media v. Charter Communications, Inc.*, No. 17-55723, to prevail in a *Rule 12(b)(6)* motion on their *§ 1981* claim, Plaintiffs needed only to plausibly allege that discriminatory intent was a factor in Comcast's refusal to contract, and not necessarily the but-for cause of that decision. Here, Plaintiffs' SAC includes sufficient allegations from which we can plausibly infer that Entertainment Studios experienced disparate treatment due to race and was thus denied the same right to contract as a white-owned company, which violates *§ 1981*. These allegations include: Comcast's expressions of interest followed by repeated refusals to contract; Comcast's practice of suggesting various methods of securing support for carriage only to reverse its position once Entertainment Studios had taken those steps; the fact that Comcast carried every network of the approximately 500 that were also carried by its main competitors (Verizon FIOS, AT&T U-verse, and DirecTV), *except* Entertainment Studios' channels; and, most importantly, Comcast's decisions to offer carriage contracts to "lesser-known, white-owned" networks

(including Inspirational Network, Fit TV, Outdoor Channel, Current TV, and Baby First Americas) at the same time it informed Entertainment Studios that it had no bandwidth or carriage capacity. Although Comcast notes that legitimate, race-neutral reasons for its conduct are contained within the SAC, when considered in the light most favorable to Plaintiffs, we cannot conclude that these alternative explanations are so compelling as to render Plaintiffs' theory of racial animus implausible.

We can infer from the allegations in the SAC that discriminatory intent played at least some role in Comcast's refusal to contract with Entertainment Studios, thus denying the latter the same right to contract as a white-owned company. Accordingly, Plaintiffs stated a plausible claim pursuant to *§ 1981*, and their SAC should not have been dismissed under *Rule 12(b)(6)*.

2. For the reasons discussed at length in our opinion in *Charter Communications*, we also conclude that the *First Amendment* does not bar Plaintiffs' *§ 1981* claim.

3. Because we reverse the district court's dismissal of Plaintiffs' SAC, we need not consider whether the court abused its discretion when it denied Plaintiffs further leave to amend.

4. We deny Plaintiffs' motion to take judicial notice.

REVERSED AND REMANDED.

“Supreme Court to Hear Racial Discrimination Case Against Comcast”

New York Times

Adam Liptak

June 10, 2019

The Supreme Court on Monday agreed to decide whether Comcast, the nation’s largest cable company, may be sued for race discrimination over its decision not to carry programming from an entertainment company owned by Byron Allen, an African-American entrepreneur.

A federal appeals court in California ruled that the case could move forward under a Reconstruction-era federal law that gives “all persons” the same right to “make and enforce contracts” as “is enjoyed by white citizens.”

A unanimous three-judge panel of the court, the United States Court of Appeals for the Ninth Circuit, said that Mr. Allen’s company, Entertainment Studios Networks, had made accusations that were serious enough to avoid dismissal at an early stage of the litigation.

Entertainment Studios said Comcast had expressed interest in its programming but never closed a deal, reversed its position on what Entertainment Studios needed to do to secure carriage, carried every network that its main competitors did except Entertainment Studios and offered space to “lesser known, white owned” networks even as it said it lacked capacity to carry Entertainment Studios.

Comcast, in urging the Supreme Court to hear its appeal, said its decision not to make a deal with Mr. Allen’s company was prompted by ordinary business calculations, “including bandwidth constraints, a preference for sports and news programming” and insufficient demand for Entertainment Studios’s offerings.

Comcast’s stated reasons were pretexts, Entertainment Studios said in its own brief. “For example,” the brief said, “Comcast claimed that it did not have sufficient bandwidth to carry Entertainment Studios’s channels, but Comcast launched more than 80 white-owned channels at the same time.”

The race-discrimination suit, Comcast’s brief said, was based on claims of “an outlandish racist conspiracy.”

“Plaintiffs contend that Comcast did not base its decision on legitimate business considerations, but on an outlandish racist plot against ‘100 percent African-American-owned media companies’ — a contrived racial category gerrymandered to include plaintiffs and virtually no one else — that involved, among others, the United States government, the country’s oldest and most respected civil rights organizations (including the N.A.A.C.P. and the National

Urban League), prominent African-Americans (including Earvin 'Magic' Johnson, Sean 'Diddy' Combs and Al Sharpton), and 'white-owned media,'" Comcast's brief said.

Entertainment Studios said it was not pursuing those claims. "Like it did in the Ninth Circuit below, Comcast is still attacking a conspiracy claim that respondents dropped over three years ago," Entertainment Studios's brief said. "Respondents are pursuing a direct claim against Comcast. Comcast cannot avoid this lawsuit by ignoring the allegations against it."

The legal question for the justices in the case, Comcast Corporation v. National Association of African American-Owned Media, No. 18-1171, is whether Entertainment Studios must assert and prove that race was the key reason for Comcast's decision or one factor among many.

The appeals court said the second kind of evidence would suffice.

"Plaintiffs needed only to plausibly allege that discriminatory intent was a factor in Comcast's refusal to contract," the unanimous three-judge panel wrote, "and not necessarily the but-for cause of that decision."

In a statement, Comcast said the case concerned "a technical point of law" and that it was proud of its efforts to promote diversity.

"Comcast has an outstanding record of supporting and fostering diverse programming, including programming from African-American owned channels, two more of which we launched earlier this year," the company's statement said. "There has been no finding of discriminatory conduct by Comcast against this plaintiff because there has been none. We carry more than 100 networks geared toward diverse audiences."

Mr. Allen issued a statement disputing some of the points Comcast made.

"This case is not about African-American-themed programming, but is about African-American ownership of networks," he said. "Unfortunately, the networks Comcast refers to as 'African-American-owned' are not wholly owned by African-Americans, and did not get any carriage until I stood up and spoke out about this discrimination and economic exclusion."

"Supreme Court Will Decide Standard for Proving Racial Bias in Discrimination Suit Against Comcast"

ABA Journal

Debra Cassens Weiss

June 10, 2019

The U.S. Supreme Court agreed Monday to decide whether a black-owned media company has to show but-for causation in its Section 1981 discrimination suit against Comcast for failing to carry its programming.

The court agreed to decide the issue in the case of Entertainment Studios Networks. The company alleges that Comcast Corp. has refused to carry any of the network's channels for more than seven years, even as Comcast launched more than 80 lesser-known, white-owned channels. "For years, Comcast has given Entertainment Studios the run-around," the company says its brief opposing certiorari.

Entertainment Studios alleges discrimination in contract in violation of Section 1981 of the Civil Rights Act, a Reconstruction-era law. In a ruling for Entertainment Studios, the 9th U.S. Circuit Court of Appeals at San Francisco said the company only has to show that discrimination was a "motivating factor" in Comcast's refusal to contract.

Comcast says in its petition for certiorari that at least five federal appeals courts have reached contrary decisions. "And for good reason: Nothing in the text of the statute purports to displace the common-law rule requiring but-for causation," the cert petition says.

Comcast pointed out that Congress permitted "motivating factor" discrimination claims under Title VII of the Civil Rights Act but didn't add a similar provision to Section 1981.

The brief for Entertainment Studios counters that Congress added the provision to Title VII to protect discrimination victims, and that doesn't mean that Congress intended to narrow civil rights claims under Section 1981.

Entertainment Studios also says the federal appellate decisions cited by Comcast didn't address burdens at the pleading stage.

Comcast is represented by Miguel Estrada of Gibson, Dunn & Crutcher. Entertainment Studios is represented by Erwin Chemerinsky, dean at the University of California at Berkeley School of Law. Chemerinsky is also a regular ABA Journal contributor.

USA Today, Reuters, the Hollywood Reporter and Think Progress have coverage of the Supreme Court's decision to hear the

case, *Comcast Corp. v. National Association of African American-Owned Media*.

"Supreme Court to Consider Curbing Racial Discrimination Claims"

Bloomberg

Greg Stohr

June 10, 2019

The U.S. Supreme Court will consider making it harder to press some types of civil rights suits, agreeing to hear an appeal from cable television provider Comcast Corp. in a clash with a black-owned media company.

Comcast is attempting to stop a lawsuit by Entertainment Studios Networks Inc., which says racial discrimination is the reason it couldn't get its channels onto the carrier's cable systems. A federal appeals court let the suit go forward.

At issue is a provision known as Section 1981, a Reconstruction-era law that bars racial discrimination in contracting. Comcast says the appeals court improperly made it easier to sue under that statute than under other civil rights laws.

Entertainment Studios, owned by comedian and producer Byron Allen, says it tried for years to get its channels carried by Comcast. The suit alleges that Comcast officials refused to reach a deal, even while expanding offerings of lesser-known, white-owned channels. Entertainment Studios is pressing a similar suit against Charter Communications Inc.

In letting the suits go forward, the San Francisco-based 9th U.S. Circuit Court of Appeals said Entertainment Studios needed to show only that racial discrimination was a "motivating factor" in the decisions.

Comcast, which says its decision was made for legitimate business reasons, says Section 1981 requires Entertainment Studios to show that it would have received a contract had it not been for racial bias. That's a standard the Supreme Court has applied in other contexts, including claims of age discrimination and retaliation.

Comcast said in a statement that it carries more than 100 networks geared toward diverse audiences.

"At this stage, the case is about a technical point of law that was decided in a novel way by the 9th Circuit," Comcast said in an emailed statement. "We hope the Supreme Court will reverse the 9th Circuit's unusual interpretation of the law and bring this case to an end."

Entertainment Studios urged the court not to hear the case. In an emailed statement, Allen said his suit is about black ownership of television networks, not black-themed programming.

"Comcast -- one of the biggest lobbyists in Washington, D.C. -- will continue to lose this

case, and the American people who stand against racial discrimination will win," Allen said.

Charter Communications is pressing a similar Supreme Court appeal, but the high court will hear only the Comcast case.

The court will hear the case in the nine-month term that starts in October. The case is Comcast v. National Association of African American-Owned Media, 18-11.

“Justice Could Blunt Racial Bias Cases With Comcast Ruling”

Law360

Anne Cullen

June 21, 2019

The U.S. Supreme Court has agreed to consider what role racism must play in a contract decision before a discrimination case against Comcast can move forward, and attorneys expect the justices' answer will make it a little harder to keep race discrimination cases alive.

On the high court’s docket is a Ninth Circuit decision that revived a $20 billion racial discrimination case against Comcast Corp. over its consistent refusals to work with African American-owned media company Entertainment Studios. Owned by former comedian Byron Allen, Entertainment Studios contends that Allen’s skin color is the reason the studio hasn't been able to get Comcast to carry its channels for years.

The Ninth Circuit panel concluded that Allen's company has shown that “discriminatory intent played at least some role in Comcast’s refusal to contract,” and that was enough to keep the case afloat. Entertainment Studios need not show racial bias was the decisive factor, the panel said.

But to many attorneys, the panel's use of a "motivating factor" test marked a significant departure from other U.S. courts' growing reliance on the "but for" standard, which the Supreme Court has increasingly held up in discrimination cases over the past decade.

Under the but-for test, Allen’s company would need to show that Comcast would have carried the studio’s channels “but for” racial bias — in other words, that discrimination tipped the scales towards denial — not just that discrimination was a motivating factor in the studio’s failure to secure a Comcast contract.

Legal scholars told Law360 that the justices' decision to take the case was probably motivated by their desire to clean up the contradictory case law and impose uniformity over how these claims should be weighed.

“The issue of which discrimination statutes have access to a motivating factor standard is one that has been in a considerable state of disarray ever since the court’s decision in the Gross case," said Katie Eyer, a law professor at Rutgers School of Law who specializes in anti-discrimination law.

In the Supreme Court's 2009 ruling in Gross v. FBL Financial Services, the justices adopted the but-for standard for Age Discrimination in Employment Act suits, making it harder for workers to prove a claim

under the ADEA. Before that ruling, Eyer explained that the mixed-motive standard was generally assumed to be available in all discrimination statutes.

"Prior to that," Eyer said, "the courts of appeals had basically treated all of the various anti-discrimination statutes similarly, and had included what's called the mixed-motive burden-shifting paradigm, where the plaintiff can just show motivating factor."

And since then, she said, the Supreme Court has been sussing out what this means for the other anti-discrimination laws, statute by statute.

Allen's studio brought its claim under section 1981 of Title 42 of the United States Code, a Reconstruction-era statute that bars race discrimination in contracting by declaring that everyone "shall have the same right to make and enforce contracts as is enjoyed by white citizens."

And Eyer said it's likely justices won't agree with the standard the Ninth Circuit adopted for that statute, even though she felt it was a reasonable interpretation.

"In the Ninth Circuit, I think they reasonably concluded that having the same right means the right to be considered for a contract without your race playing any role in the decision," she said. "But I'm not sure if the [high] court will reach that same result."

In the event the justices' cement the but-for test as the standard that should be applied to section 1981, she said discrimination plaintiffs will have a slightly more difficult time supporting their claims.

"It certainly won't make it significantly harder to bring these types of lawsuits," she noted, "but it will make it marginally harder."

Eyer voiced once caveat, however. She said the justices could make it a great deal more difficult to claim discrimination in contracting if they rule that the but-for test is met only if racism was the sole reason for being denied a contract.

"I think that's wrong and I think it would be inconsistent with what the court has said in some other cases," she said, arguing that this interpretation is not supportable under the language of any of the statutes at issue.

And this test would be essentially impossible for discrimination plaintiffs to meet, she said. "In real life, there's almost always a variety of factors," Eyer said. "Discrimination may be what tips the balance, but it's rarely the only thing standing alone."

But barring any imposition of sole causation into the matter, McCarter & English LLP partner Hugh Murray similarly felt that there would be no drastic impact on race discrimination cases if the but-for test winds up as the default in section 1981.

"That will influence a little bit the way that people have to plead their cases and prove their cases," Murray said. "But at the end of the day, it's not a huge issue because most plaintiffs will want to prove they were harmed by the race discrimination in any event."

Murray doesn't think there's too much "disarray" left in the discrimination causation landscape. He contended that the but-for test

has been largely settled as the default standard by both the Supreme Court and lower level courts, painting the Ninth Circuit's ruling as an outlier.

"The Ninth Circuit likes to have its own way. They do that a lot," Murray said, suggesting the decision may be attributable to the court's historically left lean.

The panel's decision "does allow for more claims of race discrimination to survive," he added, "so, to the extent that it has a liberal-conservative axis to it, it's on the liberal side."

Murray said his "strong supposition" is that the justices took up the case to clear away the inconsistent ruling, so they can implement but-for causation as the default test in section 1981 as well, which he emphasized would only make it harder at the margins.

"If folks want to bring a lot of lawsuits against people who have expressed improper and unacceptable racial attitudes, having a motivating factor standard would make those cases easier," Murray said.

"But the law traditionally is not trying to solve every problem in the world, it's trying to correct actual harms," he added.

The high court's decision to review the case marks a win for the country's preeminent business advocacy organization, the U.S. Chamber of Commerce, which had complained that the mixed-motive standard could leave companies vulnerable to frivolous discrimination suits.

"Employment decisions are inherently subjective in some measure. So it will be relatively easy for a plaintiff to allege that discrimination was a motivating factor," the organization told the justices in an amicus brief in April. The ruling increases the odds that "entirely legitimate workplace decisions will result in burdensome litigation and undeserved reputational harms," the chamber said.

Charter Communications Inc. also stands to benefit from the justices' decision, as Allen's studio brought a related discrimination case against Charter that balances on the same issues.

Entertainment Studios contends Charter also refused to carry the studio's channels because its owner, Byron Allen, is African American, and both cases were lodged in California federal court several years ago by Allen's firm alongside the National Association of African American-Owned Media.

While a California federal judge shut down the Comcast case in late 2016 — finding that legitimate business reasons may have stymied the business relationship, not racial animus — a separate judge in the same California court decided to let the Charter case move forward just a few weeks later.

The high court's ultimate ruling is expected to govern in both cases, as the pair of suits were evaluated and ruled on by the Ninth Circuit in tandem. After two separate appeals, the Ninth Circuit found the studio's claims can proceed against the pair of broadcast behemoths, finding but-for causation isn't required in either case.

While Allen's company believes its claims can stand under the higher causation standard, the studio's counsel

noted that federal courts have long enforced the broad reach of section 1981. It's a "viable and very important federal civil rights statute" and is crucial to fighting race-based contracting

decisions in court, Skip Miller of Miller Barondess LLP told Law360 on Thursday. He added that "this is especially important in the media business, as here, where black-owned businesses have been almost completely shut out."

Charter, which has its own Supreme Court review petition pending, said last week it's not commenting on the high court's decision to take up the Comcast case. And counsel and representatives for Comcast did not respond to repeated requests for comment.

Comcast is represented by Miguel A. Estrada, Thomas G. Hungar, Douglas Fuchs, Jesse A. Cripps, Bradley J. Hamburger and Samuel Eckman of Gibson Dunn & Crutcher LLP.

Charter is represented by Paul D. Clement, Jeffrey S. Powell, Judson D. Brown, Devin S. Anderson and William K. Lane III of Kirkland & Ellis LLP.

NAAAOM and Entertainment Studios are represented by Skip Miller, J. Mira Hashmall and David W. Schecter of Miller Barondess LLP and Erwin Chemerinsky of the University of California, Berkeley School of Law.

The cases are Comcast Corp. v. National Association of African American-Owned Media et al., case number 18- 1171, and Charter Communications Inc. v. National Association of African American-Owned Media et al., case number 18-1185, in the U.S. Supreme Court.

“Comcast, Time Warner Cable Hit with $20 Billion Racial Bias Lawsuit”

Reuters

Jonathan Stempel

February 23, 2015

Comcast Corp and Time Warner Cable Inc have been sued for $20 billion for allegedly discriminating against African American-owned media and employing advocates such as the NAACP and the Rev. Al Sharpton to advance their bias.

The lawsuit was filed on Friday in Los Angeles federal court by the National Association of African-American Owned Media as U.S. regulators review the proposed $45 billion merger between the two biggest U.S. cable operators.

The same group filed a $10 billion lawsuit in December against AT&T Inc and DirecTV, whose own proposed merger is also under regulatory review.

According to the complaint, Comcast entered into “memoranda of understanding” with Sharpton, the NAACP and other advocacy groups to provide large cash “donations” in exchange for their not interfering with its alleged refusal to contract with African-American-owned media.

The complaint said the agreements were struck after Comcast was criticized for similar failures in 2010 when it was buying part of entertainment company NBCUniversal, which it now fully owns.

Sharpton and his National Action Network, the complaint said, allegedly received “over $3.8 million in ‘donations’ and as salary” for his work as an MSNBC host.

The complaint also said Comcast and Time Warner Cable each have only one fully African American-owned channel, the Africa Channel, and that Time Warner Cable has acquiesced in Comcast’s discrimination in anticipation of the merger’s completion.

A Comcast spokeswoman called the lawsuit “frivolous,” saying it followed the Philadelphia-based company’s good faith negotiations with the plaintiff over many years.

“We do not generally comment on pending litigation, but this complaint represents nothing more than a string of inflammatory, inaccurate, and unsupported allegations,” she said.

A Time Warner Cable spokeswoman declined to discuss the lawsuit, but said the New York-based company and Comcast remain separate, “including with respect to programming decisions.”

Sharpton also rejected the allegations, saying they could support defamation

counterclaims, and that his group has received less than $1 million from Comcast.

"The lawsuit is the epitome of an insult to the black community" and has "not one scintilla of evidence," Sharpton said in a phone interview.

The NAACP did not immediately respond to requests for comment.

Entertainment Studios Networks Inc, owned by comedian and producer Byron Allen, is also suing Comcast and Time Warner Cable.

The case is National Association of African-American Owned Media et al v. Comcast Corp et al, U.S. District Court, Central District of California, No. 15-01239.

“Black-owned Network’s Bias Suit Against Comcast”

Business Insurance

Judy Greenwald

November 20, 2018

Comcast Corp. may have discriminated against a black-owned network in refusing to contract with it to distribute its shows, says a federal appeals court, in reversing a lower court ruling and reinstating the network’s lawsuit.

Los Angeles-based Entertainment Studios Networks Inc., an African American-owned television network operator, has sought for more than a decade to secure a contract from Philadelphia-based Comcast Corp., the largest cable television distribution company in the United States, according to Monday’s ruling by the 9th U.S. Circuit Court of Appeals in San Francisco in *National Association of African American-Owned Media; Entertainment Studios Networks Inc. v. Comcast Corp.*

Entertainment Studios and the NAAAM filed suit in U.S. District Court in Pasadena, California, claiming its refusal to contract with the network was racially motivated.

