

Autocam Corp. v. Sebelius

United States Court of Appeals for the Sixth Circuit
December 28, 2012, Filed
No. 12-2673

Reporter: 2012 U.S. App. LEXIS 26736

AUTOCAM CORPORATION, et al., Plaintiffs-Appellants, v. KATHLEEN SEBELIUS, Secretary of the United States Department of Health and Human Services, et al., Defendants-Appellees.

Prior History: Autocam Corp. v. Sebelius, 2012 U.S. Dist. LEXIS 184093 (W.D. Mich., Dec. 24, 2012)

Counsel: [*1] For CYRIL B. KORTE, JANE E. KORTE, KORTE AND LUITJOHAN CONTRACTORS, INCORPORATED, Plaintiffs - Appellants: Edward Lawrence White, Attorney, AMERICAN CENTER FOR LAW & JUSTICE, Ann Arbor, MI.

For KATHLEEN SEBELIUS, in her official capacity as the Secretary of the United States Department of Health and Human Services, UNITED STATES DEPARTMENT OF THE TREASURY, TIMOTHY F. GEITHNER, in his official capacity as the Secretary of the United States Department of the Treasury, UNITED STATES DEPARTMENT OF LABOR, HILDA L. SOLIS, in her official capacity as Secretary of the United States Department of Labor, UNITED STATES DEPARTMENT OF HEALTH & HUMAN SERVICES, Defendants - Appellees: Bradley Phillip Humphreys, DEPARTMENT OF JUSTICE, Civil Division, Federal Programs Branch, Washington, DC; Alisa B. Klein, Attorney, DEPARTMENT OF JUSTICE, Civil Division, Appellate Staff, Washington, DC.

Judges: Before: MOORE, ROGERS, and GRIF-FIN, Circuit Judges. ROGERS, J., dissenting.

Opinion

ORDER

Autocam Corporation, Autocam Medical, and their owners appeal the denial of a preliminary injunction in their action before the district court challenging the implementation of the contraception-coverage provisions in the Patient Protection [*2] and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (the "ACA"), under the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.* ("RFRA"). The plaintiffs move for an injunction pending appeal and to expedite the appeal.

Federal Rule of Appellate Procedure 8(a)(2) authorizes us to grant an injunction pending appeal. "In granting such an injunction, the Court is to engage in the same analysis that it does in reviewing the grant or denial of a motion for a preliminary injunction." *Id.* The relevant factors are: "(1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction." Overstreet v. Lexington-Fayette Urban Cnty. Gov't, 305 F.3d 566, 573 (6th Cir. 2002); *see also* Baker v. Adams Cnty./Ohio Valley Sch. Bd., 310 F.3d 927, 928 (2002).

To demonstrate [*3] a likelihood of success on appeal, "[i]t is not enough that the chance of success on the merits be better than negli-

gible." *Nken v. Holder*, 556 U.S. 418, 434, 129 S. Ct. 1749, 173 L. Ed. 2d 550 (2009) (internal quotation marks and citation omitted). Instead, "[m]ore than a mere possibility of relief is required." *Id.* (internal quotation marks and citation omitted).

The Supreme Court has never considered similar RFRA or free-exercise claims. *Hobby Lobby Stores, Inc. v. Sebelius*, 133 S. Ct. 641, 184 L. Ed. 2d 448, 2012 WL 6698888 (2012). But, applying a more demanding standard, it denied an injunction pending appeal in a case involving similar issues. *Id.* No circuit court has considered these claims. Although no district court has issued a final decision on these issues, the district courts that have considered whether to grant a preliminary injunction on similar claims have issued conflicting decisions. Compare *Korte*, 2012 U.S. Dist. LEXIS 177101, 2012 WL 6553996, at *6-11 (denying a preliminary injunction), *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1290-96 (W.D. Okla. 2012) (same), with *Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635, 2012 U.S. Dist. LEXIS 163965, 2012 WL 5817323, at *10-18 (D.D.C. Nov. 16, 2012) (granting a preliminary injunction), *Legatus v. Sebelius*, No. 12-12061, 2012 U.S. Dist. LEXIS 156144, 2012 WL 5359630, at *6-13 (E.D. Mich. Oct. 31, 2012) [*4] (same), and *Newland v. Sebelius*, No. 1:12-cv-1123, 2012 U.S. Dist. LEXIS 104835, 2012 WL 3069154, at *5-8 (D. Colo. July 27, 2012) (same). Certainly, the divergence of opinion by the district courts establishes the possibility of success on the merits. But, in light of the lower court's reasoned opinion in this case and the Supreme Court's recent denial of an injunction pending appeal in *Hobby Lobby*, the plaintiffs have not demonstrated more than a possibility of relief. See *Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22, 129 S. Ct. 365, 172 L. Ed. 2d 249 (2008) (parsing the meaning of "likely" relative to the "irreparable harm" requirement for issuance of a preliminary injunction).

