January 29, 2013
CCO-046-E

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

No. 13-1144

CONESTOGA WOOD SPECIALITIES CORPORATION;
NORMAN HAHN; NORMAN LEMAR HAHN;
ANTHONY H. HAHN; ELIZABETH HAHN; KEVIN HAHN,
Appellants

v.

SECRETARY OF THE UNITED STATES DEPARTMENT
OF HEALTH AND HUMAN SERVICES; SECRETARY UNITED STATES
DEPARTMENT OF LABOR; SECRETARY UNITED STATES DEPARTMENT OF
THE TREASURY;UNITED STATES DEPARTMENT OF HEALTH AND HUMAN
SERVICES; UNITED STATES DEPARTMENT OF LABOR; UNITED STATES
DEPARTMENTOF THE TREASURY
(E.D. Pa. No. 5-12-cv-06744)

Before: RENDELL, JORDAN and GARTH, Circuit Judges

OPINION/ORDER RE EXPEDITED MOTION FOR INJUNCTION

Before us is a motion for a stay pending appeal, which, in our Court, is an extraordinary remedy. *See United States v. Cianfrani*, 573 F.2d 835, 846 (3d Cir. 1978). This case involves a challenge to the enforcement provisions of the Patient Protection and Affordable Care Act (the "ACA") and related regulations that require Conestoga to include coverage for contraception – including abortifacients and sterilization – in its employee health insurance plan. *See* 42 U.S.C. § 300gg-13(a)(4); 77 Fed. Reg. 8725 (Feb. 15, 2012). In essence, Plaintiffs Conestoga Wood Specialties Corporation, a secular, for-profit corporation, and five of its shareholders, the Hahns, claim that providing the mandated coverage would violate their religious beliefs. Plaintiffs brought suit in the Eastern District of Pennsylvania and filed a motion for a preliminary injunction to enjoin enforcement of the regulations. After holding an evidentiary hearing, the District Court issued a 34-page opinion on January 11, 2013, detailing its reasons for denying injunctive relief to Plaintiffs. *See Conestoga Wood Specialties Corp. v. Sebelius*, --- F. Supp. 2d ---, No. 12-6744, 2013 WL 140110 (E.D. Pa. Jan. 11, 2013). Plaintiffs subsequently filed a motion for a stay pending appeal in this Court.

As Judge Jordan notes, the standard for obtaining a stay pending appeal is essentially the same as that for obtaining a preliminary injunction. "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 24 (2008). To qualify for preliminary injunctive relief, a party must demonstrate "(1) a likelihood of success on the merits; (2) that it will suffer irreparable harm if the injunction is denied; (3) that granting preliminary relief will not result in even greater harm to the nonmoving party; and (4) that the public interest favors such relief." *Kos Pharm., Inc. v. Andrx Corp.*, 369 F.3d 700, 708 (3d Cir. 2004). Therefore, in assessing the present motion for a stay pending appeal, we must consider the same four factors that the District Court considered after an evidentiary hearing, ultimately concluding that preliminary relief was not warranted.

Such stays are rarely granted, because in our Court the bar is set particularly high. Indeed, we have said that an "injunction shall issue only if the plaintiff produces evidence sufficient to convince the district court that all four factors favor preliminary relief." *N.J. Hosp. Ass'n v. Waldman*, 73 F.3d 509, 512 (3d Cir. 1995) (citation omitted). In other words, "[a] plaintiff's failure to establish any element in its favor renders a preliminary injunction inappropriate." *NutraSweet Co. v. Vit-Mar Enter., Inc.*, 176 F.3d 151, 153 (3d Cir. 1999). This standard distinguishes the present case from most of the cases cited by Judge Jordan in his dissent, in which those courts applied a "sliding scale" standard, whereby preliminary injunctive relief may be granted upon particularly strong showing of one factor. In those cases, "[t]he more the balance of harms tips in favor of an injunction, the lighter the burden on the party seeking the injunction to demonstrate that it will ultimately prevail." *Korte v. Sebelius*, No. 12-3841, 2012 WL 6757353, at *2 (7th Cir. Dec. 28, 2012).[1]

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[1] *See also Grote v. Sebelius*, --- F.3d ---, 13-1077, 2013 WL 362725, at *3 (7th Cir. Jan. 30, 2013) (adopting the reasoning of *Korte* and applying the same "sliding scale" standard); *Monaghan v. Sebelius*, --- F. Supp. 2d ---, No. 12-15488, 2012 WL 6738476, at *3 (E.D. Mich. Dec. 30, 2012) (applying a standard that "[c]ourts . . . may grant a preliminary injunction even where the plaintiff fails to show a strong or substantial probability of success on the merits, but where he at least shows serious questions going to the merits and irreparable harm which decidedly outweighs any potential harm to the defendant if the injunction is issued"); *Am. Pulverizer Co. v. U.S. Dep't of Health & Human Servs.*, No. 12-3459, slip op. at 8 (W.D. Mo. Dec. 20, 2012) (applying a sliding scale standard and finding that "the balance of equities tip strongly in favor of injunctive relief in this case and Plaintiffs have raised questions concerning their likelihood of success on the merits that are so serious and difficult as to call for more deliberate investigation"); *Tyndale House Publishers, Inc. v. Sebelius*, --- F. Supp. 2d ---, No. 12-1635, 2012 WL 5817323, at *4 (D.D.C. Nov. 16, 2012) (applying a sliding scale standard by which "[i]f the movant makes an unusually strong showing on one of the factors, then it does not necessarily have to make as strong a showing on another factor").

