

A New ESG Challenge

Quick-Take: Previous missives have reported on the 'political football' of Environmental, Social Responsibility (Sustainability) and Governance (ESG) investing principles for retirement plans, a debate that seems to be playing out in red versus blue states.

Background: With the country's first foray into Mr. Trump's politics, his administration determined that employer-sponsored qualified retirement plans could not take ESG investing principles into consideration in the selection of employee retirement plan investments-only pecuniary factors could be considered by plan fiduciaries when making those investment decisions. The Biden administration reversed course on that position and allowed plan fiduciaries to consider ESG factors when deciding between two investment options of equal value - ESG could a 'factor' in the final decision. With Mr. Trump's return to Washington D.C., as part of the deluge of his Executive Orders was one that reiterated the government's position that plan fiduciaries cannot consider ESG principles when selecting investment options for plan participants. To summarize the obvious, ESG considerations in retirement plan investment options has come under heavy scrutiny (not to mention both political posturing and threats) over the past decade. But now there may be yet another, albeit novel, way where ESG investing principles might be considered in the context of retirement plan investment options.

Hartley v. Thermo Fisher Scientific Inc, U.S. District Court (Western District of New York)

In this recent lawsuit filed in a federal District Court in New York, a plan participant has sued the employer's 401(k) plan's investment committee. He claims that the committee's failure to take ESG investing principles into consideration was a refusal to accommodate his religious principles.

Facts: Andrew is a statistical science director who works for Thermo Fisher. Andrew's complaint against the company is that it violated Title VII of the Civil Rights Act and New York's Human Rights Law by its refusal to add a fossil-fuel-free fund to its 401(k) plan as one investment option. Andrew claims that investing in fossil fuel companies conflicts with his religious obligation of environmental stewardship as a Christian. Specifically, Andrew

claims that Christian teaching requires caring for the environment and that personally profiting from companies that contribute to climate change violates those religious convictions. Because every equity investment option in the Thermo Fisher 401(k) plan included significant investments in fossil fuel companies, Andrew claims that he must either compromise his beliefs or forgo part of the retirement benefits available through his employment. Andrew had asked, and was repeatedly ignored by the company's investment committee, to add a single alternative investment option that excluded fossil fuel holdings. That refusal ultimately precipitated Andrew's lawsuit demanding religious accommodation.

Dispute: The upshot of Andrew's lawsuit is that through its focus on religious accommodation, rather than the perceived social benefits of ESG investing, plan participants have a legal right to investment options that align with their religious beliefs if providing those investment options would not impose an undue hardship on the employer-sponsor of the retirement plan. Andrew's complaint seeks declaratory and injunctive relief, monetary damages, and a court order that requires Thermo Fisher to provide a reasonable religious accommodation and implement policies to eliminate religious discrimination.

Current Religious Accommodation Law: In *Groff v. DeJoy*, (2023) the U.S. Supreme Court unanimously held that employers that deny religious accommodations must show that the employee's request would impose a *substantial burden on business operations*. This new 'standard' is much higher than what federal courts had previously used in earlier religious accommodation court cases.

Conclusion: ESG investing has become a 'hot potato' with serious political consequences and threats in recent years, prompting many corporations to either back away from ESG initiatives [it's woke!] or attempt to use a different name to avoid the inevitable political fallout. The *Hartley* litigation suggests that environmental factors could still enter the workplace albeit through a different 'door', that being religious accommodation rather than a corporation's sustainability policy.

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