The district court dismissed the case, which a three-judge appeals court panel unanimously reversed. The plaintiffs’ complaint “includes sufficient allegations from which we can plausibly infer that Entertainment Studios experienced disparate treatment due to race and was thus denied the same right to contract as a white-owned company,” said the ruling.

“These allegations include: Comcast’s expressions of interest followed by repeated refusals to contract; Comcast’s practice of suggesting various methods of security support for carriage only to reverse its position once Entertainment Studios had taken these steps; the fact that Comcast carried every network of the approximately 500 that were also carried by its main competitors…except Entertainment Studios’ channels; and, most importantly, Comcast’s decision to offer carriage contracts to ‘lesser-known white-owned’ networks…at the same time it informed Entertainment Studios that it had no bandwidth or carriage capacity.

“Although Comcast notes that legitimate, race-neutral reasons for its conduct are contained within the (complaint), when considered in the light most favorable to Plaintiffs, we cannot conclude that these alternative explanations are so compelling as to render Plaintiffs’ theory of racial animus implausible,” said the ruling.

“We can infer from the allegations in the (complaint) that discriminatory intent played at least some role in Comcast’s refusal to contact with Entertainment Studios, thus

denying the latter the same right to contract as a white-owned company," said the ruling, in reversing the lower court ruling and remanding the case.

"Appeals Court Rejects Charter/Comcast Motion to Dismiss Byron Allen's Multibillion-Dollar Civil Rights Suit- Update"

Deadline

Dawn C. Chmielewski

February 4, 2019

The 9th Circuit Court of Appeals today rejected Comcast and Charter's motion to dismiss Byron Allen's multibillion-dollar civil rights lawsuit against them. Read the filing here and details of the case below.

Here is a statement Allen released after the ruling:

> "Comcast and Charter are wrong by pursuing a legal defense that the First Amendment allows them to discriminate.
>
> We are very pleased with the ruling by the Ninth Circuit to uphold their decisions in our favor for a second time. If Comcast and Charter want to pursue the Supreme Court, we are highly confident that the Supreme Court will affirm the Ninth Circuit and support these historic legal decisions. Unfortunately, Brian Roberts of Comcast and Tom Rutledge of Spectrum/Charter have refused my offers to sit down to discuss these very serious matters. Now, we have no choice but to enter the discovery phase to depose all of their executives and business associates, as well as receive all of their correspondence/emails and contracts, to prove our cases in front of a jury.
>
> Every American, elected official, civil rights organization, and the Department of Justice should be offended that the largest cable companies in the U.S. pursued a legal defense that the First Amendment allowed them to discriminate against ANY American. Comcast's and Charter's shareholders and Board members should find this immoral, unacceptable, and be concerned that these companies will be held fully accountable because this has officially become very serious business.
>
> We will continue to win these cases because we are on the right side of history. As the Bible has taught us, what is done in the dark will come to light."

PREVIOUSLY, November 19**:** A federal appeals court cleared the way for Byron Allen's Entertainment Studios Networks to pursue civil rights suits against two of the

nation's biggest cable operators, Charter Communications and Comcast.

These lawsuits seek sizable damages — $20 billion against Comcast and $10 billion against Charter — for alleged violations of the Civil Rights Act.

The African-American executive said he tried for years to get the cable giants to carry his networks, which were available to millions of television viewers through rival distributors including Verizon, DirecTV, AT&T, DISH. Allen said he has been repeatedly rebuffed, and alleges race played a factor.

Charter attempted to have Entertainment Studios Network's suit dismissed on First Amendment grounds, arguing that its choice of cable channels is a form of expression.

The Court of Appeals for the 9th Circuit today supported the district court's ruling, which found that the First Amendment doesn't shield Charter from engaging in discriminatory conduct. The appeals court reached a similar decision in the suit against Comcast, sending both cases back to the trial court.

"These two decisions against Comcast and Charter are very significant, unprecedented, and historic," said Allen in a statement lauding the decision. "The lack of true economic inclusion for African Americans will end with me, and these rulings show that I am unwavering in my commitment to achieving this long overdue goal."

Charter and Comcast issued separate statements, expressing disappointment with the ruling.

"We respectfully disagree with the Court's decision, and are reviewing the decision and considering our options," Comcast said in a statement.

Charter issued a more pointed in its response, calling the allegations of racial animus a "desperate tactic."

"This lawsuit is a desperate tactic that this programmer has used before with other distributors," said Charter in a statement to Deadline. "We are disappointed with today's decision and will vigorously defend ourselves against these claims."

Entertainment Studios Networks — a constellation of eight channels, including Pets.TV, Comedy.TV, Recipe.TV, Justice Central.TV and its recent, high-profile acquisition, The Weather Channel — filed suits in federal district court in Los Angeles.

The Los Angeles-based media company alleged Charter's former senior vice president of programming, Allan Singer, refused to meet with Entertainment Studios representatives. Singer rescheduled and postponed meetings and offered "disingenuous" explanations for refusing to carry it programming, according to court documents.

Singer said bandwidth limitations and operational demands precluded carriage of ENT's cable networks, while reaching carriage agreements with "lesser-known, white-owned channels" such as the rural

focused RFD-TV and the horror channel Chiller.

Court documents cite evidence of racial bias, including one instance in which Singer allegedly approached an African-American protest group outside Charter's headquarters and told them "to get off welfare." Charter CEO Tom Rutledge referred to Allen as "Boy" at an industry event, court documents allege.

"Plaintiffs suggest that these incidents are illustrative of Charter's institutional racism," the Appeals Court writes, in summarizing the case's history. "Noting also that the cable operator had historically refused to carry African American-owned channels and, prior to its merger with Time Warner Cable, had a board of directors composed only of white men."

Entertainment Studios ascribed similar discriminatory motives on the part of Comcast, which offered carriage deals to such networks as Inspirational Network, Fit TV, Outdoor Channel and Baby First Americas while informing Allen it had no bandwidth or storage capacity for his networks.

The National Association of African American-Owned Media also is a party to the suits.

“Calif. Judge Dismissed $20B Race Bias Suit Against Comcast”

Law360

Bonnie Eslinger

October 5, 2016

A California judge Wednesday dismissed a $20 billion racial discrimination suit filed against Comcast by television producer Byron Allen’s company and the National Association of African American Owned Media, saying an amended complaint still didn’t show how Comcast's decision not to carry their stations involved bias.

The three-page ruling by U.S. District Judge Terry J. Hatter granting Comcast’s motion to dismiss the second amended complaint from Allen’s Entertainment Studios Networks and the association stated that the court had noted pleading deficiencies in dismissing the prior version of the suit. Those deficiencies hadn’t been cured in the second complaint, Judge Hatter said.

“[T]he court clearly identified the problem: the benchmarks provided by plaintiffs — allegedly representing demand by viewers for ESN channels — were ambiguous, and did not exclude the alternative explanation that Comcast’s refusal to contract with ESN was based on legitimate business reasons,” the judge states.

ESN and NAAAOM launched the suit in February 2015, claiming Comcast engaged in discrimination and then paid off civil rights groups to look the other way. It’s operative complaint states that the cable network’s refusal to contract with Entertainment Studios is racially discriminatory. Comcast has called the litigation "extortionate."

In his Wednesday ruling, Judge Hatter says the second amended complaint “merely provided the court with different opaque benchmarks.”

For example, plaintiffs added the statement that 80 million people have access to ESN channels across the country.

“But, similar to the viewer growth statistics in the FAC, this allegation represents potential, not actual, demand for ESN content, and thus it does not necessarily undercut the Comcast’s alternative explanation,” the judge wrote. “In short, not one fact added to the SAC is either antithetical to a decision not to contract with ESN for legitimate business reasons or, in itself, indicates that the decision was racially discriminatory.”

An attorney for the National Association of African American Owned Media and Entertainment Studios Networks, Skip Miller of Miller Barondess LLP, said the plaintiffs will appeal “and get this decision overturned” so the case can be reinstated.

"We have more than adequately pleaded a claim for racial discrimination under section

1981 of the Civil Rights Act, based on Supreme Court and Ninth Circuit precedent," Miller wrote in an email.

In its complaint, Entertainment Studios says it owns and operates seven different 24-hour-a-day television networks.

"These networks include Emmy-nominated and Emmy-award winning shows and talent, and original programming featuring well-known celebrities, all of which help to increase market demand for the networks," the suit states.

Representatives for Comcast were not immediately reachable on Wednesday. In July, the global media company blasted the suit as being nothing more than "extortion by litigation," and telling the California federal judge the suit should be dismissed because it is is a "scam" backed with nothing more than conspiracy theories.

In its memorandum supporting a motion to dismiss, Comcast argued that after it, as well as other major broadcasters, declined to carry ESN's collection of "bandwidth-hogging high-definition channels," the network "shifted its business model to extortion by litigation," and has now levied a host of "incendiary" claims against Comcast and other broadcasters.

But despite repeatedly alleging that Comcast is conspiring with the Federal Communications Commission and the NAACP to keep African-American-owned channels off the air, ESN's second amended complaint still has not backed up its allegations with any of the facts, according to Comcast.

"One would expect plaintiffs making such incendiary accusations — systematic discrimination by multiple publicly traded companies, a betrayal of the core mission of the nation's oldest and most respected civil rights organizations, and state-sanctioned racism in a federal government agency — to come forward with specific, compelling facts to back up those allegations," Comcast states.

Comcast argues that ESN has specifically targeted broadcasters while they have mergers pending regulatory review, the better to "maximize media attention for ESN" and potentially throw roadblocks before the mergers, pointing out that the suit was filed against Comcast and Time Warner Cable during their proposed merger, which has since been called off. After that, TWC entered a new proposed merger with Charter — and ESN filed suit against Charter, according to Comcast.

"In fact, ESN's allegation that 80 million subscribers have access to its channels is especially useless at showing consumer demand because tens of millions of those subscribers were acquired only after Plaintiffs began their industry-wide campaign of extortionate litigation," Comcast said.

In August 2015, Judge Hatter dismissed the suit for the first time, holding that the complaint didn't establish civil rights groups' ties to California or provide enough evidence to demonstrate that Comcast excluded the 100 percent African-American-owned network from its television carriage. In September, ESN and NAAAOM dropped a Ninth Circuit appeal of Judge Hatter's order

dismissing the case after the judge allowed them to amend the complaint.

On Wednesday, Entertainment Studios Network Inc. slammed a bid by Charter Communications Inc. to duck a $10 billion suit alleging it blocks black-owned companies' access to cable networks, telling a California federal judge that its racial discrimination claim has standing.

Charter, the third-largest television distributor in the U.S., contended in a motion to dismiss last month that plaintiffs Entertainment Studios Network Inc. and the National Association of African American Owned Media LLC are on a crusade to accuse major cable companies of "sensational charges of discrimination" to force them into carrying ESN channels.

ESN and NAAAOM are represented by Louis R. Miller, Amnon Z. Siegel and Lauren R. Wright of Miller Barondess LLP.

Comcast is represented by Miguel A. Estrada, Michael R. Huston, Douglas Fuchs, Jesse A. Cripps and Bradley J. Hamburger of Gibson Dunn.

The case is National Association of African American Owned Media et al. v. Comcast Corp. et al., case number 2:15-cv-01239, in U.S. District Court for the Central District of California.

Babb v. Wilkie

Ruling Below: *Babb v. Sec'y, Dep't of Veterans Affairs*, 743 F.App'x 280 (11th Cir. 2018).

Overview: Dr. Babb, a pharmacist at the C.W. Young VA Medical Center, argued that her managers violated Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act of 1967. She claimed that she was discriminated based on her gender and age, retaliated against because she had engaged in protected EEOC activity, and subjected her to a hostile work environment. She appeals from the district court's summary judgement grant in favor of the Secretary.

Issue: Whether the federal-sector provision of the Age Discrimination in Employment Act of 1967, which provides that personnel actions affecting agency employees aged 40 years or older shall be made free from any "discrimination based on age," 29 U.S.C Sec. 633a(a), requires a plaintiff to prove that age was a but-for cause of the challenged personnel action.

Noris BABB, *Plaintiff-Appellant*

v.

SECRETARY, DEPARTMENT OF VETERAN AFFAIRS, *Defendant- Appellee*

United States Court of Appeals, Eleventh Circuit

Decided on July 16, 2018

[Excerpt; some citations and footnotes omitted]

ED CARNES, Chief Judge, NEWSOM and SILER, Circuit Judges
PER CURIAM:

This appeal arises from an employment-discrimination action filed by Dr. Noris Babb, a pharmacist at the C.W. "Bill" Young VA Medical Center in Bay Pines, Florida, against the Secretary of the Department of Veterans Affairs. Babb alleges that her managers discriminated against her based on her gender and age, retaliated against her because she had engaged in protected EEOC activity, and subjected her to a hostile work environment—all in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § § 621 *et seq*. Babb appeals from the district court's grant of summary judgment in favor of the Secretary.

Babb raises three issues on appeal. First, she contends that the district court erred by applying the *McDonnell Douglas* standard rather than the more lenient "motivating factor" test to her gender- and age-

discrimination and retaliation claims. Second, she asserts that the district court overlooked genuine issues of material fact concerning intent and pretext. And finally, she argues that the district court erroneously granted summary judgement on her hostile-work-environment claim.

Having considered the parties' written briefs and oral arguments, we affirm the district court's grant of summary judgement on Babb's ADEA claim, her Title VII retaliation claim, and her hostile-work-environment claim. We reverse the district court's grant of summary judgment on Babb's gender-discrimination claim and remand for consideration under the motivating-factor standard.

I

The facts here are complex—or at least unwieldy. For the sake of clarity, we divide our summary into three parts: (a) a description of Babb's employment and responsibilities in the years leading up to her (and others') complaints about alleged gender and age discrimination; (b) a brief description of those complaints; and (c) a slightly more extended description of the actions that Babb contends constituted unlawful discrimination and/or retaliation, as well as the Secretary's asserted reasons for those actions.

A

Babb, a clinical pharmacist, joined the Medical Center in 2004. As a clinical pharmacist, Babb worked under the auspices of the Medical Center's Pharmacy Services division. In 2006, Babb accepted a position as a geriatrics pharmacist. Between 2006 and June 2013, Babb was assigned to an "interdisciplinary team" of caregivers in the Medical Center's Geriatric Clinic. Accordingly, Babb's work scope and responsibilities were governed by a service agreement between Pharmacy Services and Geriatric. As a clinical pharmacist working in the Geriatric Clinic, Babb was supervised both by Dr. Leonard Williams, Chief of the Geriatric Clinic, and by Pharmacy Services administrators—Dr. Marjorie Howard, Babb's direct Pharmacy Services supervisor; Dr. Keri Justice, Associate Chief of Pharmacy; and Dr. Robert Stewart, the Clinical Pharmacy Supervisor.

In 2009, while a member of the interdisciplinary team, Babb obtained an "advanced scope of practice," which meant that she could practice "disease state management" (or "DSM")—i.e., she could see patients and prescribe medication for conditions within the scope of her expertise without consulting a physician. In 2010, the VA announced a nationwide initiative called "Patient Aligned Care Team" (or "PACT"), which triggered staffing changes at the Medical Center. As part of the PACT initiative, the VA established qualifications standards pursuant to which pharmacists spending at least 25% of their time practicing DSM would be eligible for promotion to GS-13. Because she had an advanced scope that enabled her to practice DSM, Babb sought a promotion.

B

Along the way, Babb and some of her colleagues concluded that Pharmacy Services was implementing the new qualifications standards in a way that evinced gender and age discrimination. Two other clinical pharmacists at the Medical Center, Drs. Donna Trask and Anita Truitt, filed EEO complaints in September 2011. In April and May 2012, Babb sent emails supporting Trask and Truitt to an EEOC investigator, and later, in March 2014, Babb gave a deposition in support of Trask and Truitt. Babb also advocated on her own behalf; in a February 2013 conversation with Dr. Justice, Babb says that she identified herself as "another over 40 female with a grievance" and complained about management's decision (of which more below) not to have her practice DSM anymore. In May 2013, Babb filed the EEOC complaint that ultimately led to this suit.

C

In the fall of 2012, Pharmacy Services and Geriatric began renegotiating the services agreement governing Babb's responsibilities. Babb asked a Pharmacy Services supervisor whether she should "do anything" about the negotiations but was told that they would be "taken care of at the Service Chief level and [that she] didn't need to be concerned about it." Babb later found out that two younger pharmacists—Drs. Lindsey Childs and William Lavinghousez—did participate in the service-agreement negotiations; Pharmacy Services explained that both were infectious-disease specialists and that its representative was unfamiliar with infectious-disease treatment protocol and so needed their input.

Pharmacy Services and Geriatric finalized the new service agreement governing Babb's responsibilities in December 2012. While they considered having Babb remain in the Geriatric Clinic, keep her advanced scope, and spend at least 25% of her time practicing DSM, they ultimately concluded that such a solution was unworkable. In particular, although Dr. Williams wanted to keep Babb in the Geriatric Clinic, he thought that reserving 25% of her time for DSM posed two problems: (1) he feared that it would detract from her role as a clinical pharmacist and patient caregiver and increase wait times for geriatric patients; and (2) he did not think that the DSM model was particularly well suited to geriatric patients. Accordingly, Williams determined that the Geriatric Clinic could not afford to allow Babb to devote more than three "slots" per day to DSM. Those three slots would equate to only about 18.75% of Babb's time, well short of the 25% required for promotion under the new PACT-based standards. When it became clear that Geriatric would not agree to an arrangement that would permit Babb to meet the necessary 25% DSM threshold, Pharmacy Services and Geriatric agreed that Babb would not have any scheduled DSM responsibilities but would instead perform all of her work as part of an integrated patient-care team.

Because Babb would no longer practice DSM under the new service agreement, she would not need an advanced scope. Accordingly, shortly after the new service agreement was finalized, Pharmacy Services management

began the process of removing Babb's advanced-scope designation.

During this same time period, Babb sought opportunities in the Medical Center's anticoagulation clinic. Initially in the fall of 2012, and then again in January 2013, Babb requested anticoagulation training so that she could help out in the anticoagulation clinic. Pharmacy Services denied both requests on the grounds that the clinic was responsible for training medical residents, that the clinic was understaffed and lacked the capacity to train additional people, and that the training was unrelated to Babb's work as a clinical pharmacist in the Geriatric Clinic.

Separately, in April 2013, Babb applied for two open positions in the anticoagulation clinic. A three-member panel conducted interviews for the positions and ultimately selected two younger female pharmacists. The interviewers explained that the two selected candidates had more anticoagulation experience than Babb (who had none) and that Babb had used unprofessional language and criticized other Medical Center employees during her interview. Babb herself characterized the interview as "the worst interview of [her] life."

That same month, Pharmacy Services convened an administrative investigation board ("AIB") to investigate a vulgar letter received by Dr. Gary Wilson, Chief of Pharmacy Services. The letter discussed concern over promotion practices in pharmacy between GS-11 and GS-13. During the AIB's investigation, Justice testified that Babb had been part of a group of pharmacists known as "mow-mows" or "squeaky wheels" who were "never happy, always complaining," and that certain employees perceived that "they were [being] discriminated against because they were older and female." Wilson testified that he believed that Babb had "felt that [she was being] discriminated against over age and sex." The AIB questioned a total of 26 employees; Babb was "really upset" about being one of those questioned.

When Babb learned that she had not been selected for either of the anticoagulation positions for which she had interviewed, she filed the EEOC complaint that led to this suit in May 2013. She also requested that she be moved out of the Geriatric Clinic and into the "float pool," where she would cover for absent staff in a variety of areas. Babb's position as a floater did not require an advanced scope and did not present promotion opportunities. Pharmacy Services approved Babb's request. Soon after Babb began floating in July 2013, Babb's supervisor received two complaints about Babb that had been filed by one of Babb's coworkers. The first asserted that Babb had been rude to a patient, the second that Babb had failed to answer her pager. Babb's supervisor talked to her about the complaints, and Pharmacy Services management knew about them, but they did not result in any discipline and did not affect Babb's performance appraisal. Babb enjoyed her time in the float pool.

In early 2014, Babb applied for and was promoted to a PACT position that involved work in the hospital's Module B and Module

D. The announcement that advertised the job opening read as follows: "Four 9 hour shifts Tuesday through Friday 7:00 am – 4:30 pm with a 4 hour shift Saturday 8:00 am-12:00pm. Nights, weekends and holiday[s] on a fair and equitable rotational schedule." In April 2014, Justice submitted paperwork to facilitate Babb's promotion; she marked "excellent" on all applicable forms and remarked that Babb was "an excellent practitioner with a broad knowledge of clinical pharmacy" and "great with patients!" The VA approved Babb's promotion to GS-13 in August 2014. After starting her new job, Babb learned that she was entitled to only four hours of holiday pay for each of the five Monday federal holidays. (A traditional schedule with five eight-hour weekday shifts would provide eight hours of holiday pay for each Monday holiday.) Babb was "very upset" and said that she would not have taken the job if she had known about the holiday-pay issue. The Medical Center offered to change Babb's schedule, but she declined; she testified that due to the additional pay she gets for working on Saturdays, she makes more money than employees who work eight hours a day Monday through Friday.

