

STATE OF LOUISIANA

COURT OF APPEAL

FIRST CIRCUIT

NO. 2017 CA 0173

THE LOUISIANA DEPARTMENT OF JUSTICE AND JEFF LANDRY, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF LOUISIANA

VERSUS

JOHN BEL EDWARDS, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF LOUISIANA

Judgment Rendered: NOV 01 2017

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On Appeal from the
19th Judicial District Court
In and for the Parish of East Baton Rouge
State of Louisiana
Trial Court No. 652,283

Honorable Todd W. Hernandez, Judge Presiding

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BEFORE: HIGGINBOTHAM, HOLDRIDGE, AND PENZATO, JJ.

et Holdridge J., concurs in the result. I agree that the executive order is overly broad and in certain limited circumstances, it may extend additional protection to certain individuals not currently permitted by the constitution, legislature, or judiciary.

HIGGINBOTHAM, J.

This appeal centers on an Executive Order issued by the Governor of the State of Louisiana and challenges the legal authority and discretion of two elected state officials, the Governor and the Attorney General, relating to anti-discrimination language included in all state services, state contracts, and employment by the state.

FACTS AND PROCEDURAL HISTORY

The facts are not in dispute. On April 13, 2016, Governor John Bel Edwards issued Executive Order No. JBE 2016-11 (“Executive Order”), concerning “EQUAL OPPORTUNITY AND NON-DISCRIMINATION” in all state services, all employment by the state, and all state contracts for the purchase of services. The Executive Order specifically required that, effective July 1, 2016, all state contracts for the purchase of services must include a provision that the contractor shall not discriminate on the basis of “race, color, religion, sex, sexual orientation, gender identity, national origin, political affiliation, disability, or age” of the persons seeking such contracts or in any matter relating to employment.¹ The Executive Order further directed all “state agencies, departments, offices, commissions, boards, entities, or officers of the State of Louisiana, or any political subdivision . . . to cooperate with the implementation of the provisions” of the Executive Order. In accordance with the Executive Order, the Division of Administration, through the Office of State Procurement, began notifying contractors of the need to revise all professional services contract documents, including legal service contracts, to comply with the new anti-discrimination provision by adding the terms “sexual orientation” and “gender identity” so that the contracts could be reviewed and/or approved.

¹ The anti-discrimination provision was not required for contracts involving a religious corporation, religious association, religious educational institution, or religious society.

Shortly after the Executive Order was issued, a group of state legislators requested that the Attorney General for the State of Louisiana, Jeff Landry, issue a formal opinion addressing the validity and enforceability of the Executive Order. The legislators were concerned because proposed anti-discrimination legislation that had been intended to expand the protected groups of individuals to include “gender identity” had repeatedly failed to pass during legislative sessions for several years prior to the issuance of the Executive Order. The Attorney General issued an opinion on May 24, 2016, concluding that the Executive Order had no binding or legal effect since there was no constitutional or statutory provision in Louisiana that banned discrimination on the basis of “gender identity.” The Attorney General stated that the Executive Order exceeded the Governor’s authority to see that state laws are faithfully executed and enforced by attempting to create new legislation in violation of the separation of powers. Consequently, the Attorney General refused to approve various state agency requests for the appointment of private legal counsel if the proposed state contracts included the term “gender identity” in the anti-discrimination provision.

The Governor filed a separate mandamus action seeking an order for the Attorney General to approve a number of pending state contracts, but that action was denied on the grounds that the Attorney General had discretion in the state contract approval process. No appeal was taken in that action; therefore, the issues in the mandamus action are not currently before us. However, because the conflict remained concerning the impasse over approval of private legal counsel contracts, the Attorney General instituted the current litigation pertinent to this appeal.

In a petition for injunctive relief and for a declaratory judgment filed against the Governor on October 20, 2016, the Attorney General, as the executive head and chief administrative officer of the Louisiana Department of Justice, requested the district court to declare that the Executive Order was invalid and to enjoin any

implementation or enforcement of the Executive Order. A group of state legislators filed a petition for intervention, joining and asserting the same claims as the Attorney General regarding the question of which branch of state government has the constitutional authority to add “gender identity” as a protected class under Louisiana’s anti-discrimination laws.² In response, the Governor filed a reconventional demand for injunctive relief and declaratory judgment, seeking to have the Executive Order declared valid and insisting that the Executive Order does not create new law, does not conflict with current law, and was a lawfully issued policy directive relating to the issuance of state contracts and state employment in the executive branch of government. The Governor also requested that the district court define the role and authority of the Attorney General with regard to legal proceedings and the approval of private legal counsel for the state and its agencies, departments, boards, and commissions. The Attorney General filed several exceptions to the Governor’s reconventional demand, asserting objections on the grounds of res judicata, no cause of action, and prematurity.

