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Commercial Speech Ruling on City's Wage-History Ordinance Exhibits Limiting Power of First Amendment

by Katie Bond

Numerous states and localities have enacted regulations that limit employers' ability to request or rely on prospective employees' wage history. Philadelphia, New York City, Albany County in New York, San Francisco, California, Delaware, Massachusetts, Oregon, and California are among those with wage-history ordinances. The goal of such regulations is to stem perpetuation of the wage gap that minorities and women face in comparison to non-minority men. A recent decision on the Philadelphia ordinance, which is now on appeal to the U.S. Court of Appeals for the Third Circuit, serves as an important reminder that even well-intentioned government regulation, if it impacts speech, must be justified under the First Amendment.

Case Background. The City of Pennsylvania enacted an ordinance that (1) "prohibit[ed] an employer from inquiring about a prospective employee's wage history ('the Inquiry Provision')"; and (2) "ma[de] it illegal for an employer to rely on wage history 'at any stage in the employment process' to determine a salary for an employee ('the Reliance Provision')." *Chamber of Commerce for Greater Pa. v. City of Philadelphia*, No. 2:17-cv-1548, at *1 (Apr. 30, 2018). The Chamber of Commerce for Greater Pennsylvania challenged the ordinance arguing that it violated the First Amendment. *Id.* at *1-2. The U.S. District Court for the Eastern District of Pennsylvania granted a preliminary injunction against the City.

A government entity advancing a speech restriction must justify the necessity for, and the form of, the restriction under either strict or intermediate scrutiny depending on the type of speech at issue. *See Central Hudson Gas & Electric Corp. v. Public Service Comm'n*, 447 U.S. 557, 561-66 (1980). The court in *Chamber of Commerce for Greater Pa.* determined that the Reliance Provision in Philadelphia's ordinance "regulates only conduct and does not implicate the First Amendment." *Id.* at *35. The court declined to enjoin that provision. On the other hand, it found that Inquiry Provision impacts discussions between a prospective employer and employee and is thus commercial speech subject to intermediate scrutiny under *Central Hudson*. *Id.* at *9-11.

The first prong of the *Central Hudson* test focuses on the speech at issue. The speech must "concern[] lawful activity" and must not be inherently misleading. *Central Hudson Gas & Electric Corp.*, 441 U.S. at 563. The remaining prongs focus on the proposed restriction. The government bears the burden to identify a substantial interest justifying the speech restriction, and it must show that the restriction "directly advances" that interest and is no more extensive than necessary. *Id.* at 564-65.

The court found no issue under the first prong and the parties agreed the City was advancing a substantial interest. Philadelphia's ordinance, however, failed to pass muster under the third prong—whether the ordinance directly advances the City's interest. *Id.* at *34. The court explained that, in order to defend its regulation, "the City must establish that 'the harms that it recites are real and that its restriction will in fact alleviate them to a material degree.'" *Id.* at *17 (citing *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993)). The court further observed that "the quantum of empirical evidence" that is necessary "will vary up or down with the novelty and plausibility of the

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justification raised," but that the court must "determine[] whether the [City] has drawn reasonable inferences based on substantial evidence." *Id.* at *18 (internal quotations omitted).

In support of its position, the City relied on expert testimony presented at a City Council meeting by representatives from the Women's Law Project and the Philadelphia Commission on Human Relations. *Id.* at *16, *18-19. The City also offered on "an affidavit by a labor economics expert" and a published article quoting the Executive Director of the Women and Public Policy Program at Harvard University's Kennedy School. *Id.* at *16, *19-21. The court first acknowledged that the evidence offered "amplifies a point that is not really in dispute—that there is a gender pay disparity." *Id.* at *19. The court, however, found that the City failed to show either "[1] that [it] relied upon sufficient evidence to conclude that the wage gap is a result of discrimination," or "[2] whether curtailing inquiry into allegedly discriminatory wage history will alleviate this gap." *Id.* at *29.

Analysis. The court's assessment as to whether the regulation was likely to alleviate the wage gap appears reasonably based on the evidence recounted. The City offered little evidence in this regard, and the Harvard professor's statements, in fact, highlighted the *lack* of evidence. That professor stated "no researchers have yet evaluated" whether curtailing discussion of wage history is likely to decrease the wage gap, but that "[w]e can't only move things forward once we've tested them." *Id.* at *29. Those statements are unhelpful at best, because *Central Hudson* seeks to protect speech rights from restrictions that are based on insubstantial evidence.

The court's assessment as to whether "the wage gap is a result of discrimination" is arguably less convincing. The court summarizes in a lengthy footnote evidence identified in the City's expert affidavit. *Id.* at *56, n.12. The court describes one study as assessing 30 years of U.S. workforce data and "conclude[ing] that *labor market discrimination continues to contribute to the wage gap*." *Id*. (emphasis added). It describes another article as "a meta-analysis of 41 U.S. studies [showing] that the gender [wage] gap *due to discrimination* averaged almost 28 percent." *Id*. (emphasis added). The court rejects this evidence based on an assumption that the City needed to show that discrimination is the *sole* driver of the wage gap. The court derides the City's evidence because it "does not find that other legitimate factors *are never* relevant to explain the wage gap." *Id*. (emphasis added). The court also quotes the following statement from another article: "Differences in observable factors such as education and experience *can* explain more than a quarter of the black-white wage gap for men and over a third of the gap for women." *Id.* at 32 (emphasis added). The court's demand that the city show a cause-and-effect relationship between the discrimination and the wage gap will be challenged on appeal, given that Supreme Court precedent requires proof that "the legislature has drawn reasonable inferences based on substantial evidence."

Conclusion. The wage gap Philadelphia sought to address may merit further research and innovation. The court's holding, however, demonstrates the important limiting power of the First Amendment: government paternalism should not be the first answer to problems that might arise from the free exchange of information. As the Supreme Court observed when striking down a drug-price-advertising restriction in *Va. State Board of Pharmacy v. Va. Citizens Consumer Council, Inc.*:

> It appears to be feared that if the pharmacist who wishes to provide low cost, and assertedly low quality, services is permitted to advertise, he will be taken up on his offer by too many unwitting customers. They will choose the low-cost, low-quality service and drive the 'professional' pharmacist out of business. . . . There is, of course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication, rather than to close them. . . . It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us.

425 U.S. 748, 769-70 (1976). Where evidence is light or non-existent as to whether a speech restriction will solve any problem, the speech restriction must be viewed with skepticism.

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