No. 10-1792

In The
United States Court of Appeals
For The Fourth Circuit

LORI KENNEDY,

Plaintiff-Appellee,

v.

VILLA ST. CATHERINE, INC.,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND AT THE NORTHERN DIVISION

BRIEF OF AMICI, ALLIANCE DEFENSE FUND, AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF VILLA ST. CATHERINE, INC. AND URGING REVERSAL OF THE ORDER BELOW

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DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Pursuant to Fed. R. Civ. P. 26.1 and Local Rule 26.1, amici make the following disclosures:

1. We are NOT a publicly held corporation or other publicly held entity.
2. We do NOT have any parent corporations.
3. We do NOT have stock that is owned by a publicly held corporation or other publicly held entity.
4. There is NOT a publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation.
5. We are NOT a trade association.
6. This case does NOT arise out of a bankruptcy proceeding.

These disclosures were also made and served on Appellants and Appellees on September 21, 2010.

/s Kevin Theriot
Kevin Theriot
Attorney for Amici

Amicus Brief

STATEMENT OF INTEREST OF AMICI

The Alliance Defense Fund ("ADF")

ADF is a non-profit, religious liberties organization devoted to the defense and advocacy of religious freedom, the sanctity of human life, and traditional family values. It has two interests in this case. First, ADF is a religious organization entitled to an exemption under Section 702(a) of Title VII of the Civil Rights Act of 1964, codified in 42 U.S.C. § 2000e-1(a). ADF was formed by Christian ministries for a religious purpose. Its website states: "Responding to the urgent need for a strong, coordinated legal defense of religious freedom, the leaders of more than 35 ministries – including the late Dr. Bill Bright, the late Larry Burkett, Dr. James Dobson, the late Dr. D. James Kennedy, and the late Marlin Maddoux – came together and launched ADF in 1994 to aggressively defend religious liberty…." http://www.alliancedefensefund.org/About.

Being committed to a religious purpose, it is essential that ADF employ only those persons who share ADF's religious beliefs as stated in its Statement of Faith and Guiding Principles. http://www.alliancedefensefund.org/Careers. ADF trains its staff on religious matters so that it can pursue its religious mission with like-mindedness. It has a strong interest in this case because if Plaintiff is successful, it

will drastically undermine ADF's ability to pursue its religious purpose, as explained more fully in the Argument below.

Secondly, ADF has an interest on behalf of many of its clients who are also religious organizations exempt under Title VII. ADF represents counseling services, teen abstinence programs, residential care facilities, foster care agencies, and many other nonprofit, parachurch organizations that exist primarily to further a religious mission. Whether it be to promote a biblical understanding of raising families, educating teenagers about the biblical approach to sexuality, or caring for babies and youth with no homes or fit parents, ADF's clients serve a religious purpose and mission. It is essential to these organizations that they are able to convey their religious mission to their employees and ensure that they share the organizations' religious beliefs.

The National Association of Evangelicals ("NAE")

The National Association of Evangelicals ("NAE") is the largest network of evangelical churches, denominations, colleges, and independent ministries in the United States. It serves 50 member denominations and associations, representing 45,000 local churches and over 30 million Christians. NAE serves as the collective voice of evangelical churches and other religious ministries. It believes that religious freedom is a gift from God that the government does not create but is charged to protect. NAE is grateful for the American constitutional tradition

safeguarding religious freedom, and believes that jurisprudential heritage should be maintained in this case.

Summary of Argument

The District Court undermined the freedom of religious organizations when it allowed Ms. Kennedy's religious harassment and retaliation claims against a Catholic institution to go forward. Villa St. Catherine is a Catholic nursing center that the District Court recognized is exempt from the religious discrimination prohibitions of Title VII. Congress wisely included this exemption so that religious organizations can maintain their religious character. This makes constitutional and practical sense. A Jewish ministry to the poor should not have to adjust its workplace requirements so that a Muslim would feel comfortable accomplishing its religious goals, and vice versa. When government entangles itself in the employment decisions of religious organizations, it violates the First Amendment's protection of religious freedom.

The District Court's order results in the nonsensical legal reality that St. Catherine could have simply fired Kennedy because she was not Catholic, but could not require her to dress and act in a way that does not conflict with the Catholic beliefs of the institution and the people it serves. Under this new rule of law, an Islamic inner city ministry to Muslims cannot require its employees to

dress in traditional Islamic garb – even if it were required by their religious teaching and failure to do so might offend those individuals being served.