II

Babb sued the Secretary of the Department of Veterans Affairs in July 2014. In her complaint, Babb claimed that her managers discriminated against her based on her gender and age, retaliated against her because she had engaged in protected EEOC activity, and subjected her to a hostile work environment—all in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., and the Age Discrimination in Employment Act of 1967, 29 U.S.C. § § 621 *et seq*.

The Secretary filed a motion for summary judgment, which the district court granted. The court analyzed the gender- and age-discrimination claims, as well as the retaliation claim, under the burden-shifting framework established in *McDonnell Douglas Corp. v. Green*. With respect to each of the claims, the court found (1) that Babb had established a prima facie case, (2) that the Secretary had proffered legitimate, nondiscriminatory, non-retaliatory reasons for the challenged employment actions, and (3) that no jury could reasonably conclude that those reasons were pretextual. On Babb's hostile-work environment claim, the court held that the remarks about which Babb complained were not sufficiently severe and pervasive to create an objectively abusive working environment.

III

A

Babb first contends that the district court erred by applying the McDonnell Douglas test, rather than the more lenient motivating-factor test, to her "mixed motive" Title VII gender-discrimination claim. We agree.

In *Quigg v. Thomas County School District*, we held that a plaintiff alleging a mixed-motive Title VII discrimination claim need not satisfy *McDonnell Douglas*'s "overly burdensome" standard. Instead, we concluded that a plaintiff need only offer

"evidence sufficient to convince a jury that: (1) the defendant took an adverse employment action against the plaintiff; and (2) [a protected characteristic] was a motivating factor for the defendant's adverse employment action." Gender discrimination constitutes a motivating factor if it "factored into [the employer's] decisional process."

The Secretary does not dispute that Quigg's motivating-factor standard applies to Babb's mixed-motive gender-discrimination claim. Nor does the Secretary dispute that the district court failed to apply Quigg's standard and evaluated Babb's claim under *McDonnell Douglas* instead. The Secretary asserts, however, that Babb waived her mixed-motive claim by failing to allege it specifically in her complaint. We disagree. As a plurality of the Supreme Court explained in *Price Waterhouse v. Hopkins*, a plaintiff should not be required to label her complaint "as either a 'pretext' case or a 'mixed-motives' case from the beginning in the District Court" because "[d]iscovery often will be necessary before the plaintiff can know whether both legitimate and illegitimate considerations played a part in the decision against her." Here, Babb sufficiently raised her mixed-motive theory in the district court by arguing it in response to the Secretary's summary judgment motion.

Rather than determine for ourselves whether Babb's evidence meets Quigg's motivating-factor standard, we think it more prudent to remand Babb's gender-discrimination claim to the district court for consideration under the proper test in the first instance.

B

Babb next contends that the district court erred in applying the *McDonnell Douglas* framework, rather than the motivating-factor test, to her ADEA age-discrimination claim. If we were writing on a clean slate, we might well agree. It is true, as the Secretary says, that the Supreme Court held in *Gross v. FBL Financial Services, Inc.*, that the provision of the ADEA applicable to private-sector employees precludes application of a motivating-factor standard. In so holding, the Court hewed closely to that provision's particular text: "It shall be unlawful for an employer ... to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." As the Court's italics indicate, it focused on the phrase "because of"— which, the Court held, requires an age-discrimination plaintiff to prove "that age was the 'reason' that the employer decided to act," i.e., "the 'but-for' cause of the employer's adverse decision."

As Babb has pointed out here, the provision of the ADEA that governs discrimination claims brought by *federal*-sector employees reads differently. In pertinent part, and with exceptions not relevant here, it states that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age *shall be made free from any discrimination based on age*." Babb contends that the federal-sector provision's particular framing—which, quite unlike the private-sector provision, requires that employment

decisions be made "free from any discrimination" based on age— counsels a different result here than in *Gross*, and should be read to embody a motivating-factor (rather than but-for) causation standard. Although Babb's argument is not insubstantial, it is foreclosed by our existing precedent.

In *Trask v. Secretary, Department of Veterans Affairs*, this Court applied the McDonnell Douglas standard to an ADEA claim brought by two federal government employees—indeed, two employees who worked at the same facility where Babb worked and made many of the same allegations that Babb has made here. Under the prior-panel-precedent rule, Trask is binding on us. It is true, as Babb says, that the panel in Trask did not analyze the linguistic differences between the ADEA's private- and federal-sector provisions— differences that she claims make all the difference. Even so, we have long—and consistently, and forcefully—rejected an "overlooked reason" (or "overlooked argument") exception to the prior-precedent rule.

Accordingly, under *Trask*, the district court did not err in applying the *McDonnell Douglas* test to Babb's ADEA age-discrimination claim. And under that standard, we can find no reversible error in the district court's decision. In particular, we hold that the district court correctly concluded that Babb failed to demonstrate that the Medical Center's proffered reasons for the adverse employment decisions that she alleges were pretexual and that the "real" reason for those decisions was because Babb was too old. There are four primary adverse employment decisions that Babb says were made against her because of her age: (1) removal of her advanced scope; (2) non-selection for anticoagulation; (3) denial of training opportunities; and (4) provision of only four hours of holiday pay under her new Module B schedule. We consider each in turn.

Addressing Babb's claim that her advanced scope was removed for discriminatory reasons, the Secretary proffered testimony from Dr. Williams, the decision-maker who removed Babb's advanced-scope designation, explaining a nondiscriminatory reason for the decision. Williams testified that he decided that Babb would no longer practice DSM—thereby eliminating her need for an advanced scope—because geriatric patients presented such complex medical cases that it would be in patients' best interest for care to be provided by interdisciplinary medical teams rather than by independent pharmacists practicing DSM. Babb quarrels with Williams' choice to remove DSM from her schedule in the Geriatric Clinic, but her arguments reduce to criticism of Williams' business judgment. Under the McDonnell Douglas framework, to successfully rebut an employer's proffered nondiscriminatory reason for making a business decision, a plaintiff must "meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason." Here, Babb fails to tackle Williams' proffered nondiscriminatory reason "head on" to prove that a choice to provide interdisciplinary care to frail geriatric patients is not, in fact, what motivated Williams' decision.

Addressing Babb's non-selection for the anticoagulation position, Babb argues that age discrimination underlay the Medical Center's hiring of two younger pharmacists. The Secretary offered evidence of the Medical Center's nondiscriminatory reasons: (1) that the selected pharmacists were more experienced than Babb and (2) that Babb performed poorly in her interview, offering inadequate answers to medical questions and making disparaging remarks about coworkers. Babb does not meaningfully contest the Secretary's assessment that she interviewed poorly for the anticoagulation position; in fact, she acknowledged that her interview was the worst of her life. Babb does contest the conclusion that she was less qualified for the positions than the chosen pharmacists. But while it may be (as Babb argues) that her experience was *different* from the selected pharmacists', it was not necessarily *better* than theirs. The fact is that the hired pharmacists had anticoagulation experience that Babb lacked, and a reasonable employer could rely on that particular experience in making an anticoagulation hiring decision, as the Secretary contends occurred here. Babb has failed to prove that that the Secretary's proffered explanations her non-selection are pretextual and that age discrimination is the real reason she was passed over.

Addressing Babb's assertion that she was unlawfully denied access to training opportunities, the Secretary offers testimony from Dr. Howard and Dr. Stewart to explain nondiscriminatory reasons for those denials. Dr. Howard testified that she denied Babb's request to attend a two-day geriatrics training because (1) the registration deadline had passed by the time Babb requested permission to attend the training, (2) Babb was responsible for caring for patients in the Geriatric Clinic at the time of the training, and (3) Howard believed that Babb already possessed a good understanding of the subject matter being taught at the training. Dr. Stewart testified that at the time Babb's request for anticoagulation training was denied, the anticoagulation department was busy, understaffed, and already burdened with the responsibility of training medical residents. Babb attempts to demonstrate that these proffered nondiscriminatory reasons for denials of training are pretextual by pointing out other individuals at the Medical Center who were provided with special training opportunities, but the fact that other individuals received some special training does not prove that the real reason that Babb's requested training was denied was discriminatory—i.e., it does not meet the Secretary's explanation "head on."

Finally, addressing Babb's claim regarding discrimination in the administration of holiday pay in her Module B position, the Secretary has explained that holiday pay is tied to Babb's Module B schedule. Babb is scheduled to work nine-hour shifts Tuesday through Friday with a four-hour shift every Saturday; because Babb is never scheduled to work on a Monday, her Monday holiday pay is calculated by referencing back to her most recent work day, a four hour Saturday shift. Babb admitted that she earned more money on her Tuesday-Saturday schedule (even with her holiday pay complaints) than she would have earned on a traditional Monday-Friday

schedule with eight hours of holiday pay for each Monday holiday. When Babb complained about her holiday pay, the VA offered to permanently move her to a traditional Monday-Friday schedule that would entitle her to eight hours of holiday pay for each Monday holiday, but Babb refused the offer. Babb has failed to rebut the Secretary's nondiscriminatory explanation for Babb's holiday pay—namely, that it was calculated in relation to her Tuesday-Saturday schedule.

The Secretary has provided nondiscriminatory reasons for adverse employment decisions about which Babb has complained. Babb has failed to adequately rebut those nondiscriminatory reasons—to meet them "head on"— and prove that they are pretextual. Thus, under *McDonnell Douglas*, we affirm the district court's order of summary judgment on Babb's age discrimination claim.

C

Babb similarly asserts that the district court erred in applying McDonnell Douglas—again, rather than the motivating-factor test—to her retaliation claim. And again, if we were starting from scratch, we might agree. But again, we are not, and so we cannot.

In *University of Texas Southwest Medical Center v. Nassar*, the Supreme Court held (following the rationale of its earlier decision in Gross) that Title VII's private-sector retaliation provision requires a but-for, rather than motivating-factor, causation standard. As it had done in Gross, the Court emphasized the provision's use of the phrase "because"—in particular, its prohibition of any discrimination "because" an employee has engaged in protected EEO activity. "Given the lack of any meaningful textual difference between the text in this statute and the one in Gross," the Court held, "the proper conclusion here, as in Gross, is that Title VII retaliation claims require proof that the desire to retaliate was the but-for cause of the challenged employment action."

But, Babb asserts—as she does in connection with her ADEA claim—the language of Title VII's federal-sector anti-retaliation provision is different. Almost exactly like its ADEA analogue, it states that personnel decisions (again, with exceptions not relevant here) "shall be made free from any discrimination based on … sex …." Babb insists that the absence of the "because" language that drove the result in Nassar, combined with the presence of the broad phrase "free from any discrimination," requires application of a motivating-factor, rather than but-for, causation standard.

Again, though, our earlier decision in *Trask* stands in Babb's way. There, citing both Title VII's private-sector anti-retaliation provision and *Nassar*, we held—again, in a case involving federal-government employees—that the *McDonnell Douglas* test and a but-for causation standard applied. And for reasons already explained, it is no answer to *Trask* that the panel there did not engage the linguistic differences between the private- and federal-sector anti-retaliation provisions. We are bound just the same.

Accordingly, we are constrained to hold that the district court did not err in applying the *McDonnell Douglas* framework to Babb's retaliation claim. And under that standard, we cannot say that the district court was wrong to grant summary judgment to the Secretary. In particular, we hold that the district court correctly concluded that Babb failed to demonstrate that the Medical Center's proffered reasons for the adverse employment decisions that she alleges were pretextual and that those decisions were actually motivated by retaliatory animus.

Babb points to the same adverse employment actions in her retaliation claims as she did in her age discrimination claims. As explained above—and for the same reasons—Babb has failed to demonstrate that the Secretary's proffered nondiscriminatory reasons for making each employment decision were pretextual. Just as Babb's age discrimination claims fail because Babb has failed to show that the Secretary's nondiscriminatory reason for the action was pretextual, Babb's retaliation claims similarly fail. We affirm the district court's order of summary judgment in favor of the Secretary on Babb's retaliation claims.

D

Finally, Babb claims that the district court erred in granting summary judgment for the Secretary on her hostile-work-environment claim. We disagree; summary judgment was proper.

"A hostile work environment claim under Title VII is established upon proof that 'the workplace is permeated with discriminatory intimidation, ridicule, and insult, that is sufficiently severe or pervasive to alter the conditions of the victim's employment and create an abusive working environment.'" "In evaluating the objective severity of the harassment, this court looks at the totality of the circumstances and considers, among other things: (1) the frequency of the conduct, (2) the severity of the conduct, (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance, and (4) whether the conduct unreasonably interferes with employee's job performance." The district court here correctly concluded that Babb failed to allege an objectively hostile environment so filled with intimidation and ridicule that it was sufficiently severe or pervasive to alter her working conditions.

In support of her hostile-work-environment claim, Babb points to many of the same pieces of evidence that she invokes in connection with her discrimination and retaliation claims—e.g., the removal of her advanced scope, the denial of her request for anticoagulation training, the fact that she was not hired for the anticoagulation position for which she applied. In addition, she points to three remarks made to her that, she says, pertained to her age, gender, or protected activity: (1) one pharmacy administrator once asked her, "When do you retire?"; (2) another once referred to "Magic Mike" as a "middle-aged woman movie" while speaking to Babb; and (3) the same called her a "mow mow" (which Babb interpreted as "a grandma comment") during an investigation of a vulgar email.

Babb has not raised a genuine issue of material fact regarding her hostile work-environment claim. Her allegations pale in comparison to the sort of conduct that this Court has deemed sufficiently "severe and pervasive" to create an objectively abusive environment. Given the facts alleged by Babb, the district court correctly ruled that her hostile-work-environment claim failed as a matter of law.

IV

For the foregoing reasons, we affirm the district court's grant of summary judgment on Babb's ADEA age-discrimination claim, Title VII retaliation claim, and hostile-work-environment claim. We reverse the district court's grant of summary judgment on Babb's Title VII gender-discrimination claim and remand for consideration under the "motivating-factor" standard.

AFFIRMED in part; **REVERSED** and **REMANDED** in part.

“Justices to Review How Federal Workers Prove Job Bias Claim”

Bloomberg

Hassan A. Kanu

June 28, 2019

The U.S. Supreme Court accepted June 28 a petition asking for clarification on what federal government workers must prove when they file discrimination claims.

The main question for the court in the case is about the standard federal workers must meet to show there was age discrimination underlying a termination, demotion, or some other negative job action. A decision from the justices would resolve a federal appeals court split on the issue. The high court’s analysis may ultimately make it easier or tougher for federal government workers to prove they were discriminated against based on age or even other protected categories, like race or sex.

Norris Babb’s case against the Department of Veterans Affairs alleges discrimination and retaliation in violation of Title VII of the 1964 Civil Rights Act and the Age Discrimination in Employment Act. She alleges she was denied opportunities to advance at a department facility in Florida because of her gender and age, and that management retaliated against her for filing complaints about the issue.

Babb’s petition presented a “subsidiary question” for the court about whether retaliation against federal workers over protected activity—like filing a discrimination complaint—is explicitly barred by Title VII, but the justices limited their review to the standard for proving bias under the ADEA statute.

Private vs. Federal

Federal laws against discrimination in employment have different provisions for workers in the private sector compared to those in public employment. Broadly speaking, the private sector provisions ban employment decisions that are made “because of” someone’s age or because they engaged in protected activity. The provisions that apply to the federal sector generally use different language that requires that employment decisions “shall be made free from” discrimination.

The Supreme Court has interpreted the “because of” language as requiring what’s known as “but-for” causation, which means the plaintiff must prove that they wouldn’t have been harmed except for the fact of their identity or protected act. It has done so in both Title VII retaliation and ADEA discrimination cases.

But Congress in 1991 also amended Title VII so that discrimination claims could be proved

based on the test that was developed through interpreting the language in the federal sector provisions—known as the "motivating factor" standard. That test requires plaintiffs to show that bias was a factor in causing the harm they suffered. The amendments limit how much money and damages can be recovered, and retaliation claims brought under that statute retained the "but-for" causation standard, which is tougher for plaintiffs to surmount.

"Congress thus adopted a motivating-factor standard for causation in Title VII's private-sector discrimination provision, but it did not do so in other provisions of Title VII or any provisions of the ADEA," the VA said in its brief.

Babb and the VA both urged the high court to resolve the standard of causation issue for age discrimination complaints by federal workers. The government argued that the stricter "but-for" standard should apply, while Babb argued for the more lenient motivating factor analysis.

Some federal appeals courts—including the Ninth Circuit and the Eleventh Circuit in Babb's case—have held that the age bias statute requires but-for causation. The Ninth Circuit's decision concluded that Supreme Court precedent doesn't permit use of the motivating-factor test during trial in federal sector cases, but does in the summary judgment phase—when courts make a preliminary decision as to whether the plaintiff actually has a viable claim.

The District of Columbia Circuit, on the other hand, has rejected that approach and applied the motivating factor analysis in those cases.

Administrative "agencies that oversee discrimination and retaliation claims have followed the D.C. Circuit" and concluded "that federal employee's burden of proof should be 'a factor' or 'a motivating factor' in Title VII and ADEA discrimination cases," Babb's attorneys said in her brief.

The high court's analysis could resolve those differences in how courts and agencies approach the issue.

The case is Babb v. Wilkie, U.S., No. 18-882, review granted 6/28/19.

“Justices to Mull Requirements for Fed. Worker ADEA Claims”

Law360

Danielle Nichole Smith

June 28, 2019

The U.S. Supreme Court on Friday agreed to weigh in on whether a federal worker has to show that a challenged action from an employer wouldn't have occurred if it wasn't for the employee's age in order to successfully plead a claim under the Age Discrimination in Employment Act.

In its order, the high court granted Noris Babb's petition for writ of certiorari in her suit alleging the U.S. Department of Veterans Affairs discriminated and retaliated against her because of her gender and age. The justices specified that the question in their review would be limited to whether the federal- sector provision in the ADEA requires plaintiffs to "prove age was a but-for cause of the challenged personnel action."

The case came before the Supreme Court after Babb appealed an Eleventh Circuit panel's **partial revival** of her suit against the agency. The panel had ruled in July that while the lower court should have applied the lighter "motivating factor" test for Babb's gender discrimination claims, the court was correct to analyze her ADEA and Title VII retaliation claims using the stricter McDonnell-Douglas burden-shifting test. The panel noted, however, that its conclusions might have been different had it not been bound by an earlier circuit decision called Trask.

However, Babb argued in her high court petition that the statutory language created a different standard of causation for federal-sector workers bringing retaliation claims than private-sector workers. Because the ADEA provision for federal workers said that all personnel actions would be "free from any discrimination based on age," those workers only had to show that age was a factor in the challenged employer action to make a claim, Babb said.

The Eleventh Circuit's decision created a greater burden for federal workers seeking to bring ADEA and Title VII retaliation claims within its jurisdiction than other federal employees would have elsewhere, Babb contended.

The Department of Veterans Affairs, on the other hand, told the high court that the Eleventh Circuit correctly found that the so-called "but-for" standard was the appropriate standard for federal workers bringing employment claims under the ADEA and Title VII. Still, the agency agreed that the Supreme Court should take up the case to resolve divisions among the circuit court and federal agencies on the proper standard of causation under the relevant provisions.

Roman Martinez, an attorney for Babb, told Law360 on Friday that they were "happy the

Supreme Court decided to review the important issues presented by this case."

"The law demands that no federal employee suffer from discrimination on the basis of age," Martinez said. "We look forward to vindicating that essential principle in this case."

Babb initially sued the Department of Veterans Affairs in July 2014, alleging, among other things, that she was stripped her of an advanced certification, denied a transfer and training opportunities and shorted on holiday pay because she is a woman over 40. A Florida federal judge tossed the case in August 2016, and Babb appealed to the Eleventh Circuit the following October.

Representatives for the Department of Veterans Affairs and the U.S. Department of Justice, which represents the federal government in litigation, didn't respond Friday to requests for comment.

Babb is represented by Roman Martinez, Samir Deger-Sen and Margaret A. Upshaw of Latham & Watkins LLP, and Joseph Magri and Sean M. McFadden of Merkle & Magri PA.

The Department of Veterans Affairs is represented by Solicitor General Noel J. Francisco, Assistant Attorney General Joseph H. Hunt and Marleigh D. Dover and Stephanie R. Marcus of the U.S. Department of Justice.

The case is Babb v. Wilkie, case number 18-882, in the U.S. Supreme Court.