The denial of an injunction can "cause irreparable harm if the claim is based upon a violation of the plaintiff's constitutional rights."

Overstreet v. Lexington-Fayette Urban Cnty. Gov't, 305 F.3d 566, 578 (6th Cir. 2002). But, as discussed above, it is not clear that the contraceptive requirement violates the plaintiffs' constitutional rights. And purely monetary damages generally do not warrant an injunction. *Id.* at 578-79. Further, the district court noted that the contraceptive requirement was codified as a tax, which if it is, would bar its preliminary [*5] or permanent enjoinder. 26 U.S.C. § 7421(a); see also *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583, 183 L. Ed. 2d 450 (2012). The remaining factors do not weigh in favor of either side.

The plaintiffs also move to expedite the appeal. The appeal focuses on purely legal issues that have already been briefed below. Further, the district court's decision on appeal conflicts with another district court's decision in this circuit. See *Legatus v. Sebelius*, No. 12-12061, 2012 U.S. Dist. LEXIS 156144, 2012 WL 5359630, at *6-13 (E.D. Mich. Oct. 31, 2012) (granting a preliminary injunction on similar issues). Under these circumstances, it is prudent to expedite consideration of the issues on appeal.

The motion for an injunction pending appeal is **DENIED**. The motion to expedite the appeal is **GRANTED**, and the clerk shall expedite this appeal for briefing and submission.

Dissent by: ROGERS

Dissent

ROGERS, J., dissenting.

I would grant the injunction pending appeal, for the following reasons.

There is a reasonable likelihood of success on the merits for the plaintiffs in this case on their RFRA claim, essentially for the reasons given in *Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635, 2012 U.S. Dist. LEXIS 163965, 2012 WL 5817323, at *10-18 (D.D.C. Nov. 16, 2012). See also [*6] *Newland v. Sebelius*, No. 1:12-cv-1123, 2012 U.S. Dist. LEXIS 104835, 2012 WL 3069154, at *5-8 (D. Colo. July

27, 2012).

Both RFRA and the applicable standard for a preliminary injunction in this case require in some sense a balancing between the burden on the religious conscience of plaintiffs and the interests furthered by the regulation in question. Plaintiffs assert that it would violate their sincere religious beliefs to direct the company that they control to cut checks to pay directly for contraceptive services. They are okay, however, with giving discretionary health-care money to their employees, who may then choose to buy such services. If walking this fine line is sincerely accepted as a condition for salvation, it is not up to the government to say that the line is too fine. Lots of religious lines are fine. Of course government is not bound by every religious fine line. But RFRA requires that the government interest be strong before forcing people to cross the line.

At this stage of this litigation, the government interest does not appear particularly weighty. Arguments about the government's interest in the consistent application of the law lack force

where the Government has apparently not appealed or [*7] requested a stay in a similar case in which a preliminary injunction was entered. Legatus v. Sebelius, No. 12-12061, 2012 U.S. Dist. LEXIS 156144, 2012 WL 5359630, at *6-13 (E.D. Mich. Oct. 31, 2012). Also, we are not informed that the Government has sought or obtained a stay in two other very similar cases where a preliminary injunction has been entered (Tyndale, supra; and Newland, supra). Moreover, the interests of the employees in obtaining contraceptive services do not appear weighty in the context of this case, where such services can be paid for through individual health care accounts provided by the employer.

The burden on the plaintiffs, assuming their sincerity, is in contrast large. It is that they must take a chance on huge fines or act contrary to their conscience.

For these reasons, I would grant the injunction against the enforcement of the regulation in question pending appeal. Because the majority denies the injunction pending appeal, I agree that the appeal should be expedited.