Honorable Ricardo S. Martinez

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CHERYL ENSTAD et al.,

Plaintiffs,

vs.

PEACEHEALTH,

Defendant.

No. 2:17−cv−01496−RSM

DEFENDANT PEACEHEALTH'S OPPOSITION TO PLAINTIFFS' MOTION TO CERTIFY QUESTIONS TO THE WASHINGTON SUPREME COURT

Note on Motion Calendar: February 23, 2018

Location: 13206
Judge: Hon. Ricardo S. Martinez

Complaint Filed: October 5, 2017

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I. INTRODUCTION

The Court should deny Plaintiffs' motion to certify questions to the Washington Supreme Court because the motion fails to establish that certification is appropriate as to any of the proposed questions. The applicable law can be determined by this Court and the questions are not case dispositive. Because the sex change surgery sought by Plaintiffs was not medically necessary or appropriate for Pax Enstad ("Pax"), who was 16 years old, Plaintiffs cannot state any claim and there is no need to consider the questions posed by Plaintiffs. Moreover, Plaintiffs cannot state a claim under the WLAD for the reasons set forth in the briefs on the Motion to Dismiss. Plaintiffs want an escape hatch if this Court concludes, as PeaceHealth has argued, that Plaintiffs have failed to state a claim. Even Plaintiffs concede that the "precedents are clear." (Motion to Certify, 2:25-2:1.)

Plaintiffs' Complaint alleges that PeaceHealth is a Catholic health system, that the medical plan is a church plan and that PeaceHealth based its action on "moral disapproval" of the procedure. Accepting these allegations as true, Washington law is clear that a religious employer such as PeaceHealth cannot be required to pay for the service at issue. Under applicable precedents, including *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769 (2014), PeaceHealth is clearly an exempt religious employer. This is not a close question. [1]

Nor is there any basis for this Court or the Washington Supreme Court to find that there is a new cause of action under the WLAD against PeaceHealth under the guise of discrimination related to an employment "contract" or because Pax is a beneficiary of a self-funded medical plan. No employment contract is alleged, and Pax cannot state a claim under the WLAD against a religious employer for discrimination based upon the employer's alleged moral disapproval of sex change surgery. That is the very point of the exemption.

II. THE COURT SHOULD DENY PLAINTIFFS' MOTION TO CERTIFY.

A. Legal Standard.

"When in the opinion of any federal court before whom a proceeding is pending, it is

[1] The question of whether a party is a religious organization may be resolved as a matter of law. *See Farnam v CRISTA Ministries*, 116 Wn.2d 659, 678 (1991); *Hazen v. Catholic Credit Union*, 37 Wn.App. 502, 503 (1984).

necessary to ascertain the local law of this state in order to dispose of such proceeding and the local law has not been clearly determined, such federal court may certify to the supreme court for answer the question of local law involved and the supreme court shall render its opinion in answer thereto." RCW § 2.60.020. Further, under Washington's Rules of Appellate Procedure 16.16, the Supreme Court may entertain a petition to determine a question of law certified to it under the Federal Court Local Law Certificate Procedures Act if the question of state law is one which has not been clearly determined and does not involve a question determined by reference to the United States Constitution.

As discussed below, Plaintiffs' certification motion fails to establish that any of the proposed questions meet these legal requirements for certification. Among other things, the local law is ascertainable, this Court is equally able to apply Washington law, and the proposed questions are not case dispositive. Moreover, Plaintiffs' questions, which bear upon PeaceHealth's Free Exercise rights under the First Amendment, plainly require reference to the United States Constitution. In *Ockletree v. Franciscan Health System*, 2012 WL 6146673, * 7 (W.D. Wash. 2012), the District Court recognized that there were no cases "construing the religious exemption . . . where the alleged discrimination has nothing to do with any religious purpose or activity." Here, PeaceHealth is a religiously affiliated employer and Plaintiffs admit that the employment action taken related to its religious beliefs. (Complaint, ¶¶ 4, 70). Moreover, the Washington Supreme Court's decision in *Ockletree* itself provides guidance to this Court, making a second certification unnecessary. *See Ockletree*, 179 Wn.2d 769 (discussed in detail below).