"Supreme Court to Determine Whether "But-For" Causation Required in Federal-Sector ADEA Claims"

Employment Law Dailey

Pamela Wolf

July 2, 2019

The petitioner contends that the differing language in the ADEA's federal-sector provision permits a more lenient "motivating factor" analysis, rather than the 'but-for" causation applied in the private sector.

On June 28, the High Court granted certiorari in a case that will determine whether federal agency employees seeking to prevail on allegations of discrimination in violation of the ADEA's federal-sector provision will be required to prove that "age was a but-for cause of the challenged personnel action."

Summary judgment. Below, in *Babb v. Wilkie*, a pharmacist at a VA medical center in Florida alleged that she was subjected to gender-plus-age discrimination in violation of Title VII and the ADEA. She also alleged retaliation due to her protected EEO activity and a discriminatory and retaliatory hostile work environment in violation of the same laws. The district court granted the VA's motion for summary judgment on all of her claims.

The employee appealed, contending, among other things, that the district court erred by applying the *McDonnell Douglas* standard instead of the more lenient "motivating factor" test to her gender and age discrimination and retaliation claims.

On July 16, 2018, in an unpublished opinion, the Eleventh Circuit affirmed summary judgment of the employee's ADEA, Title VII retaliation, and hostile worker environment claims, but it reversed on her gender discrimination claim and remanded for consideration under the motivating-factor standard.

ADEA's federal-sector provision**.** As to the employee's age discrimination claim, the appeals court noted that the ADEA's federal sector provision states in relevant part that "[a]ll personnel actions affecting employees or applicants for employment who are at least 40 years of age shall be made free from any discrimination based on age." The employee asserted that this particular framing, which, unlike the private-sector provision, requires that employment decisions be made "free from any discrimination" based on age, requires a different result than in the Supreme Court's decision in *Gross v. FBL Financial Services, Inc.* (2006), and should be read to encompass a motivating-factor, rather than the but-for causation standard established in *Gross*.

While the Eleventh Circuit characterized the employee's argument as "not insubstantial," it was nonetheless foreclosed by existing precedent in *Trask v. Secretary, Department of Veterans Affairs*, in which the appeals court applied the *McDonnell Douglas* standard to an ADEA claim brought by two other federal government employees who had worked at the same facility where the plaintiff worked; they also made many of the same allegations. The court was bound by prior precedent.

Although the panel in *Trask* did not analyze the linguistic differences between the ADEA's private- and federal-sector provisions, as the employee asserted, the Eleventh Circuit had also consistently and forcefully rejected the "overlooked reason" exception to its prior precedent rule. Thus, the district court did not err in applying the *McDonnell Douglas* test to the employee's ADEA age discrimination claim.

Do *Nassar* and *Gross* apply in the federal sector? In her petition for certiorari, the employee framed the issue as whether the Supreme Court's decisions in *University of Texas Southwestern Medical Center. v. Nassar* (2013) and *Gross* interpreting statutory language applicable to the private sector bars the use of the "a factor," "motivating factor," or "substantial factor" standard in Title VII and ADEA retaliation cases brought by federal-sector employees under different statutory language. According to the employee, the High Court's reasoning in earlier cases suggests that the differing statutory language applicable to federal-sector and private-sector claims mandates differing approaches.

Question narrowed. In granting certiorari, the Supreme Court narrowed the question it will address to reach only the burden of proof in federal-sector age discrimination claims:

"Whether the federal-sector provision of the Age Discrimination in Employment Act of 1967, which provides that personnel actions affecting agency employees aged 40 years or older shall be made free from any 'discrimination based on age,' 29 U. S. C. §633a(a), requires a plaintiff to prove that age was a but-for cause of the challenged personnel action."

Klein v. Oregon Bureau of Labor and Industries

Ruling Below: *Klein v. Or. Bureau of Labor & Indus.*, 410 P.3d 1051 (Or. Ct. App. 2017)

Overview: A same-sex couple were denied service at an Oregon bakery business due to their sexual orientation, which violated Oregon's non-discrimination law. The defendants argue that there should be an exemption based on their own sincere religious beliefs of same-sex marriage. This case was remanded to a lower court by the U.S. Supreme Court based on their decision in 2018 *Masterpiece Cakeshop*.

Issue: (1) Whether Oregon violated the free speech and free exercise clauses of the First Amendment by compelling the Kleins to design and create a custom wedding cake to celebrate a same-sex wedding ritual in violation of their sincerely held religious beliefs; (2) whether the Supreme Court should overrule *Employment Division, Department of Human Resources of Oregon v. Smith*; and (3) whether the Supreme Court should reaffirm *Smith*'s hybrid-rights doctrine, applying strict scrutiny to free exercise claims that implicate other fundamental rights, and resolve the circuit split over the doctrine's precedential status.

Melissa Elaine KLEIN, dba Sweetcakes by Melissa; and Aaron Wayne Klein, dba Sweetcakes by Melissa, *Plaintiffs—Petitioners*

v.

OREGON BUREAU OF LABOR AND INDUSTRIES, *Defendant—Respondent*

Court of Appeals of Oregon

Decided on December 28, 2017

[Excerpt; some citations and footnotes omitted]

GARRETT, Judge:

Melissa and Aaron Klein, the owners of a bakery doing business as Sweetcakes by Melissa (Sweetcakes), seek judicial review of a final order of the Bureau of Labor and Industries (BOLI) finding that the Kleins' refusal to provide a wedding cake to the complainants, a same-sex couple, violated ORS 659A.403, which prohibits a place of public accommodation from denying "full and equal" service to a person "on account of * * * sexual orientation." The order further concluded that the Kleins violated another of Oregon's public accommodations laws, ORS 659A.409, by communicating an intention to unlawfully discriminate in the future. BOLI's order awarded damages to the complainants for their emotional and mental suffering from the denial of service and enjoined the Kleins

from further violating ORS 659A.403 and ORS 659A.409.

In their petition for judicial review, the Kleins argue that BOLI erroneously concluded that their refusal to supply a cake for a same-sex wedding was a denial of service "on account of" sexual orientation within the meaning of ORS 659A.403; alternatively, they argue that the application of that statute in this circumstance violates their constitutional rights to free expressionand to the free exercise of their religious beliefs. The Kleins also argue that they were denied due process of law because BOLI's commissioner did not recuse himself in this case after making public comments about it, that the damages award is not supported by substantial evidence or substantial reason, and that BOLI erroneously treated the Kleins' public statements about this litigation as conveying an intention to violate public accommodation laws in the future.

As explained below, we reject the Kleins' construction of ORS 659A.403 and conclude that their denial of service was "on account of" the complainants' sexual orientation for purposes of that statute. As for their constitutional arguments, we conclude that the final order does not impermissibly burden the Kleins' right to free expression under the First Amendment to the United States Constitution. We conclude that, under *Employment Division, Oregon Department of Human Resources v. Smith*, final order does not impermissibly burden the Kleins' right to the free exercise of their religion because it simply requires their compliance with a neutral law of general applicability, and the Kleins have made no showing that the state targeted them for enforcement because of their religious beliefs. For substantially the same reasons for which we reject their federal constitutional arguments, we reject the Kleins' arguments under the Oregon Constitution. We also reject the Kleins' arguments regarding the alleged bias of BOLI's commissioner and their challenge to BOLI's damages award. We agree with the Kleins, however, that the evidence does not support BOLI's conclusion that they violated ORS 659A.409. Accordingly, we reverse the order as to that determination and the related grant of injunctive relief. BOLI's order is otherwise affirmed.

I. BACKGROUND

We will discuss the relevant evidence and factual findings in greater detail within our discussion of particular assignments of error, but the following overview provides context for that later discussion. The complainants, Rachel Bowman-Cryer and Laurel Bowman-Cryer, met in 2004 and had long considered themselves a couple. In 2012, they decided to marry.

As part of the wedding planning, Rachel and her mother, Cheryl, attended a Portland bridal show. Melissa Klein had a booth at that bridal show, and she advertised wedding cakes made by her bakery business, Sweetcakes. Rachel and Cheryl visited the booth and told Melissa that they would like to order a cake from her. Racheland Cheryl were already familiar with Sweetcakes; two years earlier, Sweetcakes had designed,

created, and decorated a wedding cake for Cheryl's wedding, paid for by Rachel.

After the bridal show, on January 17, 2013, Rachel and Cheryl visited the Sweetcakes bakery shop in Gresham for a cake-tasting appointment, intending to order a wedding cake. At the time of the appointment, Melissa was at home providing childcare, so her husband, Aaron, conducted the tasting.

During that tasting, Aaron asked for the names of the bride and groom. Rachel told him that there were two brides and that their names were Rachel and Laurel. At that point, Aaron stated that he was sorry, but that Sweetcakes did not make wedding cakes for same-sex ceremonies because of his and Melissa's religious convictions. Rachel began crying, and Cheryl took her by the arm and walked her out of the shop. On the way to their car, Rachel became "hysterical" and kept apologizing to her mother, feeling that she had humiliated her.

Cheryl consoled Rachel once they were in their car, and she assured her that they would find someone to make the wedding cake. Cheryl drove a short distance away, but then turned around and returned to Sweetcakes. This time, Cheryl reentered the shop by herself to talk with Aaron. During their conversation, Cheryl told Aaron that she had previously shared his thinking about homosexuality, but that her "truth had changed" as a result of having "two gay children." In response, Aaron quoted a Bible passage from the Book of Leviticus, stating, "You shall not lie with a male as one lies with a female; it is an abomination." Cheryl left and returned to the car, where Rachel had remained, "holding [her] head in her hands, just bawling."

When Cheryl returned to the car, she told Rachel that Aaron had called her "an abomination," which further upset Rachel. Rachel later said that "[i]t made me feel like they were saying God made a mistake when he made me, that I wasn't supposed to be, that I wasn't supposed to love or be loved or have a family or live a good life and one day go to heaven."

When Rachel and Cheryl arrived home, Cheryl told Laurel what had happened. Laurel, who had been raised Catholic, recognized the "abomination" reference from Leviticus and felt shame and anger. Rachel was inconsolable, which made Laurel even angrier. Later that same night, Laurel filled out an online complaint form with the Oregon Department of Justice (DOJ), describing the denial of service at Sweetcakes.

In addition to the DOJ complaint, Laurel eventually filed a complaint with BOLI, as did Rachel, alleging that the Kleins had refused to make them a wedding cake because of their sexual orientation. BOLI initiated an investigation.

Meanwhile, the controversy had become the subject of significant media attention. The Kleins were interviewed by, among others, the Christian Broadcast Network (CBN) and later by a radio talk show host, Tony Perkins. In the CBN interview, which was broadcast in September 2013, the Kleins explained that they did not want to participate in celebrating a same-sex marriage, wanted to live their lives in the service of God, and that, although

they did not want to see their bakery business go "belly up," they had "faith in the Lord and he's taken care of us up to this point and I'm sure he will in the future." The CBN broadcast also showed a handwritten sign, taped to the inside of the bakery's front window, which stated:

"Closed but still in business. You can reach me by email or facebook. www.sweetcakesweb.com or Sweetcakes by Melissa facebook page. New phone number will be provided on my website and facebook. This fight is not over. We will continue to stand strong. Your religious freedom is becoming not free anymore. This is ridiculous that we cannot practice our faith. The LORD is good and we will continue to serve HIM with all our heart [heart symbol]."

In the Perkins interview, which occurred in February 2014, Aaron explained that he and Melissa "had a feeling that [requests for same-sex wedding cakes were] going to become an issue" and that they had discussed the issue. During the interview, Aaron stated that "it was one of those situations where we said 'well I can see it is going to become an issue but we have to stand firm. It's our belief and we have a right to it, you know.'"

BOLI's investigation determined that substantial evidence supported the complaints, and the agency eventually issued formal charges against the Kleins that described the initial refusal of service as well as the Kleins' subsequent participation in the CBN broadcast and Perkins interview. Specifically, BOLI alleged that the Kleins had violated ORS 659A.403, which entitles all persons "to the full and equal accommodations advantages, facilities and privileges of any place of public accommodation, without any distinction, discrimination or restriction on account of * * * sexual orientation," and further makes it "an unlawful practice for any person to deny full and equal accommodations, advantages, facilities and privileges of any place of public accommodation in violation of this section," BOLI further alleged that the Kleins' subsequent statements had violated another provision of the state's public accommodations laws, which makes it unlawful to communicate an intention to discriminate in the future on account of sexual orientation.

After the issuance of formal charges, BOLI designated an ALJ to handle the contested case proceedings, and the Kleins and BOLI engaged in extensive motions practice before the ALJ. Among those motions, the Kleins sought to disqualify BOLI's commissioner, Brad Avakian, on the ground that he was biased against them, as evidenced by his public statements about the cake controversy. In a Facebook post shortly after Laurel filed the DOJ complaint, Avakian had provided a link to a story on www.kgw.com related to the refusal of service; in that post, he wrote, "Everyone has a right to their religious beliefs, but that doesn't mean they can disobey laws that are already in place. Having one set of rules for everybody ensures that people are treated fairly as they go about their daily lives." Later, shortly after the first of the BOLI complaints was filed, an article in *The Oregonian* quoted Avakian as saying that "[e]veryone is entitled to their own beliefs, but that doesn't mean that folks have the right to discriminate." According to the Kleins,

those statements and others indicated that Avakian had prejudged their case before the hearing. The ALJ disagreed and denied the motion to disqualify.

The Kleins and BOLI also filed cross-motions for summary judgment on multiple issues involving the merits of the case, including, as relevant on judicial review: (1) whether the complainants were denied service "on account of" their sexual orientation for purposes of Oregon's public accommodation laws; (2) if so, whether the application of those laws violates the Kleins' rights to free expression and religious worship under the state and federal constitutions; and (3) whether Aaron Klein's statements during the CBN and Perkins interviews, and the note on the Sweetcakes window, were the kinds of statements of a *future* intention to discriminate that are prohibited by ORS 659A.409. In an interim order on the cross-motions, the ALJ agreed with BOLI on the first two questions, concluding that the Kleins' refusal to provide a wedding cake violated ORS 659A.403, and that the statute was constitutional, both facially and as applied under the circumstances. However, the ALJ agreed with the Kleins that Aaron's statements during the CBN and Perkins interviews had not been prospective; rather, the ALJ determined that those statements "are properly construed as the recounting of past events that led to the present Charges being filed," and therefore did not violate ORS 659A.409.

After the ALJ's rulings on the various motions, only the issue of damages remained to be decided at a hearing. BOLI alleged that each complainant was claiming damages of "at least $75,000," and it adduced evidence at the hearing—through testimony of the complainants and others—concerning emotional harm that the complainants suffered in the wake of the Kleins' refusal to make their wedding cake. During closing arguments, BOLI also asked that the ALJ award damages for the distress that the complainants suffered as a result of media and socialmedia attention after the denial of service. In response, the Kleins argued that the complainants were not credible but that, even if the ALJ were to find them credible, their emotional distress was attributable to sources other than the denial of service that were not lawful bases for a damages award, such as media attention and family conflicts. The Kleins also argued that the amount of damages requested by BOLI far exceeded anything that the agency had previously sought for similar violations.

After six days of testimony and argument regarding the damages issue, the ALJ issued a proposed final order that encompassed his earlier summary judgment and procedural rulings and also addressed the question of damages. With respect to damages, the ALJ found that Rachel had testified credibly about her emotional distress, but that Laurel had not been present at the cake refusal and had, in some respects, exaggerated the extent and severity of her emotional suffering. The ALJ concluded that there was no basis in law for awarding damages to the complainants for their emotional suffering caused by media and social-media attention. Ultimately, the ALJ determined that $75,000 was an appropriate award to compensate Rachel for her suffering as a result of the denial of

service, and that a lesser amount, $60,000, was appropriate to compensate Laurel.

Both the Kleins and the agency filed exceptions to the ALJ's proposed final order. BOLI, through its commissioner, Avakian, then issued its final order that, for the most part, was consistent with the ALJ's reasoning in his proposed order. Specifically, BOLI's final order affirmed the ALJ's determinations that the Kleins violated ORS 659A.403, it affirmed the ALJ's conclusion that application of that statute did not violate the Kleins' constitutional rights, and it affirmed the damages awards. However, the final order departed from the ALJ's determination in one respect: whether the Kleins had violated ORS 659A.409 by conveying an intention to discriminate in the future. On that question, the final order determined that, based on Aaron's statements during the CBN and Perkins interviews, and the handwritten sign taped to the bakery's window, the Kleins had conveyed an intention to unlawfully discriminate in the future by refusing service based on sexual orientation. Thus, BOLI reversed the ALJ's ruling on that matter and concluded that the Kleins violated ORS 659A.409; but, BOLI did not award any damages based on that particular violation "because there is no evidence in the record that Complainants experienced any mental, emotional, or physical suffering because of it." This petition for judicial review followed.

II. ANALYSIS

In their petition, the Kleins raise four assignments of error. In their first assignment, they argue that BOLI erred by applying ORS 659A.403 to their refusal to make the wedding cake. Within that assignment, they argue that BOLI misinterpreted the statute to apply to the refusal; alternatively, they argue that, as applied under these circumstances, the statute abridges their rights to freedom of expression and religious exercise under the federal and state constitutions. In their second assignment, the Kleins argue that their due process rights were violated by the commissioner's failure to recuse himself. The Kleins' third assignment asserts that BOLI's damages award is not supported by substantial evidence or substantial reason. And, in their fourth assignment, they argue that BOLI erred by applying ORS 659A.409because their statements after the refusal did not communicate an intention to discriminate in the future. We address each assignment of error in turn.

A. *First Assignment: Interpretation and Application of ORS 659A.403*

1. *Meaning and scope of ORS 659A.403*

In their first assignment of error, the Kleins argue that BOLI misinterpreted ORS 659A.403—specifically, what it means to deny equal service "on account of" sexual orientation. According to the Kleins, they did not decline service to the complainants "on account of" their sexual orientation; rather, "they declined to facilitate the celebration of a union that conveys messages about marriage to which they do not [subscribe] and that contravene their religious beliefs." BOLI rejected that argument, reasoning that the Kleins' "refusal to provide a wedding cake for Complainants because it was for their same-sex wedding was synonymous with refusing

to provide a cake because of Complainants' sexual orientation." We, like BOLI, are not persuaded that the text, context, or history of ORS 659A.403 contemplates the distinction proposed by the Kleins.

We review BOLI's interpretation of ORS 659A.403 for legal error, without deference to the agency's construction of the statute. To determine the legislature's intended meaning of ORS 659A.403, we use the analytic framework set forth in *State v. Gaines*, whereby we look to the text of the statute in its context, along with any helpful legislative history.

The text of ORS 659A.403(1) leaves little doubt as to its breadth and operation. It provides, in full:

"(1) Except as provided in subsection (2) of this section, *all* persons within the jurisdiction of this state are entitled to the full and equal accommodations, advantages, facilities and privileges of *any* place of public accommodation, without *any* distinction, discrimination or restriction *on account of* race, color, religion, sex, *sexual orientation*, national origin, marital status or age if the individual is of age, as described in this section, or older."

The phrase "on account of" is unambiguous: In ordinary usage, it is synonymous with "by reason of" or "because of." And it has long been understood to carry that meaning in the context of antidiscrimination statutes.

Thus, by its plain terms, the statute requires only that the denial of full and equal accommodations be causally connected to the protected characteristic or status—in this case, "sexual orientation," which is defined to mean "an individual's actual or perceived heterosexuality, homosexuality, bisexuality or gender identity, regardless of whether the individual's gender identity, appearance, expression or behavior differs from that traditionally associated with the individual's sex at birth."

In this case, Sweetcakes provides a service—making wedding cakes—to heterosexual couples who intend to wed, but it denies the service to same-sex couples who likewise intend to wed. Under any plausible construction of the plain text of ORS 659A.403, that denial of equal service is "on account of," or causally connected to, the sexual orientation of the couple seeking to purchase the Kleins' wedding-cake service.

The Kleins do not point to any text in the statute or provide any context or legislative history suggesting that we should depart from the ordinary meaning of those words. What they argue instead is that the statute is silent as to whether it encompasses "gay conduct" as opposed to sexual orientation. The Kleins state that they are willing to serve homosexual customers, so long as those customers do not use the Kleins' cakes in celebration of same-sex weddings. As such, accordingto the Kleins, they do not discriminate against same-sex couples "on account of" their *status*; rather, they simply refuse to provide certain services that those same-sex couples want. The Kleins contend that BOLI's "broad equation of celebrations (weddings) of gay conduct (marriage) with gay status rewrites and expands Oregon's public accommodations law."

