

Apache Can Shun Anti-Bias Proposal: Judge

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Thursday, Apr 24, 2008 --- New York City's comptroller and employee pension funds cannot force oil company Apache Corp., in which they own stock, to consider a resolution not to discriminate on the basis of sexual orientation or gender identity, a judge ruled Tuesday.

Apache filed the lawsuit earlier this month in the U.S. District Court for the Southern District of Texas, asking for a speedy decision as to whether it could block discussion of the resolution at the May 8 shareholder meeting.

After a bench trial last week, Judge Gray Miller sided with the oil company. Judge Miller said that the proposal, which would prohibit discrimination on the basis of sexual orientation and gender identity not only in hiring decisions, but in sales and purchasing decisions, would unduly interfere with the company's ordinary course of business.

"[T]he proposal seeks to micromanage the company to an unacceptable degree," the judge said. "Shareholders, as a group, are not sufficiently involved in the day-to-day operations of Apache's business to fully appreciate its complex nature. For example, shareholders, as a group, are not positioned to make informed judgments as to the propriety of certain sales and purchases."

"Similarly, the complex implications stemming from the proposed principle forbidding discrimination in the sale of goods and services based on sexual orientation or gender identity preclude provident judgment on the part of the shareholders," he continued. "It would be imprudent to effectively cede control over such day-to-day decisions, traditionally within the purview of a company's executives and officers, to the shareholders."

An attorney for the defendants could not immediately be reached for comment.

The dispute goes back to October, when New York City Comptroller William C. Thompson Jr., acting as a trustee for five city employee pension funds that collectively own more than \$100 million in Apache stock, told Apache that the funds planned to propose the resolution at the May shareholder meeting.

The Houston, Texas-based company responded that it planned to exclude the resolution on the grounds that it had to do with its "ordinary business." In January, it asked the U.S. Securities and Exchange Commission for a

“no-action letter” assuring it that it would not take any action against Apache for excluding the resolution.

The SEC issued a no-action letter on March 5. On April 4, Thompson's office issued a press release condemning the decision.

“This is outrageous and blatantly contradicts the SEC’s established record on these matters,” Thompson said. “The SEC’s decision sends a clear message that companies do not have to protect workers from anti-gay bias, and this is wrong.”

The press release said that Thompson was “exploring legal options such as appealing the SEC staff decision to the full commission and/or filing a lawsuit against Apache.” On April 7, a lawyer for the comptroller's office told Apache that it would file a lawsuit within a week.

Apache responded by suing the comptroller and the pension funds in the U.S. District Court for the Southern District of Texas, asking for a declaratory judgment that it was entitled to exclude the nondiscrimination proposal.

Apache's complaint said the proposal went “far beyond matters of employment discrimination policies; instead, it asks Apache to take a number of actions with respect to ... such ordinary business matters as 'allocation of employee benefits,' 'corporate advertising policy,' 'corporate advertising and marketing policy,' 'sale of goods and services' and 'corporate charitable contributions.’”

Apache said that it already has an equal opportunity employment policy, which prohibits discrimination on the basis of “race, color, religion, national origin, age, otherwise qualified disabled or veteran status.” The comptroller had given no reason that the existing policy was insufficient or should be changed, the company said.

“Indeed, the NYC comptroller did not offer any evidence – or even any suggestion – that Apache has discriminated against any potential or actual employees on the basis of sexual orientation or gender identity or on any other basis for that matter,” the complaint said. “The NYC comptroller did not suggest that Apache has discriminated against anyone at any time for any reasons.”

Apache is only one of 24 companies Thompson and the funds are pushing to resolve not to discriminate on the basis of sexual orientation or gender identity. Thompson announced the initiative on Jan. 29, calling it “unprecedented.”

“We must work together to make sure that corporate America embraces acceptance and affords all employees the same protections, regardless of their sexual orientation or gender identity,” Thompson said at the time. “Each year, more companies are making this commitment because they believe in guaranteeing equal treatment in the workplace. However, many of this

country's largest corporations still refuse to protect all workers.”

Apache is represented in the matter by Susman Godfrey LLP and Covington & Burling LLP. The defendants are represented by New York City lawyers and Schwartz Junell Greenberg & Oathout LLP.

The case is Apache Corp. v. The New York City Employees' Retirement System et al., case number 4:08-cv-01064, in the U.S. District Court for the Southern District of Texas.