The decision to certify a question rests in the sound discretion of the trial court. *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). Certification is not required simply because "there is doubt as to local law and [] the certification procedure is available." *Id.*; *see also Riordan v. State Farm Mut. Auto. Ins. Co.*, 589 F.3d 999, 1009 (9th Cir. 2009). "Federal courts are not precluded from affording relief simply because neither the state Supreme Court nor the state legislature has enunciated a clear rule governing a particular type of controversy." *Paul v. Watchtower Bible & Tract Soc. of New York, Inc.*, 819 F.2d 875, 879 (9th Cir. 1987) (noting that such policy would

provide litigants an incentive to forum shop); *see also Dex Media W., Inc. v. City of Seattle*, No. C10-1857JLR, 2011 WL 4352121, at *18 (W.D. Wash. Sept. 16, 2011) ("had Plaintiffs wanted a state court to consider their many state law claims, they could have easily filed this lawsuit in state court originally").

Although certification may be proper when a federal court is asked to "divine 'distant' state law as an 'outsider []' lacking the common exposure to local law," or where the Court is asked to interpret statutory language, such issues are not present when a district court sitting in Washington is asked to interpret Washington law. *FMC Techs., Inc. v. Edwards, No*. C05-946C, 2006 WL 521665, at *3 (W.D. Wash. Mar. 2, 2006). "Certification is not appropriate where the state court is in no better position than the federal court to interpret the state statute" *Micomonaco v. State of Wash.*, 45 F.3d 316, 322 (9th Cir. 1995) (denying request to certify to the Washington Supreme Court where federal court had repeatedly applied the legal test at issue).

A Westlaw search for "WLAD" shows the term has been referenced in over 500 district court cases in the Western District of Washington. This Court alone has heard dozens of WLAD cases, and had no difficulty applying WLAD's exemption for non-profit religious employers. *Salina v. Providence Hospice of Seattle*, No. C02-2559RSM, 2005 WL 5912105, at *4 (W.D. Wash. Apr. 11, 2005), *aff'd*, 226 F. App'x 653 (9th Cir. 2007) (hospice worker's disability claim under WLAD barred by religious exemption). This case similarly raises no novel issues or issues of distant state law that warrant certification of questions to the Washington Supreme Court.[2]

[2] Thus, federal courts sitting in Washington have refused to certify questions where the legal issues have already been decided by courts in the same District. *See Mendis v. Schneider Nat'l Carriers Inc*, No. C15-0144-JCC, 2016 WL 6650992, at *4 (W.D. Wash. Nov. 10, 2016) (denying certification where the "Court has already issued a decision on point"); *Cent. Puget Sound Reg'l Transit Auth. v. Lexington Ins. Co.*, No. C14-778 MJP, 2014 WL 5859321, at *3 (W.D. Wash. Nov. 12, 2014) ("This question has been considered, and ruled on, twice by this Court. Although the moving party here was not involved in the earlier rulings, the issue is not unsettled."); *Frias v. Asset Foreclosures Servs., Inc*., 957 F. Supp. 2d 1264, 1269 (W.D. Wash. 2013) ("Because the courts in this District have already answered the questions Plaintiff seeks to certify to the Washington Supreme Court, the motion to certify is DENIED."); *cf. Silvers v. U.S. Bank Nat. Ass'n,* No. 15-5480 RJB, 2015 WL 5024173, at *4 (W.D. Wash. Aug. 25, 2015) ("Plaintiff failed to show that such a certification should be made. Washington law regarding the[issue] has been determined.").

B. There are Clear Answers to Plaintiffs' Questions.

1. **Certification is Not Needed to Answer Plaintiffs' First Question Regarding *Ockletree*.**

Plaintiffs' first proposed question is whether the exclusion of religiously affiliated employers from the definition of "employer" in RCW 49.60.040(11) "applies when the organization employs a person in a non-ministerial position." (Motion to Dismiss, 2). As an initial matter, there is no statutory basis for any such reading. Under the statute, "'Employer' includes any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons, and *does not include any religious or sectarian organization not organized for private profit*." RCW 49.60.040(11) (emphasis added). The statute's plain language imposes no limit on the definition of "employer" that depends in any way on the position of the employee. Moreover, Plaintiffs have failed to establish that there is any serious doubt regarding how a Washington court would interpret the statute or that this Court cannot appropriately apply the Washington Supreme Court's decision in *Ockletree,* 179 Wn.2d 769 (2014).

