UNITED STATES DISTRICT COURT
DISTRICT OF NORTH DAKOTA
EASTERN DIVISION

THE RELIGIOUS SISTERS OF MERCY, *et al.* Plaintiffs v. THOMAS E. PRICE, M.D., Secretary of the United States Department of Health and Human Services, *et al.* Defendants	)	Case No. 3:16-cv-00386
CATHOLIC BENEFITS ASSOCIATION, *et al.,* Plaintiffs v. THOMAS E. PRICE, M.D., Secretary of the United States Department of Health and Human Services; UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; Victoria Lipnic, Acting Chair of the United States Equal Employment Opportunity Commission; and UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION Defendants	)	Case No. 3:16-cv-00432

CBA PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR ADDITIONAL STAY

INTRODUCTION

The Catholic Benefits Association Plaintiffs[1] have presumed that the Court would decide is request for temporary injunctive relief against Defendants HHS and EEOC under the well-established *Dataphase* test. Alongside their Verified Complaint, the CBA Plaintiffs filed a motion for temporary restraining order and brief that presents a full argument on the merits. The CBA Plaintiffs have referred back to these arguments in subsequent briefs. But this Court—both under Judge Erickson and now Judge Hovland—has chosen instead to manage this case using the Court's inherent authority to work for the orderly and expeditious disposition of cases. The CBA Plaintiffs have no objections to either approach, so long as the Court hears their arguments against both HHS and EEOC and so long as the Court's approach does not prejudice the CBA and its members.

Unfortunately, the government's proposed stay and remand would stop the Court from addressing the CBA Plaintiffs' claims against EEOC and would thereby prejudice the CBA Plaintiffs. Freezing the case at this point would give HHS leave to reconsider its gender transition coverage mandate, but would leave EEOC free to enforce this same mandate with impunity—just as HHS describes in its 1557 Rule—all while depriving the CBA and its members of recourse to this Court.

The CBA Plaintiffs' recent motion proposes a different course: before entering a stay or remand, the Court should enter a temporary stay of enforcement ("TSE") against EEOC. Dkt. 46. EEOC's protests notwithstanding, there is nothing improper or furtive about the CBA's request. The Court has the inherent authority to grant such relief, as it has already done twice in this case. Nor is the CBA's motion an attempt to evade review under the *Dataphase* test. Should the Court examine the CBA's request for a TRO against EEOC, the CBA is confident it would prevail. Further, the EEOC Statement is a legislative rule that is ripe for review, just like HHS's 1557 Rule.

Finally, the CBA's need for relief from EEOC is more pressing now than it has ever been.

[1] The named plaintiffs in the Catholic Benefits Association's ("CBA") Amended Verified Complaint are referred to herein collectively as "the CBA Plaintiffs." *See* CBA's Mot. for Add'l Stay, Dkt. 46, at 2 n.1.

Now that HHS is enjoined from bringing enforcement actions against CBA members, the EEOC will be receiving all of their gender transition coverage complaints as well. And if the Court grants the government's request for a remand, CBA members do not believe they will have recourse to this Court if and when those EEOC enforcement actions come.

The CBA is not opposed in principle to the government's request for a stay and remand. It is better that HHS and EEOC repeal their illegal rules on their own. The Court should give both agencies the same incentive to pull back their aggressive interpretations of federal civil rights laws. But the CBA agrees with EEOC that the Court should not decide this case piecemeal. CBA members should have protection against both parts of the tag-team that forms the ACTS Mandate.

For all these reasons, the CBA asks the Court to grant its motion and extend its temporary stay of enforcement to EEOC before it gives the government leave to amend their rules.

A. This Court has the inherent authority to issue a temporary stay of enforcement against EEOC.

The EEOC first argues that the Court should reject the CBA's "novel motion" for a TSE because the CBA's motion does not cite Rule 65. Dkt. 51 at 2. But the TSE the CBA Plaintiffs seek is no different than the two enforcement stays issued in this case—and, for that matter, the government's pending request for a stay and remand. There is nothing improper or furtive about the CBA's request for a TSE, which simply appeals to this Court's inherent authority to oversee the orderly and expeditious disposition of cases.