This makes an end run around Congress' well-conceived efforts to protect religious organizations from liability when they ensure their employees' religious beliefs comply with their own. More significantly, it violates the religious freedom of religious organizations by exposing them to liability for simply teaching employees their doctrine, and requiring them to act in compliance with it while at work. The District Court's order excluding harassment and retaliation claims from Title VII's exemption for religious organizations must be reversed because it brings § 702(a) into conflict with the First Amendment.

Argument

Courts avoid interpreting statutes to restrict religious organizations when there is a significant risk that religious freedom would be infringed. *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 501-02 (1979).[1] Applying laws so as to limit religious organizations must only occur when there is a clear, affirmative expression of congressional intent to do so. *Id.* Thus, Title VII and its religious exemption are to be construed in such a way that they do not conflict with the First Amendment. *Id.* at 507.

[1] In *Catholic Bishop* the Court held that lay teachers in schools operated by a church to teach both religious and secular subjects were not employees subject to collective bargaining under the National Labor Relations Act.

The District Court's opinion fails to meet this requirement. Carving out harassment and retaliation claims from the § 702(a) exemption to Title VII will have a profoundly negative impact on the ability of religious organizations to accomplish their religious objectives. They will have to censor communication to employees to avoid any possibility of creating an environment that might be perceived as insulting or coercive to individual employee religious beliefs.

I. THE FIRST AMENDMENT PROTECTS RELIGIOUS ORGANIZATIONS' RIGHT TO TEACH THEIR RELIGIOUS BELIEFS TO EMPLOYEES AND REQUIRE CONFORMANCE TO THEM.

Title VII's exemption in Section 702 for religious organizations is merely an acknowledgment of their constitutionally guaranteed right to employ and train individuals to further their religious mission. Even without section 702, the First Amendment would limit Title VII's ability to regulate the employment relationships within churches and similar organizations. *Spencer v. World Vision, Inc.*, No. 08-35532, 2010 WL 3293706, *4 (9th Cir. Aug. 23, 2010).

The First Amendment to the United States Constitution states: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ." These words – often referred to as the Establishment and Free Exercise Clauses – have generated much debate and litigation over the years. But one thing is clear – they were designed by the Founding Fathers to protect the freedom of religious individuals and their organizations. A vital aspect of this

protection is the legal principle of church autonomy. It is the term that describes the Constitution's safeguards against governmental intrusion into the affairs of religious organizations. *See Kedroff v. St. Nicholas Cathedral*, 344 U.S. 94, 119 (1952).

This protection must be vigorously defended because it preserves the very foundation of our society. As George Washington said in his Farewell Address, "Of all the dispositions and habits which lead to political prosperity, religion and morality are indispensable supports. …And let us with caution indulge the supposition, that morality can be maintained without religion. Whatever may be conceded to the influence of refined education on minds of peculiar structure, reason and experience both forbid us to expect, that national morality can prevail in exclusion of religious principle."[2]

If Title VII is interpreted so as to require organizations of religious people to refrain from encouraging their employees to conform to the teachings of the organization, it will greatly undermine the organization and the religious principles it seeks to further. As insightfully stated by Justice William Brennan, the Title VII exception protects the religious freedom of both individuals and organizations.

> For many individuals, religious activity derives meaning in large measure from participation in a larger religious community. Such a

[2] http://www.access.gpo.gov/congress/senate/farewell/sd106-21.pdf.

> community represents an ongoing tradition of shared beliefs, an organic entity not reducible to a mere aggregation of individuals. *Determining that certain activities are in furtherance of an organization's religious mission, and that only those committed to that mission should conduct them, is thus a means by which a religious community defines itself.* Solicitude for a church's ability to do so reflects the idea that furtherance of the autonomy of religious organizations often furthers individual religious freedom as well…. *[W]e deem it vital that, if certain activities constitute part of a religious community's practice, then a religious organization should be able to require that only members of its community perform those activities.*

Corporation of the Presiding Bishop v. Amos, 483 U.S. 327, 342-43 (1987) (Brennan, J., concurring) (emphasis added).

II. SUBJECTING RELIGIOUS ORGANIZATIONS TO RELIGIOUS HARASSMENT CLAIMS WILL SEVERELY RESTRICT THEIR RELIGIOUS FREEDOM.

The District Court ruled that religious organizations can be liable for religious harassment claims of employees, even though they could be fired for not sharing the religious beliefs of the organization. Because "harassment" is broadly defined to include anything in the workplace that might be insulting to an individual, the court's ruling will severely restrict the ability of religious organizations to maintain a workforce and office environment that reflects their beliefs.

