

Sixth Circuit Denies Government Emergency Relief in Air Force Vaccine Mandate Case

Article By:

Shams Hirji

This past Friday afternoon, the Sixth Circuit [dealt a blow](#) to the Department of the Air Force's efforts to overturn a District Court's class-wide, preliminary injunction against the Department. Specifically, the Sixth Circuit denied the Department's emergency motion to stay the District Court's class-wide injunction. Judge Matthew W. McFarland, of the Southern District of Ohio, had ordered the Department to not take any disciplinary or separation measures against a class of some 10,000 unvaccinated service members. The service members had alleged that the Department applied a general, discriminatory policy of denying their requests for religious exemptions from the Secretary of Defense's vaccine mandate applicable to all members of the armed forces. The plaintiffs argued that the Department's policy violated their rights under the Religious Freedom Restoration Act (RFRA) and the Free Exercise Clause.

For the most part, the Department focused its emergency motion on the District Court's decision to certify the class, arguing that the District Court abused its discretion in doing so. The Sixth Circuit disagreed in an opinion written by Judge Kethledge and joined by Judge Bush and Judge Murphy. The Court held, instead, that the Department was unlikely to prevail in its appeal of the class-wide preliminary injunction.

In particular, the Sixth Circuit rejected the Department's argument that the plaintiffs were unable to satisfy Rule 23(a)'s commonality and typicality requirements for class certification. Contrary to the Department's arguments, the Sixth Circuit held that the plaintiffs had offered up a "common contention" whose resolution would "resolve an issue that [was] central to the validity of each one of the claims in one stroke." That common contention was the contention that the Department "operated under a general policy of discrimination." If true, that would likely entitle the class to relief under both RFRA and the Free Exercise Clause.

As often happens with emergency motions, the panel tipped its hand a little as to how it would decide the merits of the Department's preliminary-injunction appeal. The Court noted, for example, that its "own review of the record [did] nothing to convince [the panel] that the Department is likely to show" it did not enforce a general discriminatory policy. In support of the point, the Court pointed to evidence in the record indicating that the Department had denied all or close to 100% of all religious exemption requests during the relevant period.

Ordinarily, a randomly assigned Sixth Circuit motions panel does not hold on to the case and issue an opinion on the merits as well. But it looks likely that this appeal will play out differently. Probably in recognition of the urgency and importance of the issues involved, the motions panel expedited the Department's appeal of the district court's class-wide preliminary injunction. Under the Court's order, the Department has two weeks to file its principal brief and the plaintiffs have two weeks to respond. The Department then gets seven days to reply. The Court also scheduled argument in the appeal for October 19 and said "we will strive to decide the Department's appeal in November." (Emphasis added). So, all signs point to the same panel handling the merits as handled the motion. That means the Department will need to work hard (and fast) if it is to have a shot at changing the panel's mind in Round 2 of the appeal.

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