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Civil Rights Update

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Strip Search of a Muslim State Prison Inmate in View of a Transgender Male Prison Guard Violated the Religious Land Use and Institutionalized Persons Act

The United States Court of Appeals for the Seventh Circuit recently addressed a question of whether participation of a transgender prison guard in a strip search of a Muslim inmate potentially violated the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. § 2000cc *et seq*.

In *West v. Radtke*, 48 F.4th 836 (2022), the plaintiff was a practicing Muslim incarcerated at the Green Bay Correctional Institution in Wisconsin. *West*, 48 F.4th at 840. According to the plaintiff's Islamic religious beliefs, he was forbidden from exposing his naked body to anyone but his wife. A knowing violation of this prohibition, the plaintiff claimed, would condemn him in the afterlife, but with greater condemnation resulting from a cross-sex violation. *Id.* at 841. Given the periodic necessity of strip searches in the prison environment, the plaintiff accepted that he would be subject to strips searches by male guards. *Id.* Such searches were performed by two corrections officers: one who physically performed the search and another who acted as an observer. *Id.* A policy of the Wisconsin Department of Corrections, which mirrored a regulation promulgated by the Federal Department of Justice, prohibited "cross gender" strip searches absent exigent circumstances. *Id.* "Gender" was undefined by the Wisconsin policy and federal regulation. *Id.*

In July 2016, following a visit by a friend from outside the prison, the plaintiff was subject to a routine strip search. The guard who approached the plaintiff about the search was a transgender man. *Id.* at 841-42. The transgender guard began working at the prison approximately six months earlier. *Id.* Citing his religious beliefs, the plaintiff objected to the transgender guard performing the search. Another male guard agreed to physically perform the search, but the transgender guard nevertheless acted as the observing officer. *Id.* at 842. Following the search, the plaintiff filed a complaint with prison officials and, later, with the Department of Corrections, seeking an exemption from cross-sex strip searches. *Id.* His requests and an appeal were denied. The prison's warden and security director defended the guard, responding in writing that the guard was male and qualified to perform searches. The security director also cautioned that "any further issues on this will result in discipline for you." *Id.*

The plaintiff filed suit against several prison officials, including the warden, the security director, and the transgender guard. *Id.* Two claims alleged a deprivation of the plaintiff's Fourth Amendment rights under 42 U.S.C. § 1983, and a RLUIPA claim through which the plaintiff sought an injunction exempting him from future cross-sex strip searches. *Id.* During initial case screening, the district court dismissed the Fourth Amendment claim in light of circuit precedent holding that a prisoner does not have a privacy interest against inspection of his or her body. *Id.* The RLUIPA claim proceeded with the district court ultimately granting summary judgment for the defendants. *Id.* at 842-43.

On appeal, the court addressed the RLUIPA claim in detail. RLUIPA dictates that a prison may not impose a "substantial burden" on inmates' "religious exercise" unless it can prove that doing so "is the least restrictive means of furthering [a] compelling governmental interest." *Id.* at 844 (quoting 42 U.S.C. § 2000cc-1(a)). The plaintiff bears the

initial burden of establishing a *prima facie* case that the practice substantially burdens a sincere religious exercise. *West*, 48 F.4th at 844. If this burden is met, the defendant must prove that the questioned practice is the least restrictive means to further a compelling governmental interest. *Id.*

In this case, there was no dispute that the plaintiff's objection was sincerely based. *Id.* The question at issue was whether the policy allowing the transgender guard to participate in the search constituted a substantial burden on the plaintiff's religious exercise. In addressing this issue, the court found guidance in the Supreme Court's decisions in *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014) and *Holt v. Hobbs*, 574 U.S. 352 (2015). *West*, 48 F.4th at 844-45. In *Hobby Lobby*, the Court found that a federal law forcing an employer to choose between financial penalties and providing health insurance to its employees for contraceptives was a substantial burden on the employer's religious exercise. *Id.* at 845. In *Holt*, a prison policy forced all inmates to shave their facial hair or face discipline. The plaintiff in *Holt*—a Muslim whose religious beliefs prohibited shaving—sought, but was denied, an exemption for a half-inch beard. The Court found that the prison's policy constituted a substantial burden on the inmate's religious exercise. *Id.* *Hobby Lobby* and *Holt*, according to the Seventh Circuit, mean that "a substantial burden on religious exercise occurs when a prison attaches some meaningful negative consequence to an inmate's religious exercise, forcing him to choose between violating his religion and incurring that negative consequence." *Id.* In light of this precedent, the court in *West* found that the prison forced the plaintiff into "a choice that RLUIPA aims to avoid" and, thus, a substantial burden on his religious exercise. *Id.* at 845-46.