District courts possess inherent powers "to manage [their] own affairs so as to achieve the orderly and expeditious disposition of cases." *Wolfchild v. Redwood*, 824 F.3d 761, 771 (8th Cir. 2016). A court may exercise these powers to reasonably address "the problems and needs confronting the court's fair administration of justice," so long as the Court's actions do not violate any rule[2] or

[2] The federal rules are intended "to secure the just, speedy, and inexpensive determination of every action;" the application of this rule "is left largely to the discretion of the trial court." Fed. R. Civ. Proc. 1; *Vernor's Ginger Ale v. Hires-Ideal Bottling Co.*, 8 F.R.D. 240, 241 (D. Neb. 1948).

statute. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991); *see also* Fed. R. Civ. Proc. 83(b) (districts courts can "regulate [their] practice in any manner consistent with federal law"). Among these inherent powers is the Court's ability to modify its orders at any point prior to final judgment. *Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016).

This case is a good example of how this inherent authority works in practice. On December 29, 2016, Judge Erickson issued an order staying enforcement of HHS's 1557 Rule. The order did not cite any authority, but simply granting a stay "until such time as a hearing can be held" on the pending motions, including the CBA's motion for a TRO. Dkt. 23 at 2. The government objected to the scope of this order, but not the Court's authority to enter it. Dkt. 26. This Court issued another order on January 23 extending this "injunctive relief" without making formal findings on the *Dataphase* factors. Dkt. 36. Again, the government did not protest that the Court's stay of enforcement is invalid without proof, briefing, or argument on the *Dataphase* factors.

Furthermore, the government *itself* has now asked the Court to extend its TSE without briefing the *Dataphase* factors. Instead, the government's motion merely suggests that extending this stay "would preserve the Court's scare resources," invoking "the principle of judicial economy." Dkt. 45 at 5 (citations omitted).

The CBA agrees that the Court has discretion to grant the government's motion for a stay and remand. The CBA merely asks that, before the Court does so, it first take note of the cloud that EEOC still casts over the CBA's member-employers and issue a TSE that protects these members from EEOC enforcement actions, just like the Court's stays against HHS. *See* Dkt. 46 at 3, 8.

B. The CBA's motion for a stay is rooted in its pending motion for a TRO.

EEOC casts aspersion on the CBA's motion for a TSE, claiming that the CBA has "effectively concede[d]" that "*even if* [the CBA] *were* to file a proper motion for injunction against EEOC, it would fail." Dkt. 51 at 3 (emphasis added). But the CBA *has* filed such a motion. Its request for a stay repeatedly refers the Court to its "legal arguments against the HHS 1557 Rule and

the EEOC Statement," which are set out in its motion for a TRO, Dkt. 46 at 8, a motion that remains pending before this Court.

Contrary to EEOC's opposition brief, the CBA has argued each of the *Dataphase* factors as to the EEOC Statement and those arguments are strong. As for the first factor, likelihood of success on the merits, the CBA's legal arguments against EEOC's Statement are "virtually identical" to its arguments against HHS's 1557 Rule. Dkt. 46 at 7-9 (citing CBA TRO Br. at 5, 8-10, 12-19). That is why the CBA suggests that its entire case "stands or falls" on how the Court views its arguments against HHS. CBA TRO Br. at 8. Because this Court has endorsed the *Franciscan Alliance* decision, *see* Dkt. 46 at 8, and because Title VII and IX are to be treated interchangeably, *see* CBA TRO Br. at 4, it follows that the CBA is likely to succeed on its claims against the EEOC Statement.

As for the other *Dataphase* factors, EEOC incorrectly claims that the CBA's TRO brief only addresses these tests as to the HHS rule. *See* Dkt. 51 at 2 n.1. The CBA's arguments are focused on the government's *joint* ACTS Mandate,[3] and thus apply to HHS and EEOC. CBA TRO Br. at 20. Again, the EEOC is wrong to suggest that the CBA has "effectively conceded" the irreparable harm prong. Dkt. 51 at 3. As the CBA has shown, irreparable harm follows as a matter of law as soon as the Court finds that the EEOC has violated the APA or RFRA. *Id.* The remaining two *Dataphase* factors are likewise straightforward—as to both HHS and EEOC. *Id.*