Harassment claims are actionable on any of Title VII's protected bases, including religion. *Faragher v. Boca Raton*, 524 U.S. 775, 788 (1998). A prima facie claim for religious harassment is established the same way as for sex and race: "(1) the employee[ ] suffered intentional discrimination because of [religion]; (2) the discrimination was pervasive and regular; (3) the discrimination detrimentally affected the plaintiff; (4) the discrimination would detrimentally affect a reasonable person of the same [religion] in that position; and (5) the existence of respondent superior liability." *Abramson v. William Paterson Coll. of N.J.*, 260 F.3d 265, 276 (3d Cir. 2001).

Harassment claims are usually divided into two categories: Hostile Work Environment and Coercion (sometimes referred to as *quid pro quo*). *Venters v. City of Delphi*, 123 F.3d 956 (7th Cir. 1997) (employee established a triable Title VII harassment claim by showing that an employment benefit was conditioned upon acquiescing to her supervisor's religious beliefs, and that a hostile work environment was created).

A. Hostile Work Environment

A hostile work environment exists when 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." *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993). Even a cursory review of the cases shows that subjecting religious organizations to hostile work environment claims will effectively prohibit them from furthering their religious mission in their own workplace – thus inhibiting their ability to do so in the outside world.

In *Abramson*, a college professor at a state university claimed she was subjected to a hostile work environment because of her strict observance of the Sabbath as an Orthodox Jew. 260 F.3d at 279-81. The plaintiff alleged her superiors (one of whom was Jewish) scheduled meetings on Friday evenings and Saturdays and criticized her for not attending. The court determined this was sufficient to state a triable issue for the jury on whether a hostile work environment had been established. *Id.* Notably, the court found that it is not necessary for a plaintiff to introduce direct evidence of intent to create a hostile work environment. Intent can be inferred. *Id.* at 278.

Applying this ruling to a Jewish ministry instead of a public university is a disaster for religious freedom. For instance, if a Reformed Jewish synagogue has a ministry to the poor that only operates on the weekends, it could not force an employee who is Orthodox to work on one of the two days it is open (Saturday). And if the ministry held meetings on Friday nights to prepare for its weekend

efforts, courts may infer that the ministry intended to discriminate against the employee that could not attend those meetings because of her beliefs.

But this is just the tip of the iceberg. Subjecting religious organizations to hostile work environment claims will have a chilling effect on their day to day activities. In *EEOC v. Preferred Mgmt. Corp.*, 216 F. Supp. 2d 763 (S.D. Ind. 2002), a Christian employer attempted to operate her for profit healthcare business like a religious organization. The company's mission statement (which employees had to sign) reflected Christian principles, mandatory attendance was required at daily devotional meetings, routine meetings were opened with prayer, employees received religious training, and the company only hired managers that agreed with the owner's religious beliefs. *Id*. at 820-24. Based on these facts, the court found that a reasonable jury could determine a hostile work environment was created.[3]

Of course, Preferred Management's attempt to create a religious environment in the workplace is exactly what many religious organizations do to further their missions. For instance, World Vision is a religious ministry that fights

[3] *See also EEOC v. Townley Engineering & Mfg. Co.*, 859 F.2d 610, 613 (9th Cir. 1988) (Ninth Circuit held that Title VII prohibited the religious owners of a manufacturing firm from requiring employees to attend daily chapel services); *Delelegne v. Kinney Sys., Inc.*, 2004 WL 1281071 (D. Mass. June 10, 2004) (Ethiopian Christian parking garage cashier could proceed to trial on claims of religious harassment and discriminatory termination where he was not allowed to bring a Bible to work, pray, or display religious pictures in his booth, while Somali Muslim employees were permitted to take prayer breaks and to display religious materials in their booths).

poverty around the world. *Spencer v. World Vision, Inc.*, No. 08-35532, 2010 WL 3293706 (9th Cir. Aug. 23, 2010). It requires that employees agree with the ministry's Christian Statement of Faith, Core Values, and Mission Statement. The organization's logo contains a cross. *Id.* at *11.

> According to World Vision, because it "believes the key to faithfully following Christ lies first in the hearts and minds of [its] staff and only then in program activities," religion pervades the workplace. New employees participate in a two day orientation which begins with daily devotionals and "focuses on serving Christ as the motivation for serving the poor." Through the "Faith@Work" program, World Vision employees are "strongly encouraged" to attend weekly chapel services; daily devotional activities are held within each department; prayer requests are circulated amongst coworkers; Biblical "themes" are emphasized annually, quarterly, and monthly; and an entire work day is set aside each year for prayer.

Id. at *15. When three of its employees were fired because they changed their minds regarding agreeing to the Statement of Faith, they sued World Vision under Title VII. But the Ninth Circuit correctly held that Title VII's exemption for religious organizations applied, and affirmed the district court's award of summary judgment to World Vision.