The prison argued that any burden experienced by the plaintiff was insubstantial because he was subjected to a cross-sex strip search only once, and that it is uncertain whether it will ever happen again. *Id.* at 846. The court rejected this argument, finding that "a substantial burden can exist even if it is uncertain when a prisoner will next be put to the choice of violating his religious beliefs or facing discipline." *Id.* The court reasoned that the prison's policy, and its stated intention to enforce that policy, represented "a present and substantial burden" on the plaintiff's religious exercise. *Id.*

The court next addressed whether a less-restrictive means was available for the prison to satisfy its compelling interest. Under RLUIPA, strict scrutiny applies. *Id.* at 847. Per *Hobby Lobby*, the compelling interest test must be tailored in every case to the individual person seeking relief. *Id.* If a correctional institution is unable to satisfy the test, it may need to change its rules to accommodate the religious practices of a single prisoner. *Id.* at 848. But, according to *Holt* and other Supreme Court opinions, courts should not lose sight of the distinctive needs of the prison environment, including an institution's need to maintain order and safety. *Id.*

In *West*, the defendants argued that antidiscrimination law, in the form of Title VII and the Equal Protection Clause, outweighed the plaintiff's concerns. Pursuant to *Bostock v. Clayton County*, ___ U.S. ____, 140 S. Ct. 1731, 1741 (2020), transgender-status discrimination is sex-based discrimination under Title VII. *West*, 48 F.4th at 849. However, Title VII also requires a showing of an "adverse employment action." *Id.* The court analyzed how excusing a transgender guard from cross-sex strip searches would amount to an adverse employment action. It found no compensation penalty, harm to career prospects, or resulting hostile work environment. *Id.* Further, as the prison already banned "cross-gender" strip searches in accordance with state and federal guidelines, disallowing the transgender guard from participating in strip searches of this inmate would amount to no more than a reasonably necessary limitation to accommodate the bodily-privacy and religious-exercise right of the plaintiff. *Id.* at 850-51. In other words, according to the court, the prison could accommodate the plaintiff's requested religious exemption without violating Title VII. *Id.* at 851.

The defendants' equal protection argument fared no better. The Seventh Circuit found that the district court erroneously treated the classification at issue as the prison guard's transgender status. Instead, according to the court, the analysis should have focused on the biological sex of the guard because that was the plaintiff's concern. *Id.* Sex-based classifications are not inherently unlawful in all instances. *Id.* at 852. With that in mind, the court pointed to the prison's

existing policy forbidding female guards from participating in strip searches of male inmates in all but exigent circumstances. As that limitation was constitutionally permissible, so too was the plaintiff's requested accommodation. *Id.*

The court concluded that compliance with the plaintiff's request would not violate any employee's Title VII and equal protection rights. Thus, pursuant to RLUIPA, the plaintiff in *West* was entitled to injunctive relief against strip searches by transgender prison personnel. *Id.* Here, the burden on the prison appeared to the court be a minimal one. It will be interesting to see, however, whether future developments in employment law—including Title VII—may affect the breadth and longevity of this opinion.

About the Author

John P. Heil, Jr. is a shareholder with *Heyl, Royster, Voelker & Allen, P.C.* where he serves as co-chair of the firm's Business and Commercial Litigation Practice Group. Mr. Heil's practice focuses on business and commercial litigation, complex civil rights litigation, the representation of insurance carriers in liability coverage disputes, and the defense of catastrophic tort claims in state and federal courts. Mr. Heil joined Heyl Royster in 2007 after serving for eleven years with the Cook County State's Attorney's Office. He received his J.D., with Honors, from Chicago-Kent College of Law in 1996.

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