We see no evidence that the drafters of Oregon's public accommodations laws intended that type of distinction between status and conduct. First, there is no reason to believe that the legislature intended a "status/conduct" distinction specifically with regard to the subject of "sexual orientation." When the legislature in 2007 added "sexual orientation" to the list of protected characteristics in ORS 659A.403, Or Laws 2007, ch 100, § 5, it was unquestionably aware of the unequal treatment that gays and lesbians faced in securing the same rights and benefits as heterosexual couples in committed relationships. During the same session that the legislature amended ORS 659A.403 to include "sexual orientation," it adopted the Oregon Family Fairness Act, which recognized the "numerous obstacles" that gay and lesbian couplesfaced and was intended to "extend[ ] benefits, protections and responsibilities to committed same-sex partners and their children that are comparable to those provided to married individuals and their children by the laws of this state." To that end, section 9 of that law provided:

"Any privilege, immunity, right or benefit granted by statute, administrative or court rule, policy, common law or any other law to an individual because the individual is or was married, or because the individual is or was an in-law in a specified way to another individual, is granted on equivalent terms, substantive and procedural, to an individual because the individual is or was in a domestic partnership or because the individual is or was, based on a domestic partnership, related in a specified way to another individual."

The Kleins have not provided us with any persuasive explanation for why the legislature would have intended to grant equal privileges and immunities to individuals in same-sex relationships while simultaneously excepting those committed relationships from the protections of ORS 659A.403.

Nor does the Kleins' proposed distinction find support in the context or history of ORS 659A.403 more generally. As originally enacted in 1953, the statute prohibited "any distinction, discrimination or restriction on account of race, religion, color or national origin." One of the purposes of the statute, the Supreme Court has observed, was "to prevent 'operators and owners of businesses catering to the general public to subject Negroes to oppression and humiliation.'" Yet, under the distinction proposed by the Kleins, owners and operators of businesses could continue to oppress and humiliate black people simply by recasting their bias in terms of conduct rather than race. For instance, a restaurant could refuse to serve an interracial couple, not on account of the race of either customer, but on account of the conduct—interracial dating—to which the proprietor objected. In the absence of any textual or contextual support, or legislative history on that point, we decline to construe ORS 659A.403 in a way that would so fundamentally undermine its purpose.

Tellingly, the Kleins' argument for distinguishing between "gay conduct" and sexual orientation is rooted in principles that they derive from United States Supreme Court cases rather than anything in the text, context, or history of ORS 659A.403.

Specifically, the Kleins draw heavily on the Supreme Court's reasoning in *Bray v. Alexandria Women's Health Clinic*, which concerned the viability of a federal cause of action under 42 USC section 1985(3) against persons obstructing access to abortion clinics. In that case, the Supreme Court addressed, among other things, whether the petitioners' opposition to abortion reflected an animus against women in general—that is, whether, because abortion is "an activity engaged in only by women, to disfavor it is *ipso facto* to discriminate invidiously against women as a class."

In rejecting that theory of *ipso facto* discrimination, the Court observed:

"Some activities may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed. A tax on wearing yarmulkes is a tax on Jews. But opposition to voluntary abortion cannot possibly be considered such an irrational surrogate for opposition to (or paternalism towards) women. Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of, or condescension toward (or indeed any view at all concerning), women as a class—as is evident from the fact that men and women are on both sides of the issue, just as men and women are on both sides of petitioners' unlawful demonstrations."

The Kleins argue that "[t]he same is true here. Whatever one thinks of same-sex weddings, there are respectable reasons for not wanting to facilitate them." They contend that BOLI simply "ignores *Bray*" and that BOLI's construction of ORS 659A.403 "fails the test for equating conduct with status" that the Supreme Court announced in that case.

Bray, which involved a federal statute, does not inform the question of what the Oregon legislature intended when it enacted ORS 659A.403. But beyond that, *Bray* does not articulate a relevant test for analyzing the issue presented in this case. *Bray* addressed the inferences that could be drawn from opposition to abortion as a "surrogate" for sex-based animus, and it was in that context that the Supreme Court described "irrational object[s] of disfavor" that "happen to be engaged in exclusively or predominantly by a particular class of people," such that intent to discriminate against that class can be presumed.

Here, by contrast, there is no surrogate. The Kleins refused to make a wedding cake for the complainants precisely and expressly *because of* the relationship between sexual orientation and the conduct at issue (a wedding). And, where a close relationship between status and conduct exists, the Supreme Court has repeatedly rejected the type of distinction urged by the Kleins. We therefore reject the Kleins' proposed distinction between status and conduct, and we hold that their refusal to serve the complainants is the type of discrimination "on account of * * * sexual orientation" that falls within the plain meaning of ORS 659A.403.

The *reasons* for the Kleins' discrimination on account of sexual orientation—regardless of

whether they are "common and respectable" within the meaning of *Bray*—raise questions of constitutional law, not statutory interpretation. The Kleins, in the remainder of their argument concerning the construction of ORS 659A.403, urge us to consider those constitutional questions and to interpret the statute in a way that avoids running afoul of the "Speech and Religion Clauses of the Oregon and United States constitutions." However, that canon applies only where the court is faced with competing plausible constructions of the statute. Here, the Kleins have not made that threshold showing of ambiguity. Accordingly, we affirm BOLI's order with regard to its construction of ORS 659A.403, and we turn to the merits of the Kleins' constitutional arguments.

2. *Constitutional challenges to ORS 659A.403*

The Kleins invoke both the United States and the Oregon constitutions in arguing that the final order violates their rights to free expression and the free exercise of their religion. Oregon courts generally seek to resolve arguments under the state constitution before turning to the federal constitution. In this case, however, the Kleins draw almost entirely on well-developed federal constitutional principles, and they do not meaningfully develop any independent state constitutional theories. Accordingly, in the discussion that follows, we address the Kleins' federal constitutional arguments first and their state arguments second.

a. Free expression

The Kleins argue that BOLI's final order violates their First Amendment right to freedom of speech. BOLI argues that the order simply enforces ORS 659A.403, a content-neutral regulation of conduct that does not implicate the First Amendment at all. And each side argues that United States Supreme Court precedent is decisively in its favor.

The issues before us arise at the intersection of two competing principles: the government's interest in promoting full access to the state's economic life for all of its citizens, which is expressed in public accommodations statutes like ORS 659A.403, and an individual's First Amendment right not to be compelled to express or associate with ideas with which she disagrees. Although the Supreme Court has grappled with that intersection before, it has not yet decided a case in this particular context, where the public accommodation at issue is a retail business selling a service, like cake-making, that is asserted to involve artistic expression.

It is that asserted artistic element that complicates the First Amendment analysis—and, ultimately, distinguishes this case from the precedents on which the parties rely. Generally speaking, the First Amendment does not prohibit government regulation of "commerce or conduct" whenever such regulation indirectly burdens speech. When, however, the government regulates activity that involves a "significant expressive element," some degree of First Amendment scrutiny is warranted.

In the discussion that follows, we conclude that the Kleins have not demonstrated that their wedding cakes invariably constitute fully protected speech, art, or other expression, and we therefore reject the Kleins' position that we must subject BOLI's order to strict scrutiny under the First Amendment. At most, the Kleins have shown that their cake-making business includes some arguably expressive elements as well as non-expressive elements, so as to trigger intermediate scrutiny. We assume (without deciding) that that is true, and then conclude that BOLI's order nonetheless survives intermediate scrutiny because any burden on the Kleins' expressive activities is no greater than is essential to further Oregon's substantial interest in promoting the ability of its citizens to participate equally in the marketplace without regard to sexual orientation.

(1) "Public accommodations" and the First Amendment

Oregon enacted its Public Accommodation Act in 1953. The original act guaranteed the provision of "full and equal accommodations, advantages, facilities and privileges * * * without any distinction, discrimination or restriction on account of race, religion, color, or national origin." It applied to "any hotel, motel or motor court, any place offering to the public food or drink for consumption on the premises, or any place offering to the public entertainment, recreation or amusement." Oregon's statute was thus similar in scope to Title II of the federal Civil Rights Act of 1964, which prohibits discrimination "on the ground of race, color, religion, or national origin" in three broad categories of public accommodations: those that provide lodging to transient guests, those that sell food for consumption on the premises, and those that host "exhibition[s] or entertainment," such as theaters and sports arenas. When the United States Supreme Court upheld the public accommodations provisions of Title II in 1964, it observed that the constitutionality of state public accommodations laws at that point had remained "unquestioned," citing previous instances in which it had "rejected the claim that the prohibition of racial discrimination in public accommodations interferes with personal liberty."

Over two decades, the Oregon legislature incrementally expanded the definition of "place of public accommodation" to include "trailer park[s]" and "campground[s]," and then to places "offering to the public food or drink for consumption on *or off* the premises." Then, in 1973, the legislature significantly expanded the definition to include "*any place or service* offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements or otherwise," subject to an exception for "any institution, bona fide club or place of accommodation which is in its nature distinctly private." Other states similarly enlarged the scope of their public-accommodations laws over time.

First Amendment challenges to the application of public-accommodations laws—and other forms of anti-discrimination laws—have been mostly unsuccessful. The United States Supreme Court has repeatedly acknowledged that public accommodations

statutes in particular are "well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination." The Court has further acknowledged that states enjoy "broad authority to create rights of public access on behalf of [their] citizens," in order to ensure "wide participation in political, economic, and cultural life" and to prevent the "stigmatizing injury" and "the denial of equal opportunities" that accompanies invidious discrimination in public accommodations. And the Court has recognized a state's interest in preventing the "unique evils" that stem from "invidious discrimination in the distribution of publicly available goods, services, and other advantages."

However, as states adopted more expansive definitions of "places of public accommodation," their anti-discrimination statutes began to reach entities that were different in kind from the commercial establishments that were the original target of public accommodations laws. As a result, on two occasions, the Court held that the application of such laws violated the First Amendment.

First, in *Hurley*, the court held that Massachusetts's public accommodations law could not be applied to require a St. Patrick's Day parade organizer to include a gay-rights group in its parade. Observing that state public accommodations laws do not, "as a *general* matter, violate the First or Fourteenth Amendments," the Court went on to conclude that the Massachusetts law had been "applied in a peculiar way" to a private parade, a result that "essentially requir[ed]" the parade organizers to "alter the expressive content of their parade" by accommodating a message (of support for gay rights) that they did not want to include. The Court further reasoned that such an application of the statute "had the effect of declaring the [parade] sponsors' speech itself to be the public accommodation," which violated "the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message."

Following *Hurley*, the Court decided *Boy Scouts of America v. Dale*, (*Dale*), in which it held that applying New Jersey's public accommodations law to require the Boy Scouts to admit a gay scoutmaster violated the group's First Amendment right to freedom of association. The Court observed that, over time, public accommodations laws had been expanded to cover more than just "traditional places of public accommodation—like inns and trains." According to the Court, New Jersey's definition of a "place of public accommodation" was "extremely broad," particularly because the state had "applied its public accommodations law to a private entity without even attempting to tie the term 'place' to a physical location." The court distinguished *Dale* from prior cases in which it held that public accommodations laws posed no First Amendment problem, observing that, in those prior cases, the law's enforcement did not "materially interfere with the ideas that the organization sought to express."

Thus, *Hurley* and *Dale* demonstrate that the First Amendment may stand as a barrier to the application of state public

accommodations laws when such laws are applied to "peculiar" circumstances outside of the usual commercial context.

In this case, the Kleins concede that Sweetcakes is a "place of public accommodation" under Oregon law because it is a retail bakery open to the public. But the Kleins contend that, as in *Hurley* and *Dale*, application of ORS 659A.403 in this case violates their First Amendment rights.

(2) First Amendment precedent

BOLI and the Kleins offer competing United States Supreme Court precedent that, they argue, clearly requires a result in their respective favors. We begin our analysis by explaining why we do not regard the authorities cited by the parties as controlling.

The Kleins argue that the effect of BOLI's final order is to compel them to express a message—a celebration of same-sex marriage—with which they disagree. They primarily draw on two interrelated lines of First Amendment cases that, they contend, preclude the application of ORS 659A.403 here.

First, the Kleins rely on cases holding that the government may not compel a person to speak or promote a government message with which the speaker does not agree.

We do not consider that line of cases to be helpful here. In "compelled speech" cases like *Barnette* and *Wooley*, the government prescribed a specific message that the individual was required to express. ORS 659A.403 does nothing of the sort; it is a content-neutral regulation that is not directed at expression at all. It does not even regulate cake-making; it simply prohibits the *refusal of service* based on membership in a protected class. The United States Supreme Court has repeatedly held that such content-neutral regulations—although they may have incidental effects on an individual's expression—are an altogether different, and generally permissible, species of government action than a regulation *of speech.* In short, we reject the Kleins' analogy of this case to *Barnette* and *Wooley*.

Second, the Kleins rely heavily on *Hurley* and *Dale*, which, as discussed above, invalidated the application of public accommodations statutes in "peculiar" circumstances outside of the usual commercial context. The difficulty with that analogy is that this case *does* involve the usual commercial context; Sweetcakes is not a private parade or membership organization, and it is hardly "peculiar," as that term was used in *Hurley*, to apply ORS 659A.403 to a retail bakery like Sweetcakes that is open to the public and that exists for the purpose of engaging in commercial transactions. Indeed, the Kleins accept the premise that Sweetcakes is a place of public accommodation under Oregon law, and that, as such, it must *generally* open its doors to customers of all sexual orientations, regardless of the Kleins' religious views about homosexuality. Thus, if the Kleins are to succeed in avoiding compliance with the statute, it cannot be because their activity occurs outside the ordinary commercial context that the government has wide latitude to regulate, as was the case in *Hurley* and *Dale*. The Kleins must find support elsewhere.

In BOLI's view, on the other hand, the Kleins' arguments are disposed of by the United States Supreme Court's decision in *FAIR*. In that case, an association of law schools and law faculty (FAIR) sought to enjoin the enforcement of the Solomon Amendment, a federal law that requires higher-education institutions, as a condition for receiving federal funds, to provide military recruiters with the same access to their campuses as non-military recruiters. Because FAIR opposed the military's policy at that time regarding homosexual service-members, FAIR argued that the equal-access requirement violated the schools' First Amendment rights to freedom of speech and association.

The Court rejected FAIR's compelled-speech argument, reasoning that the Solomon Amendment "neither limits what law schools may say nor requires them to say anything," and, therefore, the law was a "far cry" from the compulsions at issue in *Barnette* and *Wooley.* The Court acknowledged that compliance with the Solomon Amendment would indirectly require the schools to "speak" in a sense because it would require the schools to send emails and post notices on behalf of the military if they chose to do so for other recruiters. Nevertheless, the Court found it dispositive that the Solomon Amendment did not "dictate the content of the speech at all, which is only 'compelled' if, and to the extent [that,] the school provides such speech for other recruiters." The Court distinguished that situation from those where "the complaining speaker's own message was affected by the speech it was forced to accommodate."

In BOLI's view, this case is like *FAIR* because ORS 659A.403 does not directly compel any speech; even if one considers the Kleins' cake-making to involve some element of expression, the law only compels the Kleins to engage in that expression for same-sex couples "if, and to the extent" that the Kleins do so for the general public.

This case is distinguishable from *FAIR*, however, in a significant way. Essential to the holding in *FAIR* was that the schools were not compelled to express a message with which they disagreed. The schools evidently did not assert, nor did the Supreme Court contemplate, that there was a meaningful ideological or expressive component to the emails or notices themselves, which merely conveyed factual information about the presence of recruiters on campus. The Court thus distinguished the case from *Barnette* and *Wooley*, cases that addressed the harm that results from true compelled speech—that is, depriving a person of autonomy as a speaker and "inva[ding]" that person's "'individual freedom of mind.'"

Here, unlike in *FAIR*, the Kleins very much *do* object to the substantive content of the expression that they believe would be compelled. They argue that their wedding cakes are works of art that express a celebratory message about the wedding for which they are intended, and that the Kleins cannot be compelled to create that art for a wedding that they do not believe should be celebrated. And there is evidentiary support for the Kleins' view, at least insofar as every wedding cake that they create partially reflects their own creative and aesthetic judgment. Whether that is sufficient to make

their cakes "art," the creation of which the government may not compel, is a question to which we will turn below, but even the Kleins' subjective belief that BOLI's order compels them to express a specific message that they ideologically oppose makes this case different from *FAIR*.

That fact is also what makes this case difficult to compare to other public accommodations cases that the United States Supreme Court has decided. It appears that the Supreme Court has never decided a free-speech challenge to the application of a public accommodations law to a retail establishment selling highly customized, creative goods and services that arguably are in the nature of art or other expression.

To put the problem into sharper focus, we see no reason in principle why the services of a singer, composer, or painter could not fit the definition of a "place of public accommodation" under ORS 659A.400. One can imagine, for example, a person whose business is writing commissioned music or poetry for weddings, or producing a sculpture or portrait of the couple kissing at an altar. One can also imagine such a person who advertises and is willing to sell those services to the general public, but who holds strong religious convictions against same-sex marriage and would feel her "freedom of mind" violated if she were compelled to produce her art for such an occasion. For the Kleins, this is that case. BOLI disagrees that a wedding cake is *factually* like those other examples, but the legal point that those examples illustrate is that existing public accommodations case law is awkwardly applied to a person whose "business" is artistic expression. The Court has not told us how to apply a requirement of nondiscrimination to an artist.

We believe, moreover, that it is plausible that the United States Supreme Court would hold the First Amendment to be implicated by applying a public accommodations law to require the creation of pure speech or art. If BOLI's order can be understood to compel the Kleins to create pure "expression" that they would not otherwise create, it is possible that the Court would regard BOLI's order as a regulation of content, thus subject to strict scrutiny, the test for regulating fully protected expression.

Although the Court has not clearly articulated the extent to which the First Amendment protects visual art and its creation, it has held that the First Amendment covers various forms of artistic expression, including music; "live entertainment," such as musical and dramatic performances; and video games. The Court has also made clear that a particularized, discernible message is not a prerequisite for First Amendment protection.

In short, although ORS 659A.403 is a content-neutral regulation that is not directed at expression, the Kleins' arguments cannot be dismissed on that ground alone. Rather, we must decide whether the Kleins' cake-making activity is sufficiently expressive, communicative, or artistic so as to implicate the First Amendment, and, if it is, whether BOLI's final order compelling the creation of such expression in a particular circumstance survives First Amendment scrutiny.

(3) Whether these cakes implicate the First Amendment

If, as BOLI argues, the Kleins' wedding cakes are just "food" with no meaningful artistic or communicative component, then, as the foregoing discussion illustrates, BOLI's final order does not implicate the First Amendment; the Kleins' objection to having to "speak" as a result of ORS 659A.403 is no more powerful than it would be coming from the seller of a ham sandwich. On the other hand, if and to the extent that the Kleins' wedding cakes constitute artistic or communicative expression, then the First Amendment is implicated by BOLI's final order. In short, we must decide whether the act that the Kleins refused to perform—to design and create a wedding cake—is "sufficiently imbued with elements of communication" so as to "fall within the scope" of the First Amendment.

On this point, BOLI makes a threshold argument that we must address, which is that, because the Kleins refused service to Rachel and Laurel before even finding out what kind of cake the couple wanted, there is no basis for assessing the "artistic" component of whatever cake might have resulted. For all we know, BOLI reasons, Rachel and Laurel might have wanted a standardized cake that would not have involved any meaningful expressive activity on the part of the Kleins. However, we believe the fair interpretation of this record is that the Kleins do not offer such "standardized" or "off the shelf" wedding cakes; they testified that their practice for creating wedding cakes includes a collaborative and customized design process that is individual to the customer. According to the Kleins, they intend—and their "clients expect"—that "each cake will be uniquely crafted to be a statement of each customer's personality, physical tastes, theme and desires, as well as their palate." According to Melissa, she "almost never make[s] a cake without creating a unique element of style and customization." Furthermore, the complainants expressly stated that they wanted a cake "like" the one that the Kleins had created for Rachel's mother's wedding, which was a custom-designed cake. On this record, we therefore assume that any cake that the Kleins made for Rachel and Laurel would have followed the Kleins' customary practice.

Consequently, the question is whether that customary practice, and its end product, are in the nature of "art." As noted above, if the ultimate effect of BOLI's order is to compel the Kleins to create something akin to pure speech, then BOLI's order may be subject to strict scrutiny. If, on the other hand, the Kleins' cake-making retail business involves, at most, both expressive and non-expressive components, and if Oregon's interest in enforcing ORS 659A.403 is unrelated to the content of the expressive components of a wedding cake, then BOLI's order need only survive intermediate scrutiny to comport with the First Amendment.

