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Group Prescription Plans Must Cover Contraceptives: Catholic Charities of the Diocese of Albany v. Serio 859 N.E.2d 459 (N.Y. 2006)

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On October 19, 2006, in *Catholic Charities of the Diocese of Albany v. Serio*,[1] a provision of the Women's Health and Wellness Act ("WHWA") withstood a challenge on both federal and state constitutional grounds. The challenged statute required an employer's prescription drug plan to include coverage for the cost of contraceptive drugs.[2] At the heart of the case before the court was the WHWA's exemption for so-called "religious employers."[3] Employers who qualify for the exemption are able to "request a contract without coverage for federal food and drug administration approved contraceptive methods that are contrary to the religious employer's religious tenets."[4] The definition of a qualifying "religious employer" is provided in the statute.[5]

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[1] Catholic Charities of the Diocese of Albany v. Serio, 859 N.E.2d 459, 464 (N.Y. 2006).

[2] N.Y. INS. LAW § 3221(l)(16) (McKinney 2004).

[3] N.Y. INS. LAW § 3221(l)(16)(A).

[4] *Id.*

[5] N.Y. INS. LAW § 3221(l)(16)(A)(1) provides:

> For purposes of this subsection, a "religious employer" is an entity for which each of the following is true:
> (a) The inculcation of religious values is the purpose of the entity.
> (b) The entity primarily employs persons who share the religious tenets of the entity.
> (c) The entity serves primarily persons who share the religious tenets of the entity.
> (d) The entity is a nonprofit organization as described in Section 6033(a)(2)(A)i or iii, of the Internal Revenue Code of 1986, as amended.

Plaintiffs in this case were ten faith-based social service organizations that objected to the WHWA's mandate for contraceptive coverage.[6] None of the plaintiffs qualified for the religious employer exemption under the WHWA, essentially because plaintiffs' activities were not limited only to "ministering to the faithful" but also included providing social and educational services.[7] Plaintiffs, believing contraception to be sinful, brought an action against the Superintendent of Insurance to seek declarative and injunctive relief under both the federal and state constitutions, asserting that the contraception provisions compelled them to violate their religious tenets by financing conduct that they condemn.[8] The New York Supreme Court granted summary judgment against plaintiffs and declared the legislation valid.[9] The Appellate Division affirmed the decision, and the case was subsequently brought before the Court of Appeals, where it was affirmed.[10]

In affirming the validity of the WHWA, the Court of Appeals of New York dealt with plaintiffs' claims that the WHWA's contraception provisions violated: (1) the Free Exercise Clause of the United States Constitution, (2) the Free Exercise Clause of the New York Constitution, and (3) the Establishment Clause of the United States Constitution.[11]

First, the court found that the United States Supreme Court's decision in *Employment Division v. Smith,*[12] barred plaintiffs' federal free exercise claim.[13] In *Smith*, the Court held that "the right of free exercise does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)'."[14] The First Amendment is not violated

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[6] *Catholic Charities*, 859 N.E.2d at 462. Eight of plaintiffs had Roman Catholic affiliations. *Id.* Some of the entities provided a variety of social services, including: immigrant resettlement programs, affordable housing programs, job development services, domestic violence shelters, health care facilities, and schools. *Id.* at 462-63. The other two plaintiffs were affiliated with Baptist Bible Fellowship International, offering a similar variety of social services to the public. *Id.* at 463.

[7] *Id.*

[8] *Id.*

[9] *Catholic Charities*, 859 N.E.2d at 463.

[10] *Id.*

[11] *Id.* Plaintiffs' Establishment Clause argument was found to be without merit, since the court was of the opinion that it could not be convincingly argued that the WHWA was designed to favor or disfavor any one religion in particular. *Id.* at 468.

[12] Employment Div. v. Smith, 494 U.S. 872 (1990).

[13] *Catholic Charities*, 859 N.E.2d at 463-64.