EEOC claims in its opposition brief that the CBA is trying to hide from its legal burden under Rule 65, but the truth runs the other way. EEOC now "respectfully request[s] the opportunity to respond to any proper motion for an injunction against the EEOC," Dkt. 51 at 3 n.1, but EEOC *had* that chance when the CBA filed its motion for TRO, and it *passed* on it. *See* Defs.' Resp. to CBA's Mot. for TRO, Dkt. 5, No. 3:16-cv-432. Since then, the CBA has repeatedly referenced its

[3] Page 2 of the CBA's TRO brief introduces the term "ACTS Mandate" (**A**bortion and **C**omprehensive **T**ransgender **S**ervices Mandate) to capture HHS's and EEOC's coordinated efforts to force even religious employers to provide gender transition coverage in their sponsored health plans.

arguments against the EEOC Statement,[4] but EEOC has stayed silent each time. Only in late May, in HHS's request for a stay and remand, did EEOC speak up for the first time—but only to urge the Court "not" to "adjudicate the CBA Plaintiffs' claims against the EEOC." Dkt. 45 at 5 n.3. And now, after the CBA has renewed its request for relief against EEOC, has the EEOC filed its first brief, only to accuse *the CBA* of trying to pull one over on the Court. Dkt. 51, *passim*.

The CBA remains eager for the Court to assess its claims against EEOC. In contrast, the EEOC's opposition brief continues its attempt to avoid accountability in this case.

C. The CBA's claims against EEOC are justiciable.

EEOC also seeks to avoid this Court's scrutiny by arguing that the CBA's challenge is not justiciable: it claims that the CBA's challenge is not ripe because the EEOC Statement is not a final agency action and that the CBA lacks standing because the EEOC has not yet come down on a CBA member for excluding gender transition coverage. Dkt. 51 at 5.

The EEOC Statement is a final agency action. First, there is nothing "tentative" or "interlocutory" about EEOC's expansive interpretation of Title VII. *See Hawkes Co., Inc. v. U.S. Army Corps of Engineers*, 782 F.3d 994, 999 (8th Cir. 2015) (quoting *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)). The EEOC has declared that that Title VII bars gender identity discrimination, Congressional intent notwithstanding. CBA TRO Br. at 5. HHS's 1557 Rule documents EEOC's confirmation that, under this legal theory, it would investigate employers that exclude coverage for gender transitions. *Id.* Second, the EEOC Statement determines parties' "rights or obligations," "from which legal consequences flow." *See Hawkes*, 782 F.2d at 999. The EEOC Statement puts Catholic employers on notice that they must "immediately alter their behavior or play an expensive game of Russian roulette" based on potential enforcement actions from EEOC and referrals to

[4] *See* CBA TRO Br. at 7-20 (arguing for TRO against EEOC); CBA Notice of Supp. Auth., Dkt. 14, No. 3:16-cv-432 (asking Court to apply *Franciscan Alliance* to the CBA's claims against EEOC); CBA Resp. to Defs.' Expedited Mot. for Technical Correction, Dkt. 15 at 2, No. 3:16-cv-432 (referring the Court to the CBA's legal argument against EEOC); CBA Mot. to Amend Compl., Dkt. 42 at 2 (describing claims against EEOC); CBA Am. Verified Compl., Dkt. 44 (amended complaint restates claims against EEOC).

DOJ. *Iowa League of Cities v. EPA*, 711 F. 3d 844, 868 (8th Cir. 2013); CBA TRO Br. at 5-6 (outlining EEOC's enforcement mechanisms).

EEOC's Statement pressures CBA members to provide gender transition coverage, just like the U.S. Department of Education's now-rescinded Guidelines pressured schools to grant students access to bathrooms, lockers, and showers based only on their subjective gender identity. The same district court judge that decided *Franciscan Alliance* reviewed those Guidelines last summer. EEOC's arguments here are nearly identical to those the Department of Education tried in that case, but the court held that these Guidelines were a final rule and were void under the APA. *Texas v. United States*, 201 F. Supp. 3d 810, 825 (N.D. Tex. 2016). The court's analysis is on all fours with this case.