As noted above, the District Court certified a question in that case *because no cases had dealt with a situation in which the alleged discrimination had nothing to do with a religious purpose or activity*. While that is not the case here – because Cheryl Enstad's employment as a social worker in a PeaceHealth hospice clearly relates to PeaceHealth's religious mission[3] – the *Ockletree* decision itself informs this Court regarding the applicable law. *See also Salina*, No. C02-2559RSM, 2005 WL 5912105, at *4, *aff'd*, 226 F. App'x 653 (9th Cir. 2007) (hospice worker's disability claim under WLAD barred by religious exemption); *Farnam v. CRISTA Ministries*, 116 Wn.2d 659, 680-81 (applying exemption to nursing home employee).

As discussed in PeaceHealth's Motion to Dismiss and Reply, all three of the opinions in *Ockletree* support dismissal of Plaintiffs' WLAD claims in this case. Chief Justice Johnson's opinion joined by three other justices found that the religious employer exemption should be applied even where (unlike the present case) the employee's job had no relationship to a religious purpose or activity. *Ockletree*, 179 Wn.2d at 785 ("the religious employer exemption satisfies the

[3] See Reply, 9.

reasonable ground test because it similarly accommodates the broad protections to religious freedoms afforded by Washington's article I, section 11"). Indeed, Justice Johnson's opinion noted the importance of the WLAD's religious exemption given the WLAD's extension of protection to "sexual orientation[and] gender identity." *Id*.

Although Justice Stephens joined by three justices dissented from the very broad lead opinion, the dissenting Justices were concerned that "[a]s applied to Ockletree, the WLAD exemption immunizes FHS from potential liability for employment discrimination *based on grounds unrelated to its religious beliefs or practice*." *Id.* at 804 (emphasis added). Likewise, Justice Wiggins, in his opinion agreeing with the lead opinion and concurring in part with the dissenting opinion, also focused on the lack of a nexus between Ockletree's termination based upon disability and the defendant's religious practices. *Id.* at 806.[4] Justice Wiggins agreed with the dissent regarding Ockletree, whose job had no relationship to a religious purpose or activity.

However, there is no reason to think that the concerns of the dissenting Justices are limited to the specific employment context that arose in *Ockletree* or that the appropriate nexus with religion can only be present if the plaintiff's job relates to the religious purpose of the organization. The dissenters were concerned with the issue that gave rise to the District Court's original certification – whether the Constitution limited the application of the exemption "where the alleged discrimination has nothing to do with any religious purpose or activity." *Ockletree*, 2012 WL at * 7. Here, that is not an issue. Plaintiffs' have pled that PeaceHealth is a Catholic health system that objected on moral grounds to paying for sex change surgery for a 16 year old. The necessary religious nexus is thus pled right in the Complaint. In light of the admitted nexus, there is no substantial question regarding the application of *Ockletree* as to which this Court requires the aid of the Washington Supreme Court.

Here, the question is whether the WLAD's religious employer exemption applies to a discrimination claim based upon a religious employer's benefit policy, which Plaintiffs allege is grounded in the employer's religious beliefs. (Complaint, ¶ 70.) The answer is clearly "yes"

[4] Justice Wiggins's concern that application of the exemption itself may result in excessive entanglement is simply not present in a case where the Plaintiffs admit that the challenged policy is based upon the employer's religious beliefs. *Id.* at 805-06.

based upon existing Washington law. Plaintiffs admit the essential nexus between PeaceHealth's religious beliefs and the alleged wrongful conduct: "PeaceHealth is a Catholic healthcare organization" whose medical plan exclusion of sex change surgery and related services "is based on moral disapproval . . . transgender people and gender transition." (Complaint, ¶¶ 4 and 70.) Plaintiffs further allege that the case involves an employee benefit plan, which is a "church plan," exempt from ERISA, which means that it is "a plan established and maintained … by a church or by a convention or association of churches which is exempt from tax under section 501 of title 26." 29 U.S.C. §1002(33)(A); Complaint, Ex. A, p. 9. On a motion to dismiss, the Court accepts these allegations as true. Thus, Plaintiffs admit the nexus required by all three opinions in *Ockletree* and no further clarification is necessary or warranted in this case. Certification would merely create unnecessary delay and would be a waste of judicial resources.