The parties agreed to proceed to an expedited trial on the exceptions and the merits on November 29, 2016. The district court considered the law, evidence, and arguments of all counsel before denying all of the Attorney General’s exceptions and granting the Attorney General’s request for permanent injunctive and declaratory relief, enjoining the mandatory adoption and implementation of the Executive Order. The district court declared that the Executive Order constituted an unlawful ultra-vires act because it created new and/or expanded upon existing Louisiana law as opposed to directing a faithful execution of the existing laws of Louisiana, which was the sole purpose for the issuance of the Executive Order. The

² Intervenors are fifteen duly-elected Louisiana State Representatives: Beryl A. Amedee, Lawrence A. Bagley, Phillip R. DeVillier, Rick Edmonds, Raymond E. Garofalo, Jr., Lance Harris, Cameron Henry, Dodie Horton, Frank A. Howard, Mike Johnson, Blake Miguez, Jay Morris, Clay Schexnayder, Alan Seabaugh, and Julie Stokes.

district court further declared that the Executive Order was a violation of the Louisiana Constitution's separation of powers doctrine and an unlawful usurp of the constitutional authority vested only in the legislative branch of government.

As for the Governor's reconventional demand, the district court declared that the law permits the Attorney General's involvement in the appointment of private legal counsel to state agencies, boards, and commissions, but the Attorney General's authority does not extend to the review of the retention of private legal counsel to assert claims on behalf of the state, and the Attorney General's actions may not supersede the actions of private legal counsel once appointed, except for cause. The district court also found that the drafters of the Louisiana Constitution intended for the office of the Governor to be superior to the office of the Attorney General within the executive branch of state government, but the district court declined to issue an advisory opinion as to which of the state officers would prevail in any given dispute that could possibly arise between them. Written reasons were issued by the district court on December 14, 2016, and a judgment was signed accordingly on January 3, 2017. The Governor filed an appeal and the Attorney General answered the appeal.³

ASSIGNMENTS OF ERROR

The Governor assigns the following specifications of error for our review: (1) the district court erred in finding that the Governor had exercised legislative powers in issuing the Executive Order; (2) the district court erred in failing to limit the Attorney General's involvement with the appointment of private legal counsel to represent state entities; and (3) the district court erred in failing to recognize that the Attorney General has limited authority to appoint private legal counsel to represent the state.

³ After this Court *ex proprio motu* issued a rule to show cause concerning our jurisdiction, we maintained this appeal in a separate action on May 1, 2017, finding that the Governor's Executive Order was not a "law or ordinance" that would warrant the Louisiana Supreme Court's direct review as provided in La. Const. art. V, § 5(D). See **Benelli v. City of New Orleans**, 474 So.2d 1293, 1294 (La. 1985).

Four assignments of error are raised in the Attorney General's answer to the Governor's appeal: (1) the district court erred in denying the Attorney General's exceptions; (2) the district court erred in declaring that the Attorney General may not supersede actions of private legal counsel except for cause once counsel is appointed to represent a state entity; (3) the district court erred in declaring that the Attorney General cannot review retention of outside legal counsel once appointed; and (4) the district court erred in declaring the Governor is superior to the Attorney General within the executive branch of government after determining there was no justiciable controversy.

DISCUSSION

The main issues in the appeal and answer to appeal concern the validity of the Executive Order, as well as the extent of the Governor's and the Attorney General's respective authority. Such questions of law are reviewed *de novo*, as they involve statutory interpretation. See **Thibodeaux v. Donnell**, 2008-2436 (La. 5/5/09), 9 So.3d 120, 122-23; **Crowe v. Bio-Medical Application of Louisiana, LLC**, 2014-0917 (La. App. 1st Cir. 6/3/16), 208 So.3d 473, 483, writ denied, 2017-0502 (La. 5/12/17), 219 So.3d 1106. The Governor maintains that the Executive Order is merely an important anti-discrimination policy statement related to state contracts and employment services within the executive branch of government, and that nothing prohibits the Governor from establishing policy through an Executive Order that does not conflict with existing law. The Attorney General and intervenors contend that the Governor acted outside of his lawful powers in issuing the Executive Order, which unconstitutionally usurped the constitutionally granted power of the Legislature.

The Louisiana Constitution divides the powers of government into three separate branches: legislative, executive, and judicial. La. Const. art. II, § 1. Our constitution further provides that no branch may exercise power belonging to

another. La. Const. art. II, § 2. The legislative power of the state rests exclusively in the Legislature. La. Const. art. II, § 1; La. Const. art. III, § 1; **Hill v. Jindal**, 2014-1757 (La. App. 1st Cir. 6/17/15), 175 So.3d 988, 1006, writ denied, 2015-1394 (La. 10/23/15), 179 So.3d 600. The Governor has constitutional authority, as chief executive officer of the state, to see that all laws of the state and the United States are faithfully executed, and nothing prohibits the Governor from establishing policy through Executive Orders. See La. Const. art. IV, § 5(A); La. R.S. 49:215(A). However, the limited power of the Governor to issue Executive Orders does not inherently constitute authority to exercise the legislative lawmaking function. See Louisiana Hospital Ass’n v. State, 2013-0579 (La. App. 1st Cir. 12/30/14), 168 So.3d 676, 687, writ denied, 2015-0215 (La. 5/1/15), 169 So.3d 372. See also P. Lamonica & J. Jones, 20 La. Civ. L. Treatise, *Legis. Law & Proc.* § 8:1, n. 2 (2016).

