United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED
December 13, 2021

Lyle W. Cayce
Clerk

No. 21-11159

DAVID SAMBRANO, ON THEIR OWN BEHALF AND *on behalf of* ALL OTHERS SIMILARLY SITUATED; DAVID CASTILLO, ON THEIR OWN BEHALF AND *on behalf of* ALL OTHERS SIMILARLY SITUATED; KIMBERLY HAMILTON, ON THEIR OWN BEHALF AND *on behalf of* ALL OTHERS SIMILARLY SITUATED; DEBRA JENNEFER THAL JONAS, ON THEIR OWN BEHALF AND *on behalf of* ALL OTHERS SIMILARLY SITUATED; GENISE KINCANNON, ON THEIR OWN BEHALF AND *on behalf of* ALL OTHERS SIMILARLY SITUATED; SETH TURNBOUGH, ON THEIR OWN BEHALF AND *on behalf of* ALL OTHERS SIMILARLY SITUATED,

Plaintiffs—Appellants,

versus

UNITED AIRLINES, INCORPORATED,

Defendant—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 4:21-CV-1074

Before STEWART, HAYNES, and HO, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that Appellants' opposed motion for an injunction pending appeal is DENIED for the reasons stated in the district

court's Opinion & Order of November 8, 2021 and Orders of November 19, 2021 and November 23, 2021. *See, e.g.*, *Dr. A. v. Hochul*, No. 21A145, 2021 WL 5873126, 595 U.S. (Dec. 13, 2021).

IT IS FURTHER ORDERED that Appellants' alternative opposed motion to expedite the appeal is GRANTED.

JAMES C. HO, *Circuit Judge*, dissenting:

United Airlines claims that it made the "business judgment" that every employee must obtain a COVID-19 vaccine, no matter what religious objections they might have. But various United employees contend that their religious views about the vaccine are in fact none of the company's business.

So the employees filed suit under Title VII of the Civil Rights Act of 1964. They sought preliminary injunctive relief to avoid indefinite unpaid suspension as the company threatened. The district court denied that relief. The employees immediately filed this appeal.

Before us today is Plaintiffs' emergency motion for an injunction pending their appeal. Federal Rule of Appellate Procedure 8(a) permits us to grant such an injunction, provided that the plaintiffs show "(1) a strong likelihood of success on the merits; (2) irreparable injury in the absence of an injunction; (3) that the balance of hardships weighs in their favor if injunctive relief is granted; and (4) that the public interest favors such relief." *Whole Woman's Health v. Jackson*, 13 F.4th 434, 441 (5th Cir. 2021).

As to likelihood of success on the merits, I agree with the district court that Plaintiffs' claims "appear compelling and convincing at this stage."

First, Title VII of the Civil Rights Act of 1964 prohibits employers from discriminating on the basis of religion, 42 U.S.C. § 2000e–2(a)(1), and requires employers to make reasonable accommodations for "all aspects of" an employee's religious beliefs, absent "undue hardship on the conduct of the employer's business," 42 U.S.C. § 2000e(j). Yet United is imposing a vaccine mandate on its employees despite their sincere religious objections—despite the company's record admission that "there is virtually no chance to transmit COVID-19 on its planes" because "99% of its employees" are already vaccinated and federal regulations currently require all those on board to wear masks—and despite testimony that United currently allows

not only unvaccinated passengers but also unvaccinated flight crew from other airlines as well as their own unvaccinated foreign employees on board.[1]

Second, Title VII forbids employers from retaliating against employees who attempt to exercise their statutory rights. 42 U.S.C. § 2000e-3(a). Yet United's CEO, Scott Kirby, told employees in a company town hall meeting that "very few" religious exemptions to the vaccine mandate would be granted, and that anyone who even attempted to request one would be "putting [their] job on the line."

The district court thus concluded that "United's mandate . . . reflects an apathy, if not antipathy, for many of its employees' concerns and a dearth of toleration for those expressing diversity of thought." Through both its policy and its official statements to employees, United has demonstrated a "calloused approach to" and "apparent disdain for" people of faith.

But the district court denied preliminary injunctive relief on the ground that Plaintiffs could not demonstrate irreparable injury. On appeal, the parties likewise agree that the critical question before us today is whether Plaintiffs will suffer irreparable injury absent an injunction pending appeal.

I believe they will, so I would grant the injunction pending appeal.

I.

In a garden variety case of unlawful termination, the injury to the employee is the loss of a paycheck. That can be remedied by an award of monetary damages. So in the garden variety case, there is no irreparable injury and thus no injunctive relief. *See*, *e.g.*, *Garcia v. United States*, 680 F.2d 29, 31–32 (5th Cir. 1982) ("There is no provision in the law for injunctions

[1] Plaintiffs allege that the vaccines "were developed using aborted fetal tissue." United does not question the sincerity of Plaintiffs' religious objection in this proceeding.

against discharge in routine termination cases because the remedy by way of reinstatement and back pay is well established and is universally used.").

But this case is very different. United is not trying to fire anyone. Instead, the company is trying to make its employees obtain the COVID-19 vaccine, notwithstanding any religious objections they might have.

Forcing individuals to choose between their faith and their livelihood imposes an obvious and substantial burden on religion. Make no mistake: Vaccine mandates like the one United is attempting to impose here present a crisis of conscience for many people of faith. It forces them to choose between the two most profound obligations they will ever assume—holding true to their religious commitments and feeding and housing their children.

To many, this is the most horrifying of Hobson's choices. And it is a quintessentially irreparable injury, warranting preliminary injunctive relief.