The record reflects that the Kleins' wedding cakes follow a collaborative design process through which Melissa uses her customers' preferences to develop a custom design, including choices as to "color," "style," and "other decorative detail." Melissa shows customers previous designs "as inspiration," and she then draws "various designs on sheets

of paper" as part of a dialogue with the customer. From that dialogue, Melissa "conceives" and customizes "a variety of decorating suggestions" as she ultimately finalizes the design. Thus, the process does not simply involve the Kleins executing precise instructions from their customers; instead, it is clear that Melissa uses her own design skills and aesthetic judgments.

Therefore, on this record, the Kleins' argument that their products entail artistic expression is entitled to be taken seriously. That being said, we are not persuaded that the Kleins' wedding cakes are entitled to the same level of constitutional protection as pure speech or traditional forms of artistic expression. In order to establish that their wedding cakes are fundamentally pieces of art, it is not enough that the Kleins *believe* them to be pieces of art. For First Amendment purposes, the expressive character of a thing must turn not only on how it is subjectively perceived by its maker, but also on how it will be perceived and experienced by others. Here, although we accept that the Kleins imbue each wedding cake with their own aesthetic choices, they have made no showing that other people will necessarily experience *any* wedding cake that the Kleins create predominantly as "expression" rather than as food.

Although the Kleins' wedding cakes involve aesthetic judgments and have decorative elements, the Kleins have not demonstrated that their cakes are inherently "art," like sculptures, paintings, musical compositions, and other works that are both intended to be *and are* experienced predominantly as expression. Rather, their cakes, even when custom-designed for a ceremonial occasion, are still cakes made to be eaten. Although the Kleins themselves may place more importance on the communicative aspect of one of their cakes, there is no information in this record that would permit an inference that the same is true in all cases for the Kleins' customers and the people who attend the weddings for which the cakes are created. Moreover, to the extent that the cakes are expressive, they do not reflect only the Kleins' expression. Rather, they are products of a collaborative process in which Melissa's artistic execution is subservient to a customer's wishes and preferences. For those reasons, we do not agree that the Kleins' cakes can be understood to fundamentally and inherently embody the Kleins' expression, for purposes of the First Amendment.

We also reject the Kleins' argument that, under the facts of this case, BOLI's order compels them to "host or accommodate another speaker's message" in a manner that the Supreme Court has deemed to be a violation of the First Amendment. In the only such case that involved the enforcement of a content-neutral public accommodations law, *Hurley*, the problem was that the speaker's autonomy was affected by the forced intermingling of messages, with consequences for how others would perceive the content of the expression. Here, because the Kleins refused to provide their wedding-cake service to Rachel and Laurel altogether, this is not a situation where the Kleins were asked to articulate, host, or accommodate a specific message that they found offensive. It would be a different case if BOLI's order had awarded damages against the Kleins for

refusing to decorate a cake with a specific message requested by a customer.

The Kleins' additional concern, as we understand it, is that a wedding cake communicates a "celebratory message" about the wedding for which it is intended, and the Kleins do not wish to "host" the message that same-sex weddings should be celebrated. But, unlike in *Hurley*, the Kleins have not raised a nonspeculative possibility that anyone attending the wedding will impute that message to the Kleins. We think it more likely that wedding attendees understand that various commercial vendors involved with the event are there for commercial rather than ideological purposes. Moreover, to the extent that the Kleins subjectively feel that they are being "associated" with the idea that same sex marriage is worthy of celebration, the Kleins are free to engage in their own speech that disclaims such support.

In short, we disagree that the Kleins' wedding cakes are invariably in the nature of fully protected speech or artistic expression, and we further disagree that BOLI's order forces the Kleins to host, accommodate, or associate with anyone else's particular message. Thus, because we conclude that BOLI's order does not have the effect of compelling fully protected expression, it does not trigger strict scrutiny under the First Amendment.

As noted above, however, BOLI's order is still arguably subject to intermediate First Amendment scrutiny if the Kleins' cake-making activity involves both expressive and non-expressive elements. Here, we acknowledge that the Kleins' cake-making process is not a simple matter of combining ingredients and following a customer's precise specifications. Instead, based on the Kleins' customary practice, the ultimate effect of BOLI's order is to compel them to engage in a collaborative process with a customer and to create a custom product that they would not otherwise make. The Kleins' argument that that process involves individualized aesthetic judgments that are themselves within the realm of First Amendment protected expression is not implausible on its face.

Ultimately, however, we need not resolve whether that argument is correct. That is because, even assuming (without deciding) that the Kleins' cake-making business involves aspects that may be deemed "expressive" for purposes of the First Amendment, BOLI's order is subject, at most, to intermediate scrutiny, and it survives such scrutiny, as explained below.

(4) BOLI's final order survives First Amendment scrutiny

Neither ORS 659A.403 nor BOLI's order is directed toward the expressive content of the Kleins' business. When a content-neutral regulation indirectly imposes a burden on protected expression, it will be sustained if

"'it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'"

We address each factor in turn.

We first address the state's interest in enforcing its public-accommodations law. As noted above, the United States Supreme Court has consistently acknowledged that states have a compelling interest both in ensuring equal access to publicly available goods and services and in preventing the dignitary harm that results from discriminatory denials of service. That interest is no less compelling with respect to the provision of services for same-sex weddings; indeed, that interest is particularly acute when the state seeks to prevent the dignitary harms that result from the unequal treatment of same-sex couples who choose to exercise their fundamental right to marry. Thus, we readily conclude that BOLI's order furthers "an important or substantial governmental interest."

Furthermore, Oregon's interest is in no way related to the suppression of free expression. Rather, Oregon has an interest in preventing the harms that result from invidious discrimination that is "wholly apart from the point of view such conduct may transmit." BOLI's order reflects a concern with ensuring equal access to products like wedding cakes when a seller chooses to sell them to the general public, not a concern with influencing the expressive choices involved in designing or decorating a cake.

Finally, we conclude that any burden imposed on the Kleins' expression is no greater than essential to further the state's interest. Again, it is significant that BOLI's order does not compel the Kleins to express an articulable message with which they disagree; rather, their objection is to being compelled to engage in any conduct that they regard as expressive. "'[A]n incidental burden on speech is no greater than is essential, and therefore is permissible'" if "'the neutral regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" Given that the state's interest is to avoid the "evil of unequal treatment, which is the injury to an individual's sense of self-worth and personal integrity," there is no doubt that that interest would be undermined if businesses that market their goods and services to the "public" are given a special privilege to exclude certain groups from the meaning of that word. Thus, we conclude that the final order in this case survives First Amendment scrutiny.

(5) Oregon Constitution, Article I, section 8

The Kleins assert that BOLI's final order also violates their rights under Article I, section 8, of the Oregon Constitution, which provides that "[n]o law shall be passed restraining the free expression of opinion, or restricting the right to speak, write, or print freely on any subject whatever[.]" The Kleins' argument is limited to the observation that Article I, section 8, has been held to establish broader protection for speech than the First Amendment, a premise from which they conclude that, "since BOLI's Final Order violates the federal Constitution's Speech Clause, it also violates the Oregon Constitution's broader counterpart *a fortiori*." We have rejected the First Amendment predicate for that derivative argument, and the Kleins do not offer any separate analysis under the state constitution. Accordingly, we reject their argument under Article I, section 8, without further discussion.

b. Free exercise of religion

We turn to the Kleins' contention that BOLI's order violates their constitutional right to the free exercise of their religion. The Kleins advance two arguments under the United States Constitution: (1) BOLI's final order is not merely the application of a "neutral and generally applicable" law because it impermissibly "targets" religion, and (2) the order implicates the Kleins' "hybrid rights," subjecting it to heightened scrutiny that it cannot survive. The Kleins also invoke the Oregon Constitution's free-exercise clauses in Article I, sections 2 and 3, contending that: (1) as under the federal constitution, the final order impermissibly targets religion, and (2) even if the final order does not impermissibly target religion, they should be granted an exemption to ORS 659A.403 on religious grounds. For the reasons explained below, we reject the Kleins' arguments.

The First Amendment proscribes laws "prohibiting the free exercise of" religion. The question presented by this case is whether BOLI's final order enforcing ORS 659A.403 against the Kleins runs afoul of that constitutional guarantee; if it does, the order is invalid unless it can survive strict scrutiny.

The answer begins with *Employment Division, Oregon Department of Human Resources v. Smith*, in which the United States Supreme Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" Put another way, neutral and generally applicable laws do not offend the Free Exercise Clause simply because "the law has the incidental effect of burdening a particular religious practice."

To determine whether a law is "neutral," courts first ask whether "the object of [the] law is to infringe upon or restrict practices because of their religious motivation." To determine a law's object, we begin with the text, as "the minimum requirement of neutrality is that a law not discriminate on its face.". "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." "Apart from the text, the effect of a law in its real operation is strong evidence of its object." Additionally, whether a law is "generally applicable" depends on whether the government selectively seeks to advance its interests "only against conduct with a religious motivation."

Nothing in the text of ORS 659A.403 or BOLI's final order is facially discriminatory towards the exercise of religious beliefs. Rather, the statute prohibits *any* "place of public accommodation" from discriminating "on account of" protected characteristics, including "sexual orientation." Similarly, BOLI's order is, on its face, a neutral application of ORS 659A.403 that gives no indication that the result would have been different if the Kleins' refusal of service was based upon secular rather than religious convictions.

A law that is written in neutral terms may still violate the Free Exercise Clause, however. In *Church of Lukumi Babalu Aye,*

Inc., the Court concluded that the city ordinances in question—which prohibited certain animal slaughtering for "ritual[s]" and "sacrifice"—were not neutral because some important terms, as the ordinances defined them, targeted the Santeria religion's practice of ritualistic animal sacrifice while exempting other secular and religious practices like hunting and kosher slaughter. The laws were also not "generally applicable" because they were substantially underinclusive in advancing the government's stated interests of protecting the public health and preventingcruelty to animals. Rather, the laws were "drafted with care to forbid few killings but those occasioned by religious sacrifice."

Here, the Kleins advance a similar argument that BOLI's order violates the Free Exercise Clause because it applies ORS 659A.403 in a way that impermissibly "targets" religion for disfavored treatment. They contend that the final order was a "novel expansion" of ORS 659A.403 that "was, at best, discretionary and done for the specific purpose of forcing business owners with moral reservations about same-sex marriage to either violate their consciences or go out of business." (Emphasis removed.) BOLI responds that no evidence exists to support the Kleins' assertions, which are "pure speculation and utterly without merit."

On review of the record, we agree with BOLI. The Kleins have directed us to no evidence whatsoever that ORS 659A.403 was enacted for the purpose of singling out *religiously* motivated action, or that BOLI has selectively targeted religion in its enforcement of the statute. The Kleins likewise fail to support their assertion that BOLI's final order constitutes a "novel expansion" of the statute, rather than a straightforward application of a facially neutral statute to the facts of this case. For those reasons, the Kleins' "targeting" argument is meritless.

The Kleins' second argument under the federal Free Exercise Clause is that the final order burdens their "hybrid rights." That is, the final order burdens *both* Free Exercise rights and other constitutional rights, a combination that purportedly triggers an exception to *Smith* and subjects even neutral laws of general applicability to strict scrutiny. The Kleins' argument relies on the following passage from *Smith*:

"The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech * * *. * * *

"The present case does not present such a hybrid situation, but a free exercise claim unconnected with any communicative activity * * *."

We have previously expressed skepticism about whether a "hybrid-rights "doctrine" exists, and, to the extent it does, how it could be properly applied. In *Church at 295 S. 18th Street, St. Helens*, we referred to the *Smith* passage as "*dictum*," observing that it merely "noted—without reference to any particular standard—that, in the past, the

Court had struck down neutral, generally applicable laws when a case 'involved' both the Free Exercise Clause and some other constitutional protection.” We questioned whether that *dictum* could be soundly applied as a legal standard in other cases:

"Why the addition of another constitutional claim would affect the standard of review of a free exercise claim is not immediately obvious. Indeed, if the mere allegation of an additional constitutional claim has the effect of altering the standard articulated in *Smith*, then the 'hybrid' exception likely would swallow the *Smith* rule; free exercise claims will frequently also pose at least a colorable free speech claim. On the other hand, if the Court meant that strict scrutiny pertains only when an additional constitutional claim is successfully asserted, then the rule of *Smith* becomes mere surplusage, as the church already would win under the alternate constitutional theory."

Other courts have similarly called the *Smith* passage *dictum* and have declined to follow it.

The intervening years have given us no reason to reconsider our view that the *Smith* passage was *dictum*. Despite the considerable doubts about the "hybrid-rights doctrine" that have been expressed in case law and academic commentary, the United States Supreme Court has taken no further steps to embrace such a doctrine. We therefore agree with the Sixth Circuit's reasoning that, "at least until the Supreme Court holds that legal standards under the Free Exercise Clause vary depending on whether other constitutional rights are implicated, we will not use a stricter legal standard than that used in *Smith* to evaluate generally applicable, exception less state regulations under the Free Exercise Clause." Accordingly, we reject the Kleins' "hybrid-rights doctrine" argument.

As noted, the Kleins also invoke Article I, sections 2 and 3, of the Oregon Constitution (the free-exercise clauses). Under those clauses, when a law is not neutral and expressly targets religion, courts examine the law with "exacting scrutiny"; when the law is "neutral toward religion," the Oregon Supreme Court has framed the proper inquiry as whether there is "statutory authority to make such a regulation" and whether an individual claims "exemption on religious grounds."

The Kleins' first argument is that the statute and final order are not neutral toward religion because they "target" the Kleins' religious practice. In support of that contention, the Kleins essentially incorporate their arguments under the federal Free Exercise Clause; they do not contend that the analysis meaningfully differs under the state constitution, and we therefore reject that argument for the same reasons discussed above.

Second, the Kleins argue that, even in the absence of impermissible targeting, they should be granted a religious exemption from compliance with ORS 659A.403. They rely on two cases—*Hickman* and *Cooper v. Eugene Sch. Dist.* As BOLI correctly points out, however, neither of those cases actually created a religious exemption to a neutral law, or discussed the criteria, methodology,

or standards that a court would use in determining whether to grant one. *Cooper* dealt with a law that was "not neutral toward religion," which the Supreme Court distinguished from a "general" and "neutral" regulation that *could* present an issue of an "individual claim to exemption on religious grounds." Nearly two decades later, *Hickman* simply cited *Cooper,* in a case that similarly did not present the issue of whether to grant a religious exemption.

In short, although the Kleins argue that the Oregon Constitution requires that they be granted an exemption on religious grounds to an otherwise neutral law, the cases on which they rely did not impose such a requirement, but merely acknowledged an abstract possibility that it could happen in a future case. The Kleins have not offered a focused argument for why the Oregon Constitution requires an exemption in this case, under the methodology for interpreting our constitution. They simply assert that a religious exemption to ORS 659A.403's requirement of nondiscrimination on account of sexual orientation would impair the state's nondiscrimination goals "minimally, if at all," while furthering goals of "respect and tolerance for people of different beliefs." That argument does not amount to solid constitutional ground in which to root an individual exemption to a valid and neutral statute.

Moreover, it is far from clear that a religious exemption as proposed by the Kleins would have only a "minimal" effect on the state's antidiscrimination objectives. The Kleins seek an exemption based on their sincere religious opposition to same-sex marriage; but those with sincere religious objections to marriage between people of different races, ethnicities, or faiths could just as readily demand the same exemption. The Kleins do not offer a principled basis for limiting their requested exemption in the manner that they propose, except to argue that there are "decent and honorable" reasons, grounded in religious faith, for opposing same-sex marriage, as recognized by the United States Supreme Court in *Obergefell*. That is not in dispute. But neither the sincerity, nor the religious basis, nor the historical pedigree of a particular belief has been held to give a special license for discrimination.

For the foregoing reasons, we reject the Kleins' arguments that BOLI's final order violates the federal Free Exercise Clause or Article I, sections 2 and 3, of the Oregon Constitution.

B. *Second Assignment: Commissioner's Failure to Recuse Himself*

In their second assignment of error, the Kleins assert that BOLI's commissioner, Avakian, "the ultimate decision maker in this case, violated the Kleins' [d]ue [p]rocess rights by failing to recuse himself despite numerous public comments revealing his intent to rule against them." Specifically, they argue that Avakian's comments about the cake controversy in a Facebook post and in an article that appeared in *The Oregonian* show that he judged the Kleins' case before giving them an opportunity to present their version of the facts and the law. We agree with BOLI that Avakian's comments reflect, at most, his general views about the law and public policy, and therefore

are not the kind of comments that require disqualification.

To establish a due-process violation, "[o]ne claiming that a decision[ ]maker is biased has the burden of showing actual bias." When that claim of bias is based on prejudgment, the relevant inquiry is whether "the decision maker has so prejudged the particular matter as to be incapable of determining its merits on the basis of the evidence and arguments presented."

Importantly, in assessing bias, courts have long distinguished between a decision-maker's prejudgment of facts as opposed to preconceptions about law or policy, particularlyin the context of quasi-judicial decisions. As we explained in *Samuel v. Board of Chiropractic Examiners*, *rev den*, "[a] preconceived point of view concerning an issue of law * * * is not an independent basis for disqualification." In *Cement Inst.*, the United States Supreme Court articulated that principle in the context of a challenge to the impartiality of the Federal Trade Commission:

"[No previous] decision of this Court would require us to hold that it would be a violation of procedural due process for a judge to sit in a case after he had expressed an opinion as to whether certain types of conduct were prohibited by law. In fact, judges frequently try the same case more than once and decide identical issues each time, although these issues involved questions both of law and fact. Certainly, the Federal Trade Commission cannot possibly be under stronger constitutional compulsions in this respect than a court."

Accordingly, public comments that convey preconceptions about law or policy related to a dispute do not automatically disqualify a decision-maker from judging that controversy. As Judge Jerome Frank succinctly observed in *In re J.P. Linahan, Inc.*, if "'bias' and 'partiality' be defined to mean the total absence of preconceptions in the mind of the judge, then no one has ever had a fair trial and no one ever will." The touchstone of bias, instead, is whether the comments show that the decision maker is not capable of judging the controversy fairly on its own facts.

In assessing a decision-maker's capability in that regard, we presume that public officials will perform their duties lawfully.

In this case, Avakian's comments on Facebook and in the *The Oregonian* fall short of the kinds of statements that reflect prejudgment of the facts or an impermissibly closed-minded view of law or policy so as to indicate that he, as a decision maker, cannot be impartial. On Facebook, before a BOLI complaint had been filed, Avakian posted:

"Everyone has a right to their religious beliefs, but that doesn't mean they can disobey laws that are already in place. Having one set of rules for everybody ensures that people are treated fairly as they goabout their daily lives."

Below that paragraph, Avakian provided a link to "'Ace of Cakes' offers free wedding cake for Ore. Gay couple www.kgw.com.," followed by another paragraph:

"The Oregon Department of Justice is looking into a complaint that a Gresham

bakery refused to make a wedding cake for a same sex marriage. * * * It started when a mother and daughter showed up at Sweet Cakes by Melissa looking for a wedding cake."

Viewed in context with the rest of the post, Avakian's statements that "[e]veryone has a right to their religious beliefs, but that doesn't mean they can disobey laws that are already in place," and that "[h]aving one set of rules for everybody ensures that people are treated fairly as they go about their daily lives," are comments about the controversy between the Kleins and the complainants. However, they do not describe particular facts of the case, suggest that

Avakian has already investigated or decided those facts, or even suggest that he has fixed views as to any defenses or interpretations of the law that might be advanced in the context of a contested proceeding. That is, they reflect his general views of law and policy regarding public accommodations laws, but not the type of prejudgment that casts doubt on whether he is capable of judging the controversy fairly in an official proceeding. Avakian's statements in *The Oregonian* article likewise fail to demonstrate that he was incapable of fairly judging this case. As BOLI points out, the Kleins selectively quote from that article to create an impression that Avakian was commenting specifically on their conduct. For instance, in quoting excerpts, the Kleins argue that Avakian "said that 'folks' in Oregon do not have a 'right to discriminate' and stated that those who use their 'beliefs' to justify discrimination need to be 'rehabilitate[d].'" (Alterations by the Kleins.) Later, the Kleins characterize Avakian as stating that "the Kleins * * * needed to be 'rehabilitate[d].'"

The full quotations from that article, viewed in context, present a different picture. The article states, "'Everybody is entitled to their own beliefs, but that doesn't mean that folks have the right to discriminate,' Avakian said, *speaking generally*." That sentence follows a paragraph in which the author describes the antidiscrimination law generally. Given that context, and the author's express qualification that Avakian was "speaking generally," there is no basis on which to conclude that Avakian was commenting specifically on the merits of the Kleins' case.