The Governor’s Executive Order in this case goes beyond a mere policy statement or a directive to fulfill law, because there is no current state or federal law specifically outlining anti-discrimination laws concerning and/or defining sexual orientation or gender identity.⁴ The current laws simply prohibit discrimination based on a person’s biological sex.⁵ Louisiana Constitution Article I, Section 3, provides that no person shall be denied the equal protection of the laws and that no law shall “arbitrarily, capriciously, or unreasonably discriminate against a person

⁴ Louisiana courts have looked to federal jurisprudence to interpret Louisiana discrimination laws. **King v. Phelps Dunbar, L.L.P.**, 98-1805 (La. 6/4/99), 743 So.2d 181, 187. See also Martin v. Winn-Dixie Louisiana, Inc., 132 F.Supp.3d 794, 811 (M.D. La. 2015).

⁵ While recognizing that federal law prohibits discrimination on the basis of sex, at least one federal court has held that a person who alleges employment discrimination on the basis of sexual orientation has put forth a case of sex discrimination for Title VII (the Civil Rights Act of 1964) purposes. See Hively v. Ivy Tech Community College of Indiana, 853 F.3d 339, 351-52 (7th Cir. 2017). Other federal courts have held that persons with gender identity disorders, including those discharged from employment because they were transsexuals, did not have claims cognizable under Title VII, because “sex” means discrimination on the basis of the person’s biological sex. See Oiler v. Winn-Dixie Louisiana, Inc., 2002 WL 31098541, *6 (E.D. La. 2002). The United States Supreme Court has yet to make such a ruling and the meaning of the word “sex” in Title VII has never been clarified legislatively. See Id. at *4. Nevertheless, we note that federal law provides the familiar list of protected categories found in Louisiana’s counterpart to Title VII: “race, color, religion, sex, or national origin[.]” See 42 U.S.C. § 2000e-2(a) and La. R.S. 23:332.

because of birth, age, sex, culture, physical condition, or political ideas or affiliations.” Similarly, Louisiana law concerning intentional discrimination in employment declares it unlawful for an employer to engage in discrimination because of a person’s “race, color, religion, sex, or national origin.” See La. R.S. 23:332. Clearly, the Louisiana Legislature and the people of the State of Louisiana have not yet revised the laws and/or the state Constitution to specifically add “sexual orientation” or “gender identity” to the list of protected persons relating to discrimination. Further, there is no binding federal law or jurisprudence banning discrimination on the basis of sexual orientation or gender identity. Thus, we agree with the district court that the Governor’s Executive Order constituted an unconstitutional interference with the authority vested solely in the legislative branch of our state government by expanding the protections that currently exist in anti-discrimination laws rather than directing the faithful execution of the existing anti-discrimination laws of this state.

Having found the Governor’s Executive Order invalid, we conclude that the district court did not err in permanently enjoining the mandatory adoption and implementation of the Executive Order. The remainder of the Governor’s and the Attorney General’s assignments of error are mooted by our affirmation of the district court’s ruling concerning the Executive Order, because the evidence reveals that the Attorney General’s actions in approving or disapproving state contracts concerning the employment of private legal counsel revolved exclusively around the inclusion of the disputed anti-discrimination language. Once the controversial language is removed and not an issue, we find no evidence that a justiciable controversy remains. It is well settled that courts will not decide abstract, hypothetical, or moot controversies and will not render advisory opinions with respect to such controversies. **Louisiana Associated General Contractors, Inc. v. State,**

Through Div. of Admin., Office of State Purchasing, 95-2105 (La. 3/8/96), 669 So.2d 1185, 1193.

We decline to issue an advisory opinion as to the Attorney General's authority and involvement in approving the employment of private legal counsel to represent the interests of the state when there is no evidence that such an opinion is ripe for review. It was legal error for the district court to go beyond the declaration and injunction stating that the Governor's Executive Order could not be implemented. See **Jordan v. Louisiana Gaming Control Board, 98-1122 (La. 5/15/98), 712 So.2d 74, 85.**⁶ Therefore, we affirm that portion of the district court's judgment granting the Attorney General's declaratory judgment declaring the Governor's Executive Order unconstitutional, as it exceeds the authority of the Governor and is a violation of the separation of powers doctrine. We further affirm that portion of the judgment granting the Attorney General's request for injunctive relief and permanently enjoining the Governor, or anyone acting on his behalf, from the mandatory adoption and implementation of the Executive Order. We vacate all other portions of the district court's judgment for the reasons cited above.

CONCLUSION

The district court's judgment is affirmed in part and vacated in part. All appellate costs in the amount of \$4,732.50 are assessed equally between the Governor and the Attorney General in their official capacities for the State of Louisiana.

AFFIRMED IN PART AND VACATED IN PART.

⁶ "[A] declaration of rights must be refused if the issue presented to the court is academic, theoretical, or based upon a contingency which may or may not arise." **Jordan**, 712 So.2d at 85, quoting **Tugwell v. Members of the Board of Highways**, 228 La. 662, 83 So.2d 893, 899 (1955) (on rehearing).