As noted in Justice Brennan's quote in *Amos*, failure to allow World Vision to control its workforce in this manner would have limited its ability to define itself and impermissibly restricted its religious liberty. 483 U.S. 327, 342-43. But under the District Court's ruling in the case at hand, the former World Vision employees could have avoided summary judgment by simply including harassment and

retaliation claims in their complaint. Congress did not intend such a result when it exempted religious organizations from Title VII, and the First Amendment does not allow it.

B. Coercion

Impermissible harassment under Title VII also occurs when an employer or supervisor coerces an employee to abandon, alter, or adopt a religious practice as a condition of receiving a job benefit or avoiding an adverse employment action. *Venters*, 123 F.3d at 966-67. In *Venters*, an employee was able to state a claim for coercion (sometimes referred to as *quid pro quo* harassment) by presenting evidence of her supervisor discussing his religious beliefs, and inferring that continued employment was conditioned upon her accepting those beliefs. *Id.*

This type of harassment is exactly what the employees in *World Vision* were subjected to – either conform their religious beliefs about the deity of Christ to those of World Vision or be fired. 2010 WL 3293706 at *1. But if the ruling of the District Court in this case were the law in the Ninth Circuit, the World Vision employees could have saved their case by adding a claim for coercion rather than simply alleging discrimination. As with hostile work environment harassment, such a result would be absurd and severely restrict the freedom of religious organizations.

III. ALLOWING EMPLOYEES TO AVOID THE § 702(a) EXEMPTION BY ALLEGING RETALIATION IMPERMISSIBLY RESTRICTS RELIGIOUS FREEDOM.

Title VII prohibits retaliating against an employee for filing a complaint or requesting an accommodation of religious beliefs. *Virts v. Consol. Freightways Corp. of Delaware*, 285 F.3d 508 (6th Cir. 2002). A prima facie retaliation claim is established by showing: "1) the plaintiff engaged in an activity protected by Title VII; 2) the exercise of the plaintiff's civil rights was known to the defendant; 3) the defendant thereafter undertook an employment action adverse to the plaintiff; and 4) there was a causal connection between the protected activity and the adverse employment action." *Id*. at 521.

In *Abramson*, the court found the employee had sufficiently stated a claim for retaliation because she was not recommended for retention two weeks after she submitted a letter to her employer complaining of religious harassment. 260 F.3d at 288. Similarly, under Pennsylvania's version of Title VII, a Jewish employee was found to be subjected to religious harassment because his employer printed Bible verses on his paychecks and distributed a newsletter with religious content to employees. *Brown Transport Corp. v. Human Relations Com'n.*, 578 A.2d 555, 562 (Pa. Commw. Ct. 1990). The employee succeeded on his claim for retaliation because he was fired after he complained about the Bible verses and newsletter. *Id.*

Like harassment claims, subjecting religious organizations to Title VII claims for retaliation renders the § 702(a) exemption for religious organizations meaningless. Under the District Court's reading of the law, a religious ministry would not be subject to liability for firing an employee because of religious beliefs, but would be liable for retaliation if the employee complained about coercion a short time before being fired. This would effectively bypass the exemption and result in the deleterious effect on the freedom of religious ministries Congress was trying to avoid.

Conclusion

It is vitally important to faith-based organizations that they are free to require employees to conform to the ministry's religious teachings. Otherwise, religious expression within the organization will be stifled. Supervisors and co-workers will self-censor their speech out of fear of offending others who may no longer believe the same way. Expression of the ministry's religious faith in the workplace would be suppressed to avoid liability for religious harassment and retaliation. If religious organizations are not exempt from harassment and retaliation claims under Title VII, it would create an anomaly where the organization can exist to evangelize the world, but not its own work force.

"[S]tatutory exemptions to accommodate religion are generally constitutional because they work, not to expand religion but to expand religious

freedom by leaving religion alone." Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 Utah L. Rev. ____, 107 (accessible at http://ssrn.com/abstract=1663829). The exemption for religious organizations was meant to protect religious freedom and should be interpreted accordingly. The District Court's ruling below that Title VII's exemption for religious organizations does not apply to harassment and retaliation claims must be reversed because it brings Title VII into conflict with the Religion Clauses of the First Amendment.

September 21, 2010

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,258 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point Times New Roman type.

/s Kevin Theriot
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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2010, I electronically filed the foregoing with the Clerk of the Court using the ECF system, which sent notification of such filing to the attorneys for Appellant, Leslie A. Powell, Diana M. Schobel and Paul D. Flynn, and Appellees, Michael J. Hoare and Dennis Chong.

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