Similarly, and contrary to the Kleins' suggestion, the article does not quote Avakian as saying that *the Kleins* must be "rehabilitated." Rather, the article quotes Avakian concerning a more general proposition: "'The goal is never to shut down a business. The goal is to rehabilitate,' Avakian said. 'For those who do violate the law, we want them to learn from that experience and have a good, successful business in Oregon.'" Again, nothing in that quote suggests that Avakian was responding to a question about the Kleins in particular, as opposed to BOLI investigations in general. Indeed, the context again suggests the latter. The next sentence in the article states, "The bureau's civil rights division conducts about 2,200 investigations a year on all types of discrimination, Avakian said."

There is, in fact, only one quote attributed to Avakian in *The Oregonian* article that appears to relate specifically to the Kleins'

case—one that they do not mention. With regard to BOLI's investigation of the complaint against the Kleins, Avakian is quoted as saying, "'We are committed to a fair and thorough investigation to determine whether there's substantial evidence of unlawful discrimination.'"

In sum, the public comments on which the Kleins rely do not demonstrate anything more than Avakian's general views about law and policy related to antidiscrimination statutes. Because those types of public comments do not establish a lack of impartiality for purposes of due process, we reject the Kleins' second assignment of error.

C. *Third Assignment: Damages Award*

In their third assignment of error, the Kleins argue that BOLI's damages award of $75,000 and $60,000 to Rachel and Laurel, respectively, is not supported by substantial evidence or substantial reason. Within the assignment of error, they make three distinct contentions: (1) the damages award is inconsistent with BOLI's findings and ignores the Kleins' mitigating evidence and evidence of the complainants' discovery abuses; (2) the damages award is "internally contradictory" with regard to recovery for emotional distress resulting from publicity of the case; and (3) the damages award is out of line with BOLI's awards in other cases. As discussed below, we reject each of those challenges.

To better frame the arguments, we provide additional context for the damages award. Under ORS 659A.850(4)(a)(B), BOLI is authorized to "[e]liminate the effects of the unlawful practice that the respondent is found to have engaged in, including but not limited to paying an award of actual damages suffered by the complainant and complying with injunctive or other equitable relief[.]" In this case, BOLI's formal charges alleged that, pursuant to that statute, each complainant claimed "[d]amages for emotional, mental, and physical suffering in the amount of at least $75,000."

At the hearing on damages, BOLI offered evidence of the emotional distress that the complainants suffered as a result of the Kleins' denial of service, including testimony from Rachel and Laurel. The Kleins offered evidence to rebut BOLI's evidence that the refusal of service was the source of the complainants' distress, including evidence that, during the relevant time period, the complainants were engaged in a custody dispute for their two foster children. They also elicited testimony from Rachel's brother to support their theory that the complainants were pursuing the case for political reasons rather than to remedy emotional distress.

During closing arguments, BOLI's prosecutor explained that the agency was seeking damages related to two different causes:

"There are two distinct causes of emotional distress damages in this case. The first is the damage that's based on the refusal itself, and for that the Agency is seeking $75,000 for each Complainant. There is also the damages that resulted from the media scrutiny of this case, and for that amount we would defer to the forum's discretion."

BOLI's prosecutor then proceeded to argue the two causes separately, first recounting testimony about the feelings of embarrassment, depression, sadness, and anger that Rachel and Laurel experienced around the time of the refusal and thereafter, including the strain that it put on their relationship and their relationships with others. The prosecutor then argued that "[t]he second cause of emotional distress is this media scrutiny." She contended that the media coverage had made Rachel and Laurel fearful for their lives, afraid for the safety of their foster children, and anxious that it would jeopardize their then-pending efforts to adopt the children.

Anticipating a challenge to the amount of the damages sought, BOLI's prosecutor argued that emotional distress damages are "very fact specific," and that "$75,000 *for the refusal itself* is very well within the parameters of what's appropriate."

The Kleins responded that the complainants had not told a consistent story throughout; that there was no credible evidence that the emotional distress suffered by the complainants was actually caused by the denial of service as opposed to other factors in the complainants' lives, such as the custody dispute; that neither Rachel nor Laurel was present for Aaron's "abomination" statement when Cheryl returned to the shop and that, in any event, there was disagreement as to what he actually said; and that the previous cases referenced by BOLI's prosecutor involved more severe instances of discriminatory treatment.

In rebuttal, BOLI's prosecutor emphasized that whether Aaron called the complainants "an abomination" or quoted a Bible verse using that word was "beside the point": "[H]ow it was couched doesn't really matter; the word is what resonated with the Complainants."

In his proposed final order, the ALJ set forth extensive factual findings, including express credibility determinations regarding the witnesses at the hearing. The ALJ found that Rachel, despite being an "extremely emotional witness," had "answered questions directly in a forthright manner" and "did not try to minimize the effect of media exposure on her emotional state as compared to how the cake denial affected her." The ALJ explained that it credited Rachel's testimony "about her emotional suffering in its entirety," but that he "only credited her testimony about media exposure when she testified about specific incidents."

The ALJ found Laurel less credible. That was because Laurel "was a very bitter and angry witness who had a strong tendency to exaggerate and over-dramatize events," argued with the Kleins' attorney and "had to be counseled by the ALJ to answer the questions asked of her instead of editorializing about the cake refusal and how it affected her," and her "testimony was inconsistent in several respects with more credible evidence." Thus, the ALJ "only credited her testimony about media exposure when she testified about specific incidents" and otherwise credited her testimony only "when it was either (a) undisputed, or (b) disputed but corroborated by other credible testimony."

The ALJ then set forth his reasoning regarding a damages award, describing specific aspects of each complainant's emotional suffering and distinguished "suffering from the cake refusal" from "suffering from publicity about the case." With regard to the latter, the ALJ ultimately concluded that, as a factual matter, the Kleins were "responsible" for at least some of the publicity that had followed the initial refusal, but that "there is no basis in law for awarding damages to Complainants for their emotional suffering caused by media and social media attention related to this case."

The ALJ's proposed final order then set forth his conclusion on the amount of damages related to the initial refusal:

"In this case, the forum concludes that $75,000 and $60,000, are appropriate awards to compensate Complainants [Rachel] and [Laurel], respectively, for the emotional suffering they experienced from Respondents' cake refusal. [Laurel] is awarded the lesser amount because she was not present at the cake refusal and the forum found her testimony about the extent and severity of her emotional suffering to be exaggerated in some respects."

BOLI, in its final order, largely adopted the reasoning and conclusions proposed by the ALJ, including his credibility determinations. BOLI, like the ALJ, separately discussed the emotional suffering of each complainant with regard to the denial of service and from publicity. And, like the ALJ, BOLI concluded that damages for emotional suffering caused by media attention were not recoverable.

BOLI's final order also adopted the ALJ's analysis of the amount of damages to each complainant. The order states:

"In this case, the ALJ proposed that $75,000 and $60,000, are appropriate awards to compensate [Rachel and Laurel], respectively, for the emotional suffering they experienced from Respondents' denial of service. The proposal for [Laurel] is less because she was not present at the denial and the ALJ found her testimony about the extent and severity of her emotional suffering to be exaggerated in some respects. In this particular case, the demeanor of the witnesses was critical in determining both the sincerity and extent of the harm that was felt by [Rachel and Laurel]. As such, the Commissioner defers to the ALJ's perception of the witnesses and evidence presented at hearing and adopts the noneconomic award as proposed, finding also that this noneconomic award is consistent with the forum's prior orders."

In a footnote to that paragraph, the order cites specific BOLI cases in which damages were awarded, in amounts ranging from $50,000 to $350,000 per complainant.

With that background, we return to the issues presented by the Kleins' third assignment of error.

1. *Countervailing evidence*

The Kleins assert that BOLI's order "is inconsistent with its credibility determinations"—specifically, BOLI's findings regarding what Aaron actually said to Cheryl when she returned to Sweetcakes after the initial refusal of service. According

to the Kleins, BOLI found as fact that Aaron did not actually refer to Rachel as an "abomination" but had only quoted a verse from the Book of Leviticus, stating, "You shall not lie with a male as one lies with a female; it is an abomination." Yet, BOLI awarded damages to both complainants "for harm attributable to being called 'abomination[s].'"

We do not read BOLI's order to rest on a finding that Aaron specifically called the complainants "an abomination" as opposed to quoting a biblical verse. As described above, BOLI argued during the damages hearing that exactly how the word was "couched" was beside the point. BOLI's final order likewise reflects a focus on the effect of the word "abomination" on the complainants, including their recognition of that biblical reference and their associations with the reference. For instance, the order states that Rachel, who was brought up as a Southern Baptist, "interpreted [Aaron's] use of the word 'abomination' [to] mean that God made a mistake when he made her, that she wasn't supposed to exist, and that she had no right to love or be loved[.]" Similarly, the order states that Laurel recognized the statement as a reference from Leviticus and, based on her religious background, "understood the term 'abomination' to mean 'this is a creature not created by God, not created with a soul. They are unworthy of holy love. They are not worthy of life.'"

Viewing the final order as a whole, we see no inconsistency. BOLI found that Aaron used the term "abomination" in the course of explaining why he was denying service to the complainants on account of their sexual orientation, and further found that the complainants experienced emotional distress based on the use of that term. It is that nexus that underlies BOLI's damages award.

The Kleins also argue that the final order does not account for certain evidence that undermined the damages case, including evidence that the complainants were pursuing the case out of a desire for political change and that they were experiencing stress from their custody dispute at the time. The Kleins also argue that the final order fails to account for ways in which the complainants frustrated the Kleins efforts to "discover the true extent of their alleged emotional harm." According to the Kleins, the final order therefore lacks substantial reason.

The Kleins' argument in that regard "misconceives the nature of the substantial reason requirement." As the Supreme Court explained in *Jenkins*, an order satisfies the substantial reason requirement so long as it "provide[s] an explanation connecting the facts of the case and the result reached, and [there is] no indication that, in making its decision, the [agency] relied on evidence that did not qualify as substantial evidence." Beyond that, an agency generally is not required to explain *why* it was not persuaded by particular evidence.

In this case, BOLI's order includes extensive factual findings regarding the emotional suffering that the complainants experienced and it connects the amount of damages to that suffering. That is sufficient to satisfy the substantial reason requirement, and we decline to reweigh, under the guise of

substantial reason, the competing evidence as to the extent of the complainants' damages.

2. *Damages from publicity and media attention*

Next, the Kleins argue that the damages award is internally inconsistent in its treatment of harm caused by media attention from the case. According to the Kleins, BOLI's formal charges "sought $150,000 in *total* damages based on alleged emotional suffering stemming from the denial of service *and* subsequent media exposure." (Emphases by the Kleins.) But then, despite concluding that the complainants were *not* entitled to recover for harm attributable to media exposure, the final order awards an amount close to the prayer.

The Kleins' argument proceeds from a mistaken premise. BOLI's formal charges did not seek "$150,000 in *total* damages based on alleged emotional suffering stemming from the denial of service *and* subsequent media exposure." Rather, the formal charges sought damages in "the amount of *at least $75,000*" for each complainant. And, as described above, BOLI's prosecutor clearly expressed during the damages hearing—and the ALJ plainly understood—that BOLI was seeking $75,000 for each complainant for the refusal itself and *additional* damages, at the ALJ's discretion, for harm attributable to media and social media attention. Both the ALJ's preliminary order and BOLI's final order reflect that understanding of the damages request. Thus, there is no plausible basis on which to infer that, by awarding $75,000 to Rachel and $60,000 to Laurel, BOLI relied to any extent on emotional suffering from media attention, particularly when BOLI's order expressly says otherwise.

The Kleins' alternative contention regarding publicity damages is based on a statement that BOLI made in the context of denying recovery for those damages. In that part of the order, BOLI concluded that "*complainants' emotional harm related to the denial of service continued throughout the period of media attention* and that the facts related *solely to emotional harm* resulting from media attention do not adequately support an award of damages." According to the Kleins, that emphasized text reflects that BOLI "awarded damages for harm lasting over twenty-six months" related solely to the initial denial of service, yet the proposed final order and final order "note a near total lack of any such evidence" regarding persistent harm from the initial refusal.

The Kleins' mischaracterize the relevant orders. In his proposed final order, the ALJ distinguished testimony about specific incidents involving emotional suffering from testimony about emotional suffering more generally. The ALJ credited Laurel's testimony that she "still feels emotional effects from the denial of service because [Rachel and their two children] 'were' still suffering and that 'was' tearing me apart." The ALJ also specifically found that Rachel had not tried "to minimize the effect of media exposure on her emotional state as compared to how the cake denial affected her," and he credited Rachel's testimony "about her emotional suffering in its entirety." His order further states:

"Without giving any specific examples, [Rachel] credibly testified that, *in a general sense, the cake refusal has caused her continued emotional suffering up to the time of hearing*. Other than that, she did not testify as to any specific suffering she experienced after February 1 that was directly attributable to the cake refusal."

In adopting the ALJ's reasoning, BOLI's final order similarly distinguished between generalized testimony and testimony about specific instances of suffering, and it repeated the ALJ's findings in that regard.

Viewed in context, BOLI's findings and conclusions demonstrate that it credited Laurel's and Rachel's testimony that, at the time of the hearing, they continued to experience some degree of emotional suffering from the initial refusal, but the final order also reflects that BOLI understood that evidence to be generalized and limited. Nothing in the final order indicates that BOLI gave that evidence more weight than it could bear, or suggests that the agency relied on evidence that was not substantial when determining damages. Rather, the complainants' generalized evidence of continued suffering until the time of the hearing is one among the many facts on which the agency relied to support the damages award in the final order.

3. *Consistency with other BOLI awards*

Finally, the Kleins argue that BOLI's award lacks substantial reason because it is "out of line with comparable cases." The Kleins contend, as they did below, that the complainants' suffering relates to a single, discrete incident, whereas past BOLI cases with such significant damages awards involved ongoing harassment and typically involved emotional suffering so severe that it required medical treatment.

Fact-matching, when considering emotional distress damages, is of limited value. As we explained in *Edwards*, BOLI must consider "the type of discriminatory conduct, and the duration, frequency, and severity of the conduct. It also considers the type and duration of the mental distress and the vulnerability of the [c]omplainant." The actual amount of any award, therefore, depends on the facts presented by each complainant.

As BOLI notes in its final order, the agency has awarded far greater damages than $75,000 and $60,000 to a complainant in cases involving invidious discrimination. Nonetheless, given BOLI's detailed factual findings about the effect of the refusal of service on these particular complainants—including anger, depression, questioning their own identity and self-worth, embarrassment, shame, frustration, along with anxiety and reduced excitement about the wedding itself—we cannot say that the order is so far out of line with previous cases that it lacks substantial reason.

For the foregoing reasons, we reject the third assignment of error and affirm the damages award.

D. *Fourth Assignment: Application of ORS 659A.409*

In their fourth assignment of error, the Kleins contend that BOLI erred in concluding that

they violated ORS 659A.409. That statute provides, as pertinent here, that

"it is an unlawful practice for any person acting on behalf of any place of public accommodation as defined in ORS 659A.400 to publish, circulate, issue or display, or cause to be published, circulated, issue or displayed, any communication, notice, advertisement or sign of any kind to the effect that any of the accommodations, advantages, facilities, services or privileges of the place of public accommodation will be refused, withheld from or denied to, or that any discrimination will be made against, any person on account of race, color, religion, sex, sexual orientation, national origin, marital status or age * * *."

In essence, the statute makes it unlawful to threaten to commit unlawful discrimination. In its final order, BOLI concluded that the Kleins did so through several statements, as discussed below, and enjoined them from committing further violations.

The Kleins acknowledge that BOLI "may enjoin people from threatening to discriminate on the basis of sexual orientation," without implicating the First Amendment. However, the Kleins argue that the statements that BOLI found objectionable did not communicate any intention to discriminate in the future, but merely expressed the Kleins' views about the ongoing controversy and their belief in the validity of their legal and moral position.

The final order describes three discrete statements attributed to the Kleins. First, in the February 2014 interview with Tony Perkins, Aaron described his brief conversation with Rachel at Sweetcakes that led to him telling her, "[W]e don't do same-sex marriage, same-sex wedding cakes." Second, at a different point in that same interview, Aaron related an earlier conversation that he had had with Melissa regarding the prospect of legalized same-sex marriage; in that conversation, according to Aaron, he and Melissa agreed that they could "see it is going to become an issue but we have to stand firm." Third, BOLI relied on the handwritten sign that was taped to the inside of Sweetcakes' front window, which read, in part, "Closed but still in business. * * * This fight is not over. We will continue to stand strong. Your religious freedom is becoming not free anymore. This is ridiculous that we cannot practice our faith. The LORD is good and we will continue to serve HIM with all our heart."

In the final order, BOLI reasoned that the above statements, considered in "text and context," were properly construed as "the recounting of past events," but also "constitute notice that discrimination will be made in the future by refusing such services." As a result, BOLI's final order included language ordering the Kleins "to cease and desist" from making any communication "to the effect that" they would discriminate in the future "on account of sexual orientation." The language in the order precisely tracks the statutory language in ORS 659A.409, quoted above.

On judicial review, the Kleins essentially make two arguments. First, they argue that BOLI erred in concluding that the three statements, individually or collectively,

violated ORS 659A.409 by communicating an intention to discriminate in the future. In the Kleins' view, those statements simply describe "the facts of this case, their view of the law, and their intent to vindicate that view." Second, the Kleins argue that BOLI's injunction is overbroad to the extent that it purports to restrict the Kleins from expressing those views.

We agree with the Kleins' first point. Aaron's statements in the February 2014 interview can be reasonably understood only one way: as describing *past* events. BOLI's order states that Aaron "did not say only that he would not do complainants' specific marriage and cake but, that respondents 'don't do' same-sex marriage and cakes." But regardless of whether his words can be understood to refer generally to same-sex marriage and cakes, BOLI ignores the context in which he made that remark during the interview. Aaron was asked by the interviewer, "Tell us how this unfolded and your reaction to that." He responded by describing what had happened *on the day of the refusal*, including, "*I said*, 'I'm very sorry, I feel like you may have wasted your time. You know we don't do same-sex marriage, same-sex wedding cakes.' And she got upset, noticeably, and I understand that." Viewed in that context, Aaron's recounting of those historical events cannot be understood as a statement that he would deny service in the future.

Likewise, Aaron's recounting, during the interview, of past conversations that he and Melissa had engaged in *before* the denial of service cannot reasonably be understood as an assertion of their plans to discriminate in the future. Aaron was asked by the interviewer whether the controversy with the complainants had caught him off guard, and he responded, "[I]t was one of those situations where we said 'well I can see it is going to become an issue but we have to stand firm.'" That statement plainly recounted his past thinking and cannot reasonably be construed as the kind of threat of prospective discrimination that ORS 659A.409 prohibits.

That leaves the note taped to the Sweetcakes window. Again, that note read:

"Closed but still in business. You can reach me by email or facebook. www.sweetcakesweb.com or Sweetcakes by Melissa facebook page. New phone number will be provided on my website and facebook. This fight is not over. We will continue to stand strong. Your religious freedom is becoming not free anymore. This is ridiculous that we cannot practice our faith. The LORD is good and we will continue to serve HIM with all our heart [heart symbol]."

BOLI concedes that the statement could refer to their intention to stand strong in their legal fight, but argues that it "also could refer to the denial of services to same-sex couples."

We are not persuaded that, given the ambiguity in the note, it can serve as an independent basis for BOLI's determination that the Kleins violated ORS 659A.409—and, indeed, BOLI did not purport to rely on the note alone. As explained above, in overturning the ALJ's determination regarding ORS 659A.409, BOLI relied heavily on statements in the Perkins interview—taken out of context—to conclude that the Kleins had communicated

an intention to discriminate in the future. When those statements and the note are viewed in their proper context, the record does not support BOLI's conclusion that the Kleins violated ORS 659A.409. We therefore reverse that part of BOLI's order.

Reversed as to BOLI's conclusion that the Kleins violated ORS 659A.409 and the related grant of injunctive relief; otherwise affirmed.

"Supreme Court passes, for now, on a new wedding cake dispute"

The Los Angeles Times

David Savage

June 17, 2019

The Supreme Court announced Monday it would not decide, for now, whether a Christian couple from Oregon had a constitutional right to defy that state's civil rights law and refuse to make a wedding cake for the marriage of two women.

Instead, the justices told an Oregon court to take a second look at the case based on last year's high court ruling in favor of a Christian cake maker from Colorado.

In doing so, the court kept alive the couple's appeal and left open the question of whether businesses can discriminate against gays and lesbians based on their religious beliefs.

The tentative decision shows again that Chief Justice John G. Roberts Jr. and his colleagues are inclined to put off rulings on culture war controversies.

Melissa and Aaron Klein refused to make a cake in 2013 for the marriage of two women. Oregon authorities fined them $135,000 for violating the state's law that requires businesses to provide full and equal service for all customers, without regard to race, religion or sexual orientation.