This conclusion is further buttressed by RCW § 48.43.065, which specifically provides that: (1) no "healthcare facility may be required by law or contract in any circumstances to participate in the provision or payment of a specific service if they object to so doing for reason of conscience or religion," and (2) "No individual or organization with a religious or moral tenet opposed to a specific service may be required to purchase coverage for that service or services if they object to doing so for reason of conscience or religion." RCW § 48.43.065(2)(a) and (3)(a). Plaintiffs' Complaint alleges the surgical procedure was denied by PeaceHealth, a Catholic hospital system, based upon "moral disapproval." Accepting these allegations, Washington law clearly prohibits PeaceHealth from being required to pay for the procedure.

2. **Certification is Not Needed to Answer Plaintiffs' Second Question Regarding the Scope of the WLAD.**

Plaintiffs' second question concerns whether an employee's discrimination claim under the WLAD can be based upon the gender identity of a dependent or beneficiary. For several reasons, this question need not be answered at all. First, because (as discussed above) PeaceHealth is exempt from the WLAD, Plaintiffs have no employment discrimination claim under the WLAD and so this question needs no answer . Second, as discussed in PeaceHealth's Motion to Dismiss, for multiple reasons, Plaintiffs fail to allege a valid discrimination claim.

(Motion to Dismiss, 7-15.) For example, Plaintiffs fail adequately to plead that chest surgery was medically necessary for Pax, a precondition to any claim of discrimination.

Second, Plaintiffs' certification motion fails to establish that Washington law is uncertain on the proffered question. RCW 49.60.180(3) provides that it is unlawful "to discriminate against any person in compensation or in other terms or conditions of employment because of . . . sex" and the applicable regulations make it clear that this applies to the employee. The regulations promulgated by the Washington Human Rights Commission ("WHRC"), which Plaintiffs ignore, show that the WLAD does not permit "associational discrimination" claims.

Instead, an employee's claim must be based upon the *employee's* gender identity[5] and not the gender identity of someone else. Wash. Admin. Code §§ 162-32-010 ("This chapter interprets and implements the sexual orientation and gender expression and gender identity discrimination protections of RCW 49.60.030, 49.60.180, and 49.60.215 and provides guidance regarding certain specific forms of sexual orientation and gender expression and gender identity discrimination"); Wash. Admin. Code 162-32-030 ("Employee benefits provided in whole or in part by an employer must be consistent between all employees and equal for all employees, regardless of *the employee's* sexual orientation or gender expression or gender identity") (emphasis added). Thus, the regulations already make clear that employment discrimination claims based upon employee benefits may only be based upon alleged discrimination based upon the employee's sexual orientation. The question does not need to be certified because it has already been answered and

[5] Plaintiffs claim that this case "potentially affects swaths of workers" is simply false. This is not a case that involves a significant policy issue that will have broad effect like the manufacture and sale of products in Washington, or the duty of care owed to invitees by business owners. *See, e.g., Hill v. Xerox Bus. Serv., LLC*, 868 F.3d 868 (9th Cir. 2017) (unpaid wages under the Washington Minimum Wage Act); *McKown v. Simon Property Group, Inc.,* 689 F.3d 1086 (9th Cir. 2012) (business owner duties to invitees); *Bylsma v. Burger King Corp.*, 676 F.3d 779 (9th Cir. 2012) (product liability). A study by The Williams Institute at UCLA Law School, which is dedicated to conducting rigorous, independent research on sexual orientation and gender identity law and public policy, estimates that transgender individuals account for approximately .61% of the population of Washington state. https://williamsinstitute.law.ucla.edu/wp-content/uploads/How-Many-Adults-Identify-as-Transgender-in-the-United-States.pdf. Moreover, the National Center for Transgender Equality reports that "Of respondents who had female on their original birth certificates, 21% had a chest reduction or reconstruction and 8% had a hysterectomy. Only 2% reported having any genital surgery." https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf at p. 101. In other words, Plaintiffs raise an issue that affects around 0.1% of Washington citizens.

this Court can and will apply the law.