[14] *Smith*, 494 U.S. at 879 (citation omitted).

where a prohibition on the exercise of religion is merely an incidental effect of a generally applicable and otherwise valid provision, and not the object.[15] Here, the court found that interference with religious beliefs was not the object of the WHWA.[16] Instead, the neutral purpose of the challenged portions, to make contraceptive coverage broadly available to New York women, was not altered simply because the Legislature chose to exempt some religious institutions and not others.[17] The court also found that neither the doctrine of church autonomy nor the "ministerial exception", both exceptions to the *Smith*'s "no-exemption" holding, were applicable to plaintiffs' federal free exercise claim.[18]

The court felt plaintiffs' strongest argument, albeit a losing one, was that the WHWA violated the Free Exercise Clause of the New York Constitution.[19] New York courts had not adopted the "inflexible rule of *Smith* that no person may complain of a burden on religious exercise that is imposed by a generally applicable, neutral statute."[20] Rather, the courts had held that the respective interests advanced by the legislation and the burdened party must be balanced to determine if the incidental burden on religion is justified, but the amount of deference due the

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[15] *Id.* at 878.

[16] *Catholic Charities*, 859 N.E.2d at 464.

[17] *Id.* Finding that such a holding would discourage any such exemptions in the future, the court cited a California Supreme Court decision upholding a statute almost identical to the WHWA. *Id*; *see* Catholic Charities of Sacramento, Inc. v. Super. Ct., 85 P.3d 67, 83 (Cal. 2004) ("[T]he court has repeatedly indicated that it is a permissible legislative purpose to alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." (quotation omitted)).

[18] *Catholic Charities*, 859 N.E.2d at 465. Dismissing the church autonomy exception, the court found the Legislature had not attempted to "lend its power to one or the other side in controversies over authority or dogma" through the WHWA. *Id.* (citing *Smith*, 494 U.S. at 877). The court found further that the ministerial exception had only been applied to employment discrimination claims, and even then only to "ministers," neither of which were involved in this case. *Id.*

[19] *Id.* at 463. Article I, § 3 of the New York Constitution provides:

> The free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever be allowed in this state to all humankind; and no person shall be rendered incompetent to be a witness on account of his or her opinions on matters of religious belief; but the liberty of conscience hereby secured shall not be so construed as to excuse acts of licentiousness, or justify practices inconsistent with the peace or safety of this state.

N.Y. Const. art. I, § 3.

[20] *Catholic Charities*, 859 N.E.2d at 466.

Legislature had never been articulated.[21] Here, the court held that *substantial* deference was due the Legislature, and the burden lay on the party claiming the exemption to show unreasonable interference with religious freedom.[22] The court explicitly rejected a strict scrutiny standard, and instead held that the *Smith* principle should be the usual, but not invariable, rule.[23]

Although admitting that the burden on plaintiffs' religious practices was serious, the court found that the WHWA did not literally *compel* plaintiffs to purchase contraceptive coverage, and in fact, plaintiffs were not legally required to purchase prescription drug plans at all.[24] Also important to the court, since many of plaintiffs' employees were non-believers, plaintiffs had to be prepared to accept neutral regulations imposed to protect those employees' legitimate interests in acting according to their own beliefs.[25] Finally, the court found that the Legislature had a substantial interest in providing women with better health care and fostering equality between the sexes.[26] While the Legislature may have made a different choice, no unreasonable interference with plaintiffs' exercise of religion was shown, and the choice that was made was therefore constitutional.[27]

The decision of the Court of Appeals is troublesome in its dismissal of a strict scrutiny standard in light of the *Smith* decision.[28] While not binding itself to the inflexibility of the *Smith* holding, the court nevertheless proceeded to adopt the underlying principle of that case – generally applicable and neutral laws, even if they are offensive to a person's religious tenets, place the burden on a plaintiff to show unreasonable interference with religious practice.[29] There is a real danger of the burden of proof becoming impossible to overcome, a danger that is foreshadowed by the outcome of this case, in which the court found an admittedly serious burden on plaintiffs' religious practice and yet did not rule in their favor. While it may be true that plaintiffs in the instant case fell short of showing unreasonable interference with the free exercise

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[21] *Id.*

[22] *Id.*

[23] *Id.* at 467.

[24] *Id.* at 468.

[25] *Id.*

[26] *Catholic Charities*, 859 N.E.2d at 468.

[27] *Id.*

[28] *See id.* at 467.

[29] *Id.*

of their religion, the complete elimination of a religious exemption from generally applicable laws would be inconsistent with the religious safeguards of the First Amendment.[30]

[30] *See id.* (citing Michael McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409, 1418-19 (1990)).