To be sure, the law requires us to balance the factors against each other; however Judge Jordan overstates the significance of *Constructors Association of Western Pennsylvania v. Kreps*, 573 F.2d 811 (3d Cir. 1978), in favor of applying a less stringent standard. The fact of the matter is that this Court has not sanctioned the "sliding scale" standard employed in other courts of appeals. Accordingly, we must examine each factor and determine whether Plaintiffs have met their burden as to each element.

We agree with the District Court's ruling that Plaintiffs have not met their burden in demonstrating likelihood of success on the merits. We find the District Court's reasoning persuasive and we incorporate it by reference herein. In short, it determined that Plaintiffs had not demonstrated their likelihood of success on the merits of their claims under either the First Amendment or the Religious Freedom Restoration Act ("RFRA"). *Conestoga Wood Specialties Corp.*, 2013 WL 140110 at *18. The District Court determined that, as a secular, for-profit corporation, Conestoga has no free exercise rights under the First Amendment, *id.* at *6-8, and is not a "person" under the RFRA, *id.* at *10.

Concerning the Hahns' rights under the Free Exercise Clause of the First Amendment, the District Court concluded that the ACA regulations are generally applicable because they are not specifically targeted at conduct motivated by religious belief, and are neutral because the purpose of the regulations is to promote public health and gender equality instead of targeting religion. *Id.* at *8-9. Because a neutral law of generally applicability need only be "rationally related to a legitimate government objective" to be upheld – and the government demonstrated that the regulations are just that – the District Court concluded that the Hahns' challenge to the regulations under the Free Exercise Clause were not likely to succeed. *Id.* (citing *Combs v. Home-Ctr. Sch. Dist.*, 540 F.3d 231, 243 (3d Cir. 2008)). Likewise, the District Court found that the Hahns' claims under the RFRA were not likely to succeed because the burden imposed by the regulations does not constitute a "substantial burden" under the RFRA. While this question presents a close call, *id.* at *12, the District Court ultimately concluded that any burden imposed by the regulations would be too attenuated to be considered substantial and that any burden on the Hahns' ability to exercise their religion would be indirect, *id.* at *14.

Furthermore, regarding Plaintiffs' claim under the Establishment Clause of the First Amendment, the District Court found that the "religious employer exemption" of the ACA does not violate the Establishment Clause because it applies equally to organizations of every faith and does not favor one denomination over another, and does not create excessive government entanglement with religion. *Id.* at *15-16. Finally, the District Court found that Plaintiffs' Free Speech claim had little likelihood of success because the ACA regulations "affect[] what [Plaintiffs] must *do* . . . not what they may or may not say," *id.* at *17 (quoting *Rumsfeld v. Forum for Academic and Institutional*

Rights, 547 U.S. 47, 60 (2006)), and the regulations do not interfere with Plaintiffs' expression of their opinions regarding contraceptives.

While we note that the issues in this case have not been definitively settled by this Court or the Supreme Court, we nonetheless find that Plaintiffs failed to prove a "reasonable likelihood of success on the merits," as required by law. *See Assoc. N.J. Rifle and Pistol Clubs v. Governor of the State of New Jersey*, --- F.3d ---, No. 12-1624, 2013 WL 336680, at *2 (3d Cir. Jan. 30, 2013). Judge Goldberg's reasoning comports with that of other courts who analyzed the issue of whether a stay should be granted pending appeal in the same situation based on the same factors, and the same standard, that we do. *See, e.g., Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-6294, 2012 WL 6930302, at *3 (10th Cir. Dec. 20, 2012) (concluding that the reach of the RFRA does not "encompass the independent conduct of third parties with whom the plaintiffs have only a commercial relationship"). Plaintiffs and Judge Jordan take issue with certain aspects of Judge Goldberg's analysis and view of the case law; however, we conclude that his reasoning is sound and is not likely to be overturned on appeal.

While we recognize that, as Judge Jordan urges, the rights at stake are important, we do not, unlike other courts, relax our standard depending on the nature of the right asserted. Given our standard, because Plaintiffs failed to prove their likelihood of success on the merits, we DENY their request for extraordinary relief. Judge Garth is filing a concurrence and Judge Jordan is filing a dissent.

By the Court,

/s/Marjorie O. Rendell
Circuit Judge

Dated: 2/7/13
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