The case could have set a national precedent, deciding whether conservative Christians may receive a religious exemption from laws that bar discrimination based on sexual orientation or transgender status. There is no federal law that forbids discrimination based on sexual orientation, but Oregon, like California and 20 other states, prohibits such discrimination by businesses and employers.

The justices had considered the appeal since early February. The couple's lawyers asked the court to hear the case and issue a national ruling. Oregon's attorney general said the appeal should be turned down.

The justices did neither. The court issued a one-line order sending the case of Klein vs. Oregon Bureau of Labor back to an Oregon court "for further consideration in light of Masterpiece Cakeshop vs. Colorado Civil Rights Commission." In that case, the justices by a 7-2 vote said a Christian cake maker had been treated unfairly by a state civil rights commission.

The Kleins were represented in the Supreme Court by the Texas-based First Liberty Institute, and its president, Kelly Shackelford, called the outcome "a victory for Aaron and Melissa Klein and for the religious liberty of all Americans."

Rachel and Laurel Bowman-Cryer, the two women who sued after they were turned away, were represented by Lambda Legal,

which called the outcome "very disappointing"

"It is a long-standing rule that the freedom of religion is not a license for businesses to discriminate," said Jennifer Pizer, a senior counsel for the legal defense fund.

In recent years, several Catholic social services agencies have objected to arranging adoptions for same-sex couples, and a small number of business owners — including a photographer in New Mexico and a florist in Washington state — waged legal battles after refusing to participate in same-sex marriage ceremonies.

Until now, the Christian business owners have lost in the courts. Judges have upheld the state civil rights laws and the principle of nondiscrimination.

Four conservative justices dissented in 2015 when the court upheld an equal right to marry for same-sex couples. With Justice Brett M. Kavanaugh having joined the court, there may now be five justices ready to side with religious conservatives on the question of whether their beliefs can override civil rights statutes.

Retired Justice Anthony M. Kennedy played the key role in the court's 2015 decision on equal marriage rights. He was torn last year over the case of a baker from Colorado who cited his Christian beliefs as reason for turning away two men who were planning a wedding party.

Kennedy wrote an opinion in Masterpiece Cakeshop that did not resolve how future cases would be decided. He endorsed equal rights for gays and lesbians, but said Jack Phillips, the baker in that case, had been subjected to religious "hostility" by a state commission.

"These disputes must be resolved with tolerance, without undue disrespect to sincere religious belief, and without subjecting gay persons to indignities when they seek goods and services in an open market," he wrote.

The Klein appeal asked the justices to decide "whether Oregon violated the Free Speech and Free Exercise Clauses of the 1st Amendment by compelling the couple to design and create a custom wedding cake to celebrate a same-sex wedding ritual, in violation of their sincerely held religious beliefs" and whether "the court should overrule" a disputed 1990 decision barring most religious exemptions.

The case began early in 2013 when the Bowman-Cryers were preparing to marry. The women had been together for nearly 10 years and were in the process of adopting two children with special needs. Rachel and her mother went to the Sweet Cakes shop in Gresham, Ore., a small city just east of Portland, where they had purchased decorative cakes before. But when Aaron Klein learned the marriage would have two brides, he said the shop would not make a cake for them.

In a later conversation with Rachel's mother, Klein quoted a passage from the biblical Book of Leviticus and its reference to "an abomination," which many religious conservatives read as a condemnation of homosexual conduct.

The two women filed a complaint with the state agency that enforces its antidiscrimination law. An administrative law judge held a hearing and awarded the couple $135,000 in compensation for their emotional suffering. The state commission and the state's courts rejected appeals filed by the Kleins.

Last year, the Oregon Supreme Court refused to hear their case. And last fall, shortly after Kavanaugh was confirmed, the Christian couple asked the U.S. Supreme Court to hear their appeal.

"Justices Dodge New Case Defending Denial of Service to LGBT Couple"

Law.com

Marcia Coyle

June 17, 2019

The U.S. Supreme Court on Monday said it will not take up and hear arguments over whether a baker who refused on religious grounds to make a wedding cake for a same-sex couple violated a state's anti-discrimination law.

The justices vacated the lower court ruling and sent the case *Klein v. Oregon Bureau of Labor & Industries* back to the Oregon Court of Appeals for further consideration in light of the high court's decision last term in *Masterpiece Cakeshop v. Colorado Civil Rights Commission*.

In *Masterpiece*, the justices avoided deciding the First Amendment speech and religion claims by a Colorado baker. The 7-2 majority on June 4, 2018, reversed the commission and the Colorado Court of Appeals because the commission did not give a neutral hearing to the baker. Some commission members, Justice Anthony Kennedy said, showed hostility towards the baker's religious beliefs.

"The outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market," Kennedy, who announced his retirement later that month, said. Justice Brett Kavanaugh succeeded Kennedy.

In the *Oregon* case, Melissa and Aaron Klein owned a bakery doing business as Sweetcakes by Melissa. Rachel Bowman-Cryer and her mother, Cheryl, visited the bakery in 2013 for a cake-tasting appointment. Rachel and her longtime partner Laurel Bowman-Cryer were planning to marry.

During the tasting, Aaron Klein told them that Sweetcakes would not make wedding cakes for same-sex ceremonies because of his and Melissa's religious convictions. The couple who wanted a cake filed complaints with the Oregon bureau, alleging the Kleins refused to make them a wedding cake because of their sexual orientation.

The bureau found that the Kleins had violated the state's public accommodations law by denying "full and equal" service to a person "on account of sexual orientation" and a second public accommodations law by communicating an intention to unlawfully discriminate in the future.

The Oregon Court of Appeals agreed that their refusal to make the cakes was "on account of" the couple's sexual orientation. It

also found that the bureau's final order did not impermissibly burden the Kleins' First Amendment right to free exercise of their religion because, as the U.S. Supreme Court held in 1990 in *Employment Division v. Smith*, the order "simply requires their compliance with a neutral law of general applicability, and the Kleins have made no showing that the state targeted them for enforcement because of their religious beliefs."

In their Supreme Court petition, the Kleins, represented by Adam Gustafson, partner at Boyden Gray & Associates, pressed again their First Amendment speech and free exercise claims. They also asked the justices to overrule the 1990 Smith decision. The Smith majority opinion was written by Justice Antonin Scalia.

Oregon Solicitor General Benjamin Gutman countered that the Kleins denied service to the same-sex couple based on their sexual orientation before discussing the design of any cake. Under Supreme Court cases, he wrote, "baking is conduct, not speech, and Oregon may regulate that conduct for purposes unrelated to the suppression of free expression. Whether a particular cake reflecting a specific message could be protected by the First Amendment is not presented on this record."

"The Supreme Court is Showing an Instinct for Self-Preservation, at Least Until Next Year's Election"

The New York Times

Linda Greenhouse

June 20, 2019

The justices of the Supreme Court know how to keep out of trouble. That's the takeaway from the order the court issued on Monday, sending back to the lower court a new case about another baker who wouldn't bake a wedding cake.

The case, Klein v. Oregon Bureau of Labor and Industries, was a near-exact replica of last year's Masterpiece Cakeshop case. Like the owner of that Colorado bakery, the husband and wife owners of Sweetcakes by Melissa in Gresham, Ore., claimed that their religion prohibited them from designing and baking a cake to be used in celebrating a same-sex marriage. To do so, the owners explained in their petition to the Supreme Court, would amount to "complicity in sin." In fact, they said, the very reason they baked wedding cakes was to "celebrate weddings between one man and one woman."

Like Colorado, Oregon has a public accommodations law that bars business from discriminating on the basis of sexual orientation. Acting on the complaint of a lesbian couple, the official in charge of enforcing that law imposed a $135,000 fine to be paid to the couple as "compensatory damages for emotional, mental and physical suffering." The Oregon Court of Appeals upheld the order, and the Oregon Supreme Court refused to hear the appeal.

On Monday, instead of adding the case to their docket, the justices vacated the lower-court decision and told the Oregon Court of Appeals to reconsider the case "in light of" last June's Masterpiece Cakeshop decision. Objectively, that disposition makes little sense. The Supreme Court didn't actually decide the constitutional issues in Masterpiece Cakeshop. Rather, Justice Anthony Kennedy's majority opinion found that two Colorado officials who had a hand in deciding the case against the baker had made comments that indicated an impermissible "hostility" to religion. As Justice Ruth Bader Ginsburg observed in dissent, comments by "one or two members of one of the four decision-making entities" involved in passing judgment in the case did not amount to anything the Supreme Court had ever deemed close to impinging on the free exercise of religion. The decision was, in other words, a punt. It has no "light" to shed on the Oregon dispute.

To add a case to the Supreme Court's docket takes only four votes. The Oregon bakers' appeal described their case as an "ideal vehicle" that "squarely presents the constitutional questions that the court did not

answer in Masterpiece Cakeshop." Wasn't that enough to interest four justices? Quite likely, it was, at least initially. That's where serious strategizing must have come into play. The appeal reached the court last October. The justices took it up at their private conference 10 times. While the closed-door conference is the Supreme Court's ultimate black box, we know enough about it to be certain that it's not a place for idle chatter. No doubt memos were circulating, with arguments for and against taking the case. Having ducked this particular front in the culture wars a year ago, did the justices really want to get back in now?

I think that what finally prevailed was an institutional instinct for self-preservation. Why re-enter this battle at this moment? Cases granted this spring will be argued in the fall, to be decided next spring with the political season at its height and the court itself under a bright election-year spotlight. The court already has plenty to do next term, with three cases granted on whether federal law protects gay and transgender people against discrimination on the job. The conflict between private conscience and public duty is age-old. The court has time to resolve it in future cases. In fact, another such case will soon be on the way to the Supreme Court. This month, the Washington State Supreme Court reinstated a ruling against a flower shop owner who, because of her "relationship with Jesus Christ," told a gay couple, longtime customers, that she could not design a flower arrangement for their wedding. The justices had vacated that ruling and sent the case back to the state court last summer for reconsideration in light of Masterpiece Cakeshop. The state court, deeming Masterpiece Cakeshop irrelevant, reissued its original opinion almost word for word.

What I discern as the Supreme Court's instinct for self-preservation was also on display last month in an abortion case from Indiana. The state was appealing a ruling that invalidated its law banning abortions for reasons of the race, sex or disability of the fetus, a law enacted in deliberate and flagrant violation of existing abortion precedents. The state's appeal, Box v. Planned Parenthood of Indiana and Kentucky, went to conference an astonishing 15 times over five months. Ultimately, the court denied the appeal, noting in an unsigned opinion that because the United States Court of Appeals for the Seventh Circuit is the only court to have considered such a law, "we follow our ordinary practice of denying petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals."

On a court deeply divided on the subject of abortion, that disposition was unanimous. Ordinarily, when the court turns down an appeal, it says nothing. That the justices chose to explain themselves in this instance has to be seen, it seems to me, as sending a message. If I read that message correctly, we can expect the same outcome when the states that are now busy banning abortion appeal to the Supreme Court from the lower-court rulings that will inevitably strike down the new laws. (But to be precise, my prediction holds only until Election Day 2020, when the justices will be free from whatever constraint they now feel about taking a step likely to incite a public backlash against the Republican Party.)

These reflections on the court's instinct for self-preservation lead me to a final question: What to do about the census case? As the world knows, the deeply contested question of the validity of the Trump administration's plan to ask about citizenship has become even more fraught with revelations from the computer files of a recently deceased Republican redistricting specialist, Thomas Hofeller. The documents appear to validate the conclusion reached by Federal District Judge Jesse Furman, whose ruling against the Trump administration is before the justices, that the administration's purported good-government reason for adding the citizenship question was a pretext. The real reason, the documents indicate, was to provide a statistical basis for entrenching Republican power by disregarding noncitizens in the population counts for future redistricting.

The court heard argument in the case in April, a month before the new information surfaced in an unrelated redistricting case. Judge Furman, responding to a request by one set of plaintiffs to reopen the census case for further discovery, said that with the case now before the Supreme Court, he lacked authority to do so. Those plaintiffs, represented by the American Civil Liberties Union, have now asked the justices for a "limited remand" that would send the case back to the District Court "to allow exploration of where the truth lies."

Even if the justices were so inclined, the request presents obvious logistical difficulties, with the clock ticking toward the date when the census forms have to be in final shape for distribution. It was that deadline that led the court to grant the administration's request to hear the appeal directly from the District Court without waiting for a decision from the Court of Appeals.

But there is another option, suggested by the plaintiffs in a final footnote to their latest brief: Just dismiss the appeal. The procedure is known as a DIG: "dismissed as improvidently granted." The justices use it once or twice a term, usually when a case turns out, on further reflection, not to be what they thought it was when they granted it. In fact, the court used a DIG on April 23 to dismiss a securities case, Emulex Corp. v. Varjabedian, that had been argued a week earlier.

The court deployed a DIG on the last day of the term in June 2012 to dismiss a case, First American Financial Corp. v. Edwards, that had been argued a full five months earlier. That case presented a question with important implications for the separation of powers: whether Congress can enact a law that confers standing — the right to sue — on people who, while they can point to a legal violation, did not suffer a concrete injury traceable to the violation. Circumstantial evidence strongly suggests that after the case was argued on Nov. 28, 2011, the assignment to write the majority opinion went to Justice Clarence Thomas.

For reasons never revealed, Justice Thomas apparently failed to keep the four colleagues he needed on board with his analysis of the case, and a decision was never published. Did he overreach and scare the others away by trying to make too big a statement about the relationship between Congress and the judiciary? Did the court, tormented that term by the first Obamacare case, just throw up its

hands? The fate of First American Financial is one of the little mysteries I'd like to see solved one of these years.

For the time being, it's a reminder that the court knows how to get itself out of a tight spot when it needs to. A DIG requires no explanation. Its effect is to wipe the Supreme Court slate clean, as if the appeal had never even reached the court. A DIG here would leave Judge Furman's opinion in place and would enable the professionals in the Census Bureau, who strongly objected to adding the citizenship question, free to go about their business counting us — all of us. If I'm right about these recent signals that the court knows how to save itself, now is the time.

“U.S. Supreme Court Orders New Look at Clash Over Gay-Wedding Cake”

Bloomberg

Greg Stohr

June 17, 2019

The U.S. Supreme Court ordered reconsideration of a $135,000 award against an Oregon bakery that refused to make a cake for a same-sex wedding in a case that revived a fractious debate over religious rights and equal treatment.

After more than three months of deliberation, the justices Monday set aside the award and told an Oregon state appeals court to revisit the case in light of a 2018 Supreme Court ruling in a similar fight from Colorado. The Supreme Court resolved that case narrowly -- and avoided the core constitutional questions -- by saying Colorado officials had shown animus toward the baker’s religious views.

The latest case involves “Sweetcakes by Melissa,” a now-closed Portland-area bakery owned by Melissa and Aaron Klein. The Kleins, who are Christian, cited religious grounds when they refused to provide a cake for Rachel and Laurel Bowman-Cryer in 2013.

The Bowman-Cryers filed a complaint with the Oregon Bureau of Labor and Industries, the state’s civil rights watchdog, which found the bakers in violation of a state anti-discrimination law and awarded the two women $135,000. An Oregon state appeals court upheld the award.

The Kleins say the state violated their speech and religious freedoms. They said the ruling “will chill expression and enlarge the power of bureaucrats to force unwilling speakers to participate in rituals and to promote ideologies of all kinds that violate their creeds and their consciences.”

The Kleins, who paid the penalty plus interest in 2015, say the dispute forced them to close their business. The couple benefited from a crowdfunding campaign that raised more than $350,000, according to a report at the time.

‘Months of Delay’

Oregon Attorney General Ellen Rosenblum said the lower court applied “well-established First Amendment principles to conclude that a bakery open to the public did not have a constitutional right to discriminate against customers on the basis of the customers’ sexual orientation.”

The Supreme Court took an unusually long time to decide how to handle the case before settling on what is often a routine step. The appeal was scheduled for possible discussion at the justices’ private conference 13 times.

The Supreme Court didn’t spell out precisely what concerns it had about the award. But the Oregon court’s reconsideration is likely to

focus on the role of Brad Avakian, whose position as commissioner of the Bureau of Labor and Industries made him the key decision maker in the case.

Shortly after the Bowman-Cryers filed their complaint, Avakian posted a news article about the dispute on Facebook, along with the comment: “Everyone has a right to their religious beliefs, but that doesn’t mean they can disobey laws already in place. Having one set of rules for everybody ensures that people are treated fairly as they go about their daily lives.” Avakian didn’t specifically comment on the dispute between Sweetcakes and the Bowman-Cryers.

In upholding the award, an Oregon state appeals court said Avakian’s comments “fall short of the kinds of statements that reflect prejudgment of the facts or an impermissibly closed-minded view of law or policy so as to indicate that he, as a decision maker, cannot be impartial.”

The case is Klein v. Oregon Bureau of Labor and Industries, 18-547.

"Appeals court upholds fine against Christian bakers who refused to make same-sex wedding case"

Oregon Live

Gordan R. Friedman

December 28, 2017

The Oregon Court of Appeals on Thursday upheld a decision by Oregon's labor commissioner that forced two Gresham bakers to pay $135,000 to a lesbian couple for whom the bakers refused to make a wedding cake.

Melissa and Aaron Klein made national headlines in 2013 when they refused to bake a cake for Rachel and Laurel Bowman-Cryer, citing their Christian beliefs. The Bowman-Cryers complained to the Oregon Bureau of Labor and Industries, saying they had been refused service because of their sexual orientation.

An administrative law judge ruled that the Kleins' bakery, Sweetcakes by Melissa, violated a law that bans discrimination based on sexual orientation in places that serve the public. Brad Avakian, the state labor commissioner, affirmed heavy damages against the Kleins for the Bowman-Cryer's emotional and mental distress.

The decision will likely be the most controversial ruling, and the one with the biggest impact, handed down by Avakian during his nearly 10 years in the role. He has decided not to seek re-election when his term expires next year.

The Kleins appealed Avakian's decision, arguing for a religious exemption from the Oregon Equality Act, the anti-discrimination law. They also argued Avakian was biased against them, that his actions violated their rights to free expression as artists and their right to due process, and that the fine was excessive.

But in their ruling Thursday, a panel of state appeals court judges sided with Avakian, saying the Kleins did, in fact, deny the Bowman-Cryers because they were lesbians. The justices also rejected the Kleins' argument that Avakian's ruling violated state and federal free speech protections.

In the ruling, Judge Chris Garrett wrote that Avakian's order does not violate the Klein's free speech rights because it simply "requires their compliance with a neutral law." Garrett also wrote that the Kleins "have made no showing that the state targeted them for enforcement because of their religious beliefs."

In a statement, Avakian said the Appeals Court ruling "sends a strong signal that Oregon remains open to all."

Through their attorney, the Bowman-Cryers said Thursday's ruling affirms "the long-standing idea that discrimination has no place in America."

"All of us are equal under the law and should be treated equally," the couple said. Any ruling to the contrary would "create a sweeping license to discriminate," they said.

The appeals court ruling represents an "important victory" for the Bowman-Cryers, who faced humiliation, harassment and death threats after their wedding preparations turned into an ordeal, said Nancy Marcus, senior attorney at Lambda Law, a national pro-LGBT rights group. Marcus said the court's ruling is critical yet "completely unsurprising" because it aligns with courts in other states, which have not allowed businesses to exempt themselves from anti-discrimination laws.

Adam Gustafson, lead attorney for the Kleins and the former White House counsel for President George H.W. Bush, was not immediately available for comment. Gustafson had argued the bakers' religious beliefs should shield them from being compelled to conduct speech -- in this case, baking a cake. Such a requirement would "offend the conscience and the constitution," Gustafson argued.

The First Liberty Institute, a religious freedom law firm whose attorneys also represented the Kleins, said it is disappointed by Thursday's ruling. "The Oregon Court of Appeals decided that Aaron and Melissa Klein are not entitled to the Constitution's promises of religious liberty and free speech," said Kelly Shackelford, the institute's president.

The Kleins paid the fine following Avakian's order and closed their baking business around the same time. Donors gave the bakers more than $500,000, money they say has been spent on legal fees. The $135,000 damage award belonging to the Bowman-Cryers has been locked in an escrow account pending appeals.

The Kleins' case is one of several similar cases that has attracted significant media attention. Another, stemming from a Colorado ruling, was argued before the U.S. Supreme Court earlier this month. The court justices are reportedly divided over whether a baker was justified in turning away a gay couple seeking a wedding cake because of their religious beliefs. That baker, like the Kleins, contends that creating and custom-decorating a cake is an act of artistic expression that deserves more free speech protections than the sales of other goods and services.