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Opinion No. 07-132

Effect of 2007 Tenn. Pub. Acts, Ch. 371, on Tennessee Human Rights Commission's Authority

QUESTIONS

1. Does 2007 Tenn. Pub. Acts, Ch. 371 (Chapter 371), limit or impede the Tennessee Human Rights Commission's (THRC) authority under Tenn. Code Ann. §§ 4-21-101, *et seq*., to seek temporary relief for alleged discriminatory practices regarding use of certain symbols, names or mascots, in employment, housing, and places of public accommodation, amusement or resort, specifically as set forth in Tenn. Code Ann. § 4-21-303(g)?

2. In cases where the THRC has found a discriminatory practice to have occurred under Tenn. Code Ann. §§ 4-21-101, *et seq*., due to a public or private institutions' use of certain symbols, names or mascots, does Chapter 371 limit or impede the THRC's authority to endeavor to eliminate discriminatory practices in employment, housing, and places of public accommodation, amusement or resort, specifically as set forth in Tenn. Code Ann. § 4-21-306?

OPINIONS

1. and 2. Chapter 371 forbids state agencies, including the THRC, from taking action to "impair in any way" the use of those symbols, names or mascots covered by that statute. Filing a lawsuit to enjoin the use of such symbols, names or mascots, or imposing any of the remedies set forth in Tenn. Code Ann. § 4-21-306 to sanction or eliminate their use qualifies as action to "impair" their use under the ordinary meaning of that word.

ANALYSIS

The THRC has the authority to "receive, initiate, investigate, seek to conciliate, hold hearings on and pass upon complaints alleging violations of this chapter." Tenn. Code Ann. § 4-21-202(9).

Chapter 371 reads, in pertinent part, as follows:

SECTION 1.
(a) The general assembly recognizes that many Tennessee institutions, both public

> and private, have elected to select symbols, mascots, and names to represent such institutions. Such symbols, mascots, and names are often chosen in recognition of the area's heritage and to honor and respect certain persons or cultures and their contributions to our citizens and our state.
>
> (b) No state agency has the authority to require or to prohibit or impair in any way the right of any public or private institution to continue to honor certain persons or cultures through the use of symbols, names, and mascots.

The statute does not define "impair," but other sources do. "Impair" means to weaken, to make worse, to lessen in power, diminish or otherwise affect in an injurious manner. *Black's Law Dictionary* (6th ed. 1990). Similarly, the *Merriam Webster Dictionary* (online edition) states that to "impair" is to damage or make worse (synonym: to injure). Thus, for THRC to take action against the use of a symbol, mascot or name is prohibited by Chapter 371. If, for example, the THRC sought temporary relief from a court[1] after it received a complaint alleging the use of a name, symbol or mascot as a discriminatory practice, such action would *per force* impair the right to use the name, symbol or mascot. The action could weaken and injure the institution's intent to use symbology to recognize the area's heritage and honor and respect persons or cultures and their contributions to the citizens and the state. For the THRC to impose other types of sanctions would achieve the same negative result. *See* Tenn. Code Ann. § 4-21-306 (list of remedies the THRC may use when it has found discriminatory conduct).

Furthermore, our research has revealed no case[2] in either the federal courts or the courts of Tennessee in which the use of a symbol, without more, has been found to constitute a civil rights violation or to be unconstitutional. While the use of a symbol may certainly be offensive to some individuals, mere offensiveness does not constitute a violation of the Civil Rights Act of 1964 or the Tennessee Human Rights Act. *See, e.g., Yuknis v. First Student, Inc*., 481 F.3d 552, 555-56 (7th Cir. 2007).[3] Chapter 371 does not purport either to create or to protect a right to use such imagery. Instead, Chapter 371 simply withdraws from state agencies any authority to prohibit or impair its use. No provision of the Civil Rights Act of 1964 or the state or federal constitutions requires the legislature to make remedies available under state law for alleged civil rights violations.

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[1]Under Tenn. Code Ann. § 4-21-303(g), the THRC has the authority to seek temporary relief from the court at any time after a complaint alleging discriminatory practice(s) is filed with THRC.

[2]*But see Sambo's Restaurants, Inc. v. City of Ann Arbor*, 663 F.2d 686, 697, n. 2 (6th Cir. 1981) (Keith, J., dissenting).

[3]In *Yuknis v. First Student, Inc.*, the court held that claims of a hostile environment must be based upon hostility to a group, or specific members thereof, who are protected by Title VII, rather than being based upon general offensiveness or bad taste and observing that "[t]he pluralism of our society is mirrored in the workplace, creating endless occasions for offense. Civilized people refrain from words and conduct that offend the people around them, but not all workers are civilized all the time. Title VII is not a code of civility." *Yuknis*, 481 F.3d 552 at 556.

State agencies such as the THRC are creatures of the legislature. They have only the powers and authority granted to them by the legislature. *General Portland, Inc. v. Chattanooga-Hamilton County Air Pollution Control Board,* 560 S.W.2d 910, 913 (Tenn. App.1976). Consequently, to the extent the THRC might seek to prohibit or limit the use of a name, symbol or mascot, Chapter 371 prohibits the THRC from taking such an action.

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