Shortly before the first official case of COVID-19 appeared in the United States, our court decided a case involving a religious objection to another vaccine mandate. A firefighter objected to taking both the flu vaccine and the TDAP vaccine on religious grounds. The city granted his first request for a religious accommodation, but denied the second. I wrote that a vaccine mandate that does not take faith-based objections into account may substantially burden religious liberty by "forc[ing] citizens to choose between one's faith and one's livelihood." *Horvath v. City of Leander*, 946 F.3d 787, 799 (5th Cir. 2020) (Ho, J., concurring in the judgment in part and dissenting in part). The same underlying principles should apply here.[2]

[2] The *Horvath* panel reached a different judgment—hence my separate opinion—but only after noting that the employer there (unlike United) offered the firefighter another position (in code enforcement) with "the same salary and benefits." 946 F.3d at 792.

Indeed, just a few weeks ago, our court recognized that irreparable injury results when employees are forced to choose between their beliefs and their benefits. Our colleagues put it this way: "It is clear that a denial of the petitioners' proposed stay would do them irreparable harm," because the federal vaccine mandate "threatens to substantially burden the liberty interests of reluctant individual recipients put to a choice between their job(s) and their jab(s)" (or put another way, "no jab, no job"). *BST Holdings, L.L.C. v. OSHA*, 17 F.4th 604, 618 (5th Cir. 2021).

After all, the Supreme Court has repeatedly observed that forcing people to choose between their faith and their livelihoods "puts the same kind of burden upon the free exercise of religion as would a fine." *Sherbert v. Verner*, 374 U.S. 398, 404 (1963). *See also id.* (noting the "unmistakable" "pressure . . . to forego" one's religious practice by "forc[ing] [a worker] to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work"); *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 723 (2014) ("We doubt that the Congress . . . would have believed it a tolerable result to put family-run businesses to the choice of violating their sincerely held religious beliefs or making all of their employees lose their existing healthcare plans.").

II.

To be sure, the decisions cited above involve government mandates—not business-imposed mandates like the one presented here.

But to the person of faith who is forced to confront this challenge of conscience, what matters is not who imposed the mandate, but that the mandate conflicts with religious conviction.

And that's what matters when it comes to determining irreparable injury: We focus on the plaintiff—and our ability to remedy the plaintiff's

injury—not the identity of the defendant. As we've repeatedly observed, "Plaintiffs are entitled to a preliminary injunction if they show . . . a substantial threat that *they*"—meaning, the plaintiffs—"will suffer an irreparable injury if the injunction is not granted." *Doe I v. Landry*, 909 F.3d 99, 106 (5th Cir. 2018) (emphasis added).

Moreover, the Supreme Court has made clear that there are "extraordinary cases" in which "the circumstances surrounding an employee's discharge, together with the resultant effect on the employee, may so far depart from the normal situation that irreparable injury might be found." *Sampson v. Murray*, 415 U.S. 61, 92 n.68 (1974).

If this dispute does not present the "extraordinary case" warranting preliminary injunctive relief that the Supreme Court had in mind in *Sampson*, I don't know what case would. As the Second Circuit once observed, it does not matter if a claim of religious interference is "statutory rather than constitutional" in nature. *Jolly v. Coughlin*, 76 F.3d 468, 482 (2nd Cir. 1996). Either way, "the denial of the plaintiff's right to the free exercise of his religious beliefs is a harm that cannot be adequately compensated monetarily." *Id.*

I agree. And I would apply that same reasoning here. Whether the interference with religious conviction comes from the public or private sector, a person of faith suffers "a harm that cannot be adequately compensated monetarily." *Id.*

It is difficult to imagine how a crisis of conscience, whether instigated by government or industry, could be remedied by an award of monetary damages. Take this case: The person who acquiesces to United's mandate despite his faith doesn't lose any pay. But he will have to wrestle with self-doubt—questioning whether he has lived up to the calling of his faith. Likewise, the person who refuses must also wrestle with self-doubt—

questioning whether his faith has hurt his family, and whether living up to his commitments was worth sacrificing the interests of his loved ones.

To hypothesize that the earthly reward of monetary damages could compensate for these profound challenges of faith is to misunderstand the entire nature of religious conviction at its most foundational level. And that is so whether the mandate comes from D.C. or the C-Suite.

Finally, as if all this weren't enough, to top it all off, United is forcing this crisis of conscience on the eve of Christmas—one of the holiest times of the year, the season when Christians cherish devoting their hearts and souls to both faith and family alike, not to choosing between the two.[3]

* * *

Title VII was "intended to protect the same rights in private employment as the Constitution protects." *Riley v. Bendix Corp.*, 464 F.2d 1113, 1116 (5th Cir. 1972) (quotations omitted). And "[a]t the risk of belaboring the obvious, Title VII aimed to ensure that employees would *not* have to sacrifice their jobs to observe their religious practices." *Adeyeye v. Heartland Sweeteners*, 721 F.3d 444, 456 (7th Cir. 2013).

I would grant the injunction pending appeal. Accordingly, I dissent.[4]

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[3] As a result of company policy, Plaintiffs say that many employees will receive their final paychecks on December 15. Merry Christmas.

[4] Two of the employees also present claims under the Americans with Disabilities Act. But I do not address those claims here. The district court dismissed one employee's claims for lack of personal jurisdiction, because that employee neither lives nor works in Texas. And it is unclear to me whether the other employee has sufficiently alleged a covered disability. These issues can of course be decided in a future proceeding.