

No. 12-2673

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

FILED
Dec 28, 2012
 DEBORAH S. HUNT, Clerk

AUTOCAM CORPORATION, et al.,

Plaintiffs-Appellants,

v.

KATHLEEN SEBELIUS, Secretary of the United
States Department of Health and Human Services,
et al.,

Defendants-Appellees.

O R D E R

Before: MOORE, ROGERS, and GRIFFIN, Circuit Judges.

Autocam Corporation, Autocam Medical, and their owners appeal the denial of a preliminary injunction in their action before the district court challenging the implementation of the contraception-coverage provisions in the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act, Pub. L. No. 111-152, 124 Stat. 1029 (2010) (the “ACA”), under the Free Exercise Clause of the First Amendment and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb, *et seq.* (“RFRA”). The plaintiffs move for an injunction pending appeal and to expedite the appeal.

Federal Rule of Appellate Procedure 8(a)(2) authorizes us to grant an injunction pending appeal. “In granting such an injunction, the Court is to engage in the same analysis that it does in reviewing the grant or denial of a motion for a preliminary injunction.” *Id.* The relevant factors are: “(1) whether the movant has shown a strong likelihood of success on the merits; (2) whether the movant will suffer irreparable harm if the injunction is not issued; (3) whether the issuance of the

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injunction would cause substantial harm to others; and (4) whether the public interest would be served by issuing the injunction.” *Overstreet v. Lexington-Fayette Urban Cnty. Gov’t*, 305 F.3d 566, 573 (6th Cir. 2002); *see also Baker v. Adams Cnty./Ohio Valley Sch. Bd.*, 310 F.3d 927, 928 (2002).

To demonstrate a likelihood of success on appeal, “[i]t is not enough that the chance of success on the merits be better than negligible.” *Nken v. Holder*, 556 U.S. 418, 434 (2009) (internal quotation marks and citation omitted). Instead, “[m]ore than a mere possibility of relief is required.” *Id.* (internal quotation marks and citation omitted).

The Supreme Court has never considered similar RFRA or free-exercise claims. *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12A644, 2012 WL 6698888 (Dec. 26, 2012). But, applying a more demanding standard, it denied an injunction pending appeal in a case involving similar issues. *Id.* No circuit court has considered these claims. Although no district court has issued a final decision on these issues, the district courts that have considered whether to grant a preliminary injunction on similar claims have issued conflicting decisions. *Compare Korte*, 2012 WL 6553996, at *6-11 (denying a preliminary injunction), *Hobby Lobby Stores, Inc. v. Sebelius*, 870 F. Supp. 2d 1278, 1290-96 (W.D. Okla. 2012) (same), with *Tyndale House Publishers, Inc. v. Sebelius*, No. 12-1635, 2012 WL 5817323, at *10-18 (D.D.C. Nov. 16, 2012) (granting a preliminary injunction), *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630, at *6-13 (E.D. Mich. Oct. 31, 2012) (same), and *Newland v. Sebelius*, No. 1:12-cv-1123, 2012 WL 3069154, at *5-8 (D. Colo. July 27, 2012) (same). Certainly, the divergence of opinion by the district courts establishes the possibility of success on the merits. But, in light of the lower court’s reasoned opinion in this case and the Supreme Court’s recent denial of an injunction pending appeal in *Hobby Lobby*, the plaintiffs have not demonstrated more than a possibility of relief. *See Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) (parsing the meaning of “likely” relative to the “irreparable harm” requirement for issuance of a preliminary injunction).

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The denial of an injunction can “cause irreparable harm if the claim is based upon a violation of the plaintiff’s constitutional rights.” *Overstreet v. Lexington-Fayette Urban Cnty. Gov’t*, 305 F.3d 566, 578 (6th Cir. 2002). But, as discussed above, it is not clear that the contraceptive requirement violates the plaintiffs’ constitutional rights. And purely monetary damages generally do not warrant an injunction. *Id.* at 578-79. Further, the district court noted that the contraceptive requirement was codified as a tax, which if it is, would bar its preliminary or permanent enjoinder. 26 U.S.C. § 7421(a); *see also Nat’l Fed’n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2583 (2012). The remaining factors do not weigh in favor of either side.

The plaintiffs also move to expedite the appeal. The appeal focuses on purely legal issues that have already been briefed below. Further, the district court's decision on appeal conflicts with another district court's decision in this circuit. *See Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630, at *6-13 (E.D. Mich. Oct. 31, 2012) (granting a preliminary injunction on similar issues). Under these circumstances, it is prudent to expedite consideration of the issues on appeal.

The motion for an injunction pending appeal is **DENIED**. The motion to expedite the appeal is **GRANTED**, and the clerk shall expedite this appeal for briefing and submission.

ENTERED BY ORDER OF THE COURT



Clerk

ROGERS, J., dissenting.

I would grant the injunction pending appeal, for the following reasons.

There is a reasonable likelihood of success on the merits for the plaintiffs in this case on their RFRA claim, essentially for the reasons given in *Tyndale House Publishers, Inc. v. Sebelius*,

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No. 12-1635, 2012 WL 5817323, at *10-18 (D.D.C. Nov. 16, 2012). *See also Newland v. Sebelius*, No. 1:12-cv-1123, 2012 WL 3069154, at *5-8 (D. Colo. July 27, 2012).

Both RFRA and the applicable standard for a preliminary injunction in this case require in some sense a balancing between the burden on the religious conscience of plaintiffs and the interests furthered by the regulation in question. Plaintiffs assert that it would violate their sincere religious beliefs to direct the company that they control to cut checks to pay directly for contraceptive services. They are okay, however, with giving discretionary healthcare money to their employees, who may then choose to buy such services. If walking this fine line is sincerely accepted as a condition for salvation, it is not up to the government to say that the line is too fine. Lots of religious lines are fine. Of course government is not bound by every religious fine line. But RFRA requires that the government interest be strong before forcing people to cross the line.

At this stage of this litigation, the government interest does not appear particularly weighty. Arguments about the government's interest in the consistent application of the law lack force where the Government has apparently not appealed or requested a stay in a similar case in which a preliminary injunction was entered. *Legatus v. Sebelius*, No. 12-12061, 2012 WL 5359630, at *6-13 (E.D. Mich. Oct. 31, 2012). Also, we are not informed that the Government has sought or obtained a stay in two other very similar cases where a preliminary injunction has been entered (*Tyndale, supra*; and *Newland, supra*). Moreover, the interests of the employees in obtaining contraceptive services do not appear weighty in the context of this case, where such services can be paid for through individual health care accounts provided by the employer.

The burden on the plaintiffs, assuming their sincerity, is in contrast large. It is that they must take a chance on huge fines or act contrary to their conscience.

For these reasons, I would grant the injunction against the enforcement of the regulation in question pending appeal. Because the majority denies the injunction pending appeal, I agree that the appeal should be expedited.

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

Deborah S. Hunt
Clerk

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Filed: December 28, 2012

Mr. Patrick Thomas Gillen

Mr. Jason Charles Miller

Ms. Abby Christine Wright

Re: Case No. 12-2673, *Autocam Corporation, et al v. Kathleen Sebelius, et al*
Originating Case No. : 1:12-cv-01096

Dear Sir or Madam,

The Court issued the enclosed Order today in this case.

Sincerely yours,

s/Louise Schwarber
Case Manager
Direct Dial No. 513-564-7015

cc: Ms. Tracey Cordes

Enclosure