Plaintiffs also misrepresent the holding in *Sedlacek v. Hillis*, 145 Wn.2d 379 (2001) . In *Sedlacek*, the Washington Supreme Court made clear that "the Legislature has not extended the WLAD to include a prohibition against association discrimination." *Id.* at 391. While *Sedlacek* involved a wrongful discharge claim, the Court's analysis of WLAD was based upon the regulations promulgated by the WHRC, which make clear that WLAD claims must be based upon discrimination to disabled persons or employees themselves. *Id.*

3. **Certification is Not Needed to Answer Plaintiffs' Third Question Regarding *Marquis*.**

Plaintiffs' third question concerns whether "under *Marquis v. City of Spokane*, 130 Wash.2d 97 (1996), the WLAD protects the beneficiary of an employer provided insurance policy from discrimination in the making and performance of contracts." For multiple reasons, there is no basis to certify this question.

As an initial matter, as discussed in the Motion, Plaintiffs have failed to allege that the medical plan is an employment contract. (Motion to Dismiss, 23). The Plan itself, which is attached to Plaintiffs' complaint, expressly says that it is "NOT A CONTRACT." (Complaint, Ex. A, p. 8 ("The Plan Document shall not be deemed to constitute a contract of any type between the Company and Participant . . . ."). Nor is the Plan "insurance" as stated by Plaintiffs' question. The Plan is a self-funded church plan, which is exempt from ERISA. (Complaint, ¶¶ 39-40 and Exh. A, p. 9).

Marquis involved whether an independent contractor is protected from discrimination under the WLAD. There is no independent contractor issue in this case. To the extent that *Marquis* indicates a potential grounds for an expansion of the scope of the WLAD to include additional relationships, Plaintiffs have failed to establish that this rationale includes an action by the beneficiaries of a self-funded church plan. See Reply, 11 (discussing application of the rule of "ejusdem generis" to interpretation of the WLAD); *see, e.g., Malo v. Alaska Trawl Fisheries, Inc*., 92 Wn.2d 927, 930 (1998); *State v. Stockton*, 97 Wn.2d 528, 532 (1982)(this rule "requires that general terms appearing in a statute in connection with specific terms are to be given

meaning and effect only to the extent that the general terms suggest items similar to those designated by the specific terms. In short, specific terms modify or restrict the application of general terms where both are used in sequence") (citation omitted).

Plaintiffs admit that "[a] beneficiary of a contract holds the same right to enforcement of the contract as the contracting party themselves." (Opp. to Motion to Dismiss, 23:20-23, *citing J.T. v. Regence BlueShield*, 291 F.R.D. 601, 609 (W.D. Wash 2013).) Therefore, because Cheryl Enstad's claim is barred by the religious employer exemption, Pax's claim – based upon "the same rights" as his mother – is also barred.

Finally, *Marquis* expressly recognizes that there is no violation of the WLAD when, as here, every employee is offered the same health plan. *Marquis*, 130 Wn.2d at 114 ("We agree that a plaintiff would be unable to show that he or she was offered a contract under terms less favorable than those offered to members of the opposite sex where the same contract is offered to all").

III. CONCLUSION.

For the foregoing reasons, the Court should deny Plaintiffs' motion to certify questions to the Washington Supreme Court.

Dated: February 20, 2018

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CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of February 2018, I electronically filed the foregoing

DEFENDANT PEACEHEALTH'S OPPOSITION TO PLAINTIFFS' MOTION TO CERTIFY QUESTIONS TO THE WASHINGTON SUPREME COURT

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