EEOC claims that a mere "statement on the EEOC's website" cannot be a final agency rule. Dkt. 51 at 6. But the CBA has been locked in litigation with HHS for more than three years over a contraception and abortifacient mandate that was created when HHS updated a website. *See Burwell v. Hobby Lobby Stores, Inc.,* 134 S. Ct. 2751, 2789 & n.4 (2014).[5] The Eighth Circuit and Supreme Court had no trouble adjudicating that mandate; the same result should follow here.[6]

EEOC's remaining arguments against justiciability fail because they apply equally to HHS's 1557 Rule. EEOC stresses that it has not investigated a CBA member for excluding gender transition coverage, Dkt. 51 at 4, but neither has HHS. Both EEOC and HHS have argued against "abstract" pre-enforcement challenges by telling plaintiffs must wait until the government actually comes for them. *Id.* at 6.[7] But such pre-enforcement challenges *are* ripe when, as here, they involve "primarily legal questions" and force the plaintiffs to either "alter their behavior or play an expensive

[5] Although the Eighth Court and Supreme Court reviewed final rules issued by HHS, Labor, and Treasury, none of those regulations made sense without HHS's decision to force plans to cover all FDA-contraceptives, a decision that was not made in the Federal Register but merely on a HRSA website.

[6] *State of Neb. ex rel. Nelson v. Cent. Interstate Low-Level Radioactive Waste Comm'n*, 26 F.3d 77, 80 (8th Cir. 1994) ("The cases dealing with judicial review of administrative actions have interpreted the 'finality' element in a pragmatic way. . . ." "In deciding whether an agency's action is final, the 'core question is whether the agency has completed the decisionmaking process.'" (citations omitted)).

[7] *Compare with* Defs.' Resp. to Religious Sisters' Mot. for Prelim. Inj., Dkt. 10, at 19, 22 (HHS argues that the Religious Sisters' claims "are not ripe" because the Court must "wait for the Rule to be applied to Plaintiffs to see what its effects will be." (alterations omitted)).

game of Russian roulette." *Iowa League of Cities*, 711 F.3d at 867-68. The CBA has standing for the same reason: when a lawsuit "challeng[es] the legality of government action" and "the plaintiff himself is an object of the action," then "there is ordinarily little question" that the plaintiff has standing. *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 561-62 (1992).

D. The government's request for a remand makes the CBA's request for a temporary stay of enforcement all the more urgent.

The CBA has waited patiently for the Court to address its request for relief against EEOC, but the government's motion for a remand has made the matter more urgent. First, the Court's decision to address only the HHS rule has increased the likelihood of an EEOC investigation. The 1557 Rule states that HHS will handoff to EEOC when it "lacks jurisdiction" over a transgender discrimination claim. CBA TRO Br. at 5 (citing 81 Fed. Reg. at 31,432, 43,404). In light of this Court's TSE against HHS and the nationwide injunction issued in *Franciscan Alliance*, the CBA fears that HHS will be referring *any* alleged refusal to cover gender transition over to EEOC for review.

Second, the government's requested remand would leave the CBA and its members without recourse to this Court when an EEOC enforcement action does come. The government is seeking a remand while HHS reconsiders its 1557 Rule. Dkt. 45. As the *Religious Sisters* plaintiffs have shown, such a remand would likely deprive this Court of jurisdiction over this case. Dkt. 50 at 4. The *Religious Sisters* plaintiffs argue that the proposed remand would prejudice them if HHS then failed to follow through on its promised reconsideration. *Id.* at 5-6. The remand would prejudice the CBA all the more, given that it and its members have no protection against EEOC.

The CBA Plaintiffs agree with the government that this Court should avoid "piecemeal litigation." *See* Dkt. 45 at 5 n.3. But the best way to do that is to extend a TSE to protect the CBA from the EEOC while this matter is on hold, just like the stay this Court has issued against HHS.

WHEREFORE, the CBA Plaintiffs request that the Court grant their motion, Dkt. 46, and enter a temporary stay of enforcement against Defendant EEOC.

DATED: June 20, 2017.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 20, 2017, I electronically filed a copy of the foregoing. Notice of this filing will be sent via email to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's CM/ECF System.

s/ Eric N. Kniffin
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