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Religion

Christian Marine's Next Battle Could Be at Supreme Court

A court-martialed marine challenging orders to remove Bible verse signs from her desk could provide an intriguing opportunity for the U.S. Supreme Court to clarify a religious freedom law, scholars told Bloomberg BNA.

If that happens, the court's analysis could affect the Religious Freedom Restoration Act claims ''of all employees of the federal government, including servicemen and servicewomen, and any private company impacted by federal statutes,'' Erica Goldberg, a professor at Ohio Northern University law school, Ada, Ohio, told Bloomberg BNA by e-mail.

The act, 42 U.S.C. § 2000bb-1(a), says government action can't ''substantially burden'' religious exercise unless it furthers a compelling governmental interest and is the least restrictive means of doing so.

Here, Lance Corporal Monifa Sterling says a superior officer's orders to take down the Bible verse signs burdened her religious exercise, in *Sterling v. United States*, No. 16-814, *cert. petition filed* 12/23/16.

The U.S. Court of Appeals for the Armed Forces below disagreed, upholding her conviction for refusal to obey the orders, in *United States v. Sterling*, 75 M.J. 407 (C.A.A.F. 2016).

The ''courts of appeal are all over the map on what counts as a substantial burden under RFRA,'' Robin Fretwell Wilson, a professor at the University of Illinois law school, Champaign, Ill., told Bloomberg BNA by e-mail.

There's ''a good chance the Supreme Court will take this case'' to ''clarify the contours of the substantial burden question,'' Goldberg said.

But Sterling's failure to tell her supervisor that the signs were religious—and her failure to seek an accommodation allowing them—could make this a ''poor vehicle'' for the court to answer that question, she said.

Fourteen states and 36 Republican members of Congress including Sen. Ted Cruz (R-Texas) have joined briefs supporting Sterling's petition for review.

Circuit Split. The U.S. Court of Appeals for the Armed Forces erred in finding that Sterling's religious exercise had to be religiously compelled—not merely religiously motivated—for there to be a substantial burden under RFRA, her petition says.

A minority of circuits have found that the act applies only when a religious believer faces ''a stark choice'' between obeying a religious requirement and complying with the law or a government requirement, Wilson said.

The CAAF joined the minority here, which includes the Third, Fourth, Ninth and District of Columbia circuits, Wilson said.

In contrast, a majority of circuits ''have embraced a more protective understanding'' of what constitutes a substantial burden, Wilson said. Those courts include the First, Second, Fifth, Sixth, Seventh, Eighth, Tenth and Eleventh circuits.

That standard protects religious conduct that is religiously motivated, even if it isn't religiously compelled, Wilson said.

''Congress can always amend RFRA to clarify the law and provide greater or lesser protections for burdens on religion,'' Goldberg said.

But Congress ''needs a definitive ruling'' on what's required to demonstrate a substantial burden—''another good reason for the Supreme Court to take the case,'' Goldberg said.

'Important' Question. The ''main issue is whether a RFRA plaintiff must show that the religious exercise is important to her religious practice,'' Goldberg said.

The CAAF improperly analyzed the ''subjective importance'' of Sterling's religious conduct in determining whether it was religiously compelled or merely religiously motivated, Sterling's petition says.

Sterling failed to show how placing the Bible verse signs was ''important to her exercise of religion,'' the CAAF said.

But federal ''courts have no tools to discern the 'subjective importance' of a practice or whether a practice is religiously-compelled,'' Sterling's petition says.

Gorsuch Factor. If the high court grants review, having Supreme Court nominee and Tenth Circuit Judge Neil Gorsuch on the court ''would tilt things in Sterling's favor, I would think,'' Wilson said.

Unlike CAAF's decision, Gorsuch said ''religious exercise is substantially burdened'' if it stops a person from engaging in conduct that is merely ''motivated by'' religious belief, writing for the Tenth Circuit in *Abdulhaseeb v. Calbone*, 600 F.3d 1301 (10th Cir. 2010).

Calbone involved a Muslim prisoner's religious freedom claim under the Religious Land Use and Institutionalized Persons Act, which adopted RFRA's substantial burden standard.

If the high court grants review here, its analysis ''would also likely apply'' to federal prisoner's claims under RLUIPA, Goldberg said.

Gorsuch also joined the Tenth Circuit's decision finding that the Affordable Care Act's contraceptive mandate substantially burdened the religious exercise of

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secular corporations under RFRA, in *Hobby Lobby Stores, Inc. v. Sebelius*, 723 F.3d 1114 (10th Cir. 2013) (en banc) (82 U.S.L.W. 20, 7/2/13).

The Supreme Court affirmed in *Burwell v. Hobby Lobby Stores, Inc.*, 82 U.S.L.W. 4636, 2014 BL 180313 (June 30, 2014) (83 U.S.L.W. 10, 7/1/14).

Vehicle Trouble? There are ''some reasons why this case is a poor vehicle'' for the Supreme Court to take up, Goldberg said.

First, ''Sterling neither informed her supervisor that the signs she posted were religious in nature nor sought a religious accommodation,'' she said.

''Sterling seems to have raised this RFRA claim at trial almost as an afterthought,'' Goldberg said.

Second, ''the posting of the quotes on her desk seem more relevant to her work dynamics than a sincere exercise of her religion,'' she said. Sterling's court-martial also involved insubordination that wasn't related to the Bible verse dispute.

In one incident, she refused to wear the proper uniform, the CAAF said. In another, she refused ''to help distribute vehicle passes to families of service members returning from deployment,'' the court said.

It ''seems likely that Sterling's sign postings were a passive aggressive jab at her supervisor,'' Goldberg said.

That indicates another reason the petition is a bad vehicle, Goldberg said. There wasn't sufficient fact finding to determine if Sterling's motives were a mix of religious ones and ''passive aggressive'' ones, she said.

If there was such a mix, ''Sterling would not have a valid RFRA claim anyway,'' Goldberg said.

Military Readiness. Sterling's case raises questions about how far the military must go to accommodate religious behavior, Marsha B. Freeman, a professor at Barry University law school, Orlando, Fla., told Bloomberg BNA by e-mail.

Those include whether a servicemember would ''have to be allowed time off for religious prayer or activity even during regular workdays or, more to the point, during drills or actual field involvement,'' Freeman said.

''What if this affected troop readiness?'' she asked.

Compared to other RFRA cases, ''I think the Court faces a far different question when it comes to military readiness and orders,'' she said.

It ''will be interesting to see if the Court will second-guess the military,'' Freeman said.

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