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SUPREME COURT'S SAME-SEX WEDDING CAKE DECISION DOES NOT GRANT RIGHT TO DISCRIMINATE

Insights
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In a 7-to-2 decision, the Supreme Court ruled today that a baker's Free Exercise Clause rights under the Constitution were not properly considered by the Colorado Civil Rights Commission when it held that he was legally required to bake and sell a wedding cake for a same-sex couple. However, today's much anticipated decision in *Masterpiece Cakeshop, Inc. v. Colorado Civil Rights Commission* does not create any sort of safe harbor for businesses defending against bias claims. Instead, this narrow decision is more of a rebuke to the state commission that expressed impermissible hostility toward the baker's religious beliefs when ruling on his case, requiring the commission to reconsider its earlier action.

Most importantly, today's decision certainly does not extend a green light for businesses or employers to freely discriminate against customers, patrons, guests, or employees due to their sexual orientation or any other protected class status. Any business open to the public must recognize that this decision does not grant them the right to treat people differently because of their sexual orientation.

THE BACKGROUND STORY TAKES THE CAKE

In July 2012, David Mullins and Charlie Craig got married in Massachusetts and planned a celebration ceremony in their home state of Colorado. At that time, marriage between same-sex couples was not yet legal in Colorado, and the

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U.S. Supreme Court had not yet extended same-sex marriage rights on a nationwide basis.

Mullins, Craig, and Craig's mother, Deborah Munn, went to Masterpiece Cakeshop in Lakewood, Colorado, to inquire about purchasing a cake for the celebration. Upon learning that the cake was intended for a same-sex wedding celebration, the owner of the bakery, Jack Phillips, told them that he would not sell them a wedding cake. Instead, he offered to sell them general baked goods not specifically intended for a wedding.

The following day, Munn called the bakery to further inquire as to why the owner would not sell her son a wedding cake. Phillips replied that it was against his religious beliefs to sell same-sex wedding cakes because he believed marriage should be between a man and a woman. In fact, his bakery had previously refused to sell cakes and cupcakes for other same-sex weddings for the same reason. As Phillips describes it, he believes he can honor God through his artistic work on his cakes and that it would displease God if he created cakes for same-sex weddings.

The aftermath? Mullins and Craig ultimately received a wedding cake decorated with rainbow layers donated by another store for their celebration ceremony, and protestors soon picketed Masterpiece Cakeshop after the news about the situation spread online. But the story didn't end there. Mullins and Craig filed a charge of discrimination with the Colorado Civil Rights Commission alleging sexual orientation discrimination in violation of the Colorado Anti-Discrimination Act (CADA). The CADA prohibits businesses which are open to the public from refusing to serve customers based upon a number of protected categories, including sexual orientation.

An administrative judge ruled in their favor and ordered Masterpiece Cakeshop to do the following: design and sell wedding cakes for same-sex unions; take remedial measures about complying with the CADA, including training staff (many of whom are related to Phillips) about their requirement to sell all available goods to any customer regardless of sexual orientation; and file quarterly reports for two years with the state outlining the steps the business took to comply with the CADA. The Commission approved the judge's order, and the bakery appealed to the Colorado Court of Appeals. The bakery found no relief there, and, although the Colorado Supreme Court was not interested in

stepping into the fray, the U.S. Supreme Court agreed to issue a final ruling on the matter.

SUPREME COURT: DECISION BELOW WAS NO PIECE OF CAKE

On appeal to the Supreme Court, the bakery owner made two primary arguments. First, he contended that compelling him to make a cake that celebrates same-sex marriage violates the free speech clause of the First Amendment. Under the “compelled speech” doctrine, the government cannot force citizens to express messages that they deem objectionable or to create art with a specific message. His cakes, he argued, are protected artistic expression because he intends to, and does in fact, communicate through them. Second, he asserted that forcing him to design a cake for a same-sex marriage would contravene the portion of the First Amendment that guarantees the free exercise of religion. Here, he contended, the government targeted him because of his sincerely held religious opposition to same-sex marriage.

The Supreme Court, in a majority opinion authored by Justice Kennedy and joined by reliably liberal Justices Kagan and Breyer, ruled in favor of the cake shop and found that the Colorado Civil Rights Commission did not handle the “delicate” questions presented in this case “with the religious neutrality that the Constitution requires.” The Court ruled that the Commission improperly demonstrated hostility towards Phillips’ sincerely held religious belief against same-sex marriage, and that this hostility, when combined with the request to make a wedding cake for such an event, was “inconsistent with what the Free Exercise Clause requires.”

The Court’s conclusion was based upon evidence that the Commission had treated Phillips’ case differently from other similar cases involving bakers refusing to perform work for customers; the Court cited to public statements made by commissioners that expressed hostility towards Phillips’ religious beliefs (comparing them to the defense of slavery and the Holocaust, for example). The Court also noted that Phillips made his decision to refuse to make the wedding cake at a time when both Colorado and the United States had not legalized same-sex marriage, which should have been taken into account by the Commission.

Accordingly, the Court reversed the decision and asked the Commission to take another shot at resolving the conflict. It did not, however, answer questions related to the issue of whether a business owner's free exercise of religion must yield to an otherwise valid exercise of state power. In fact, it cautioned the Commission that "any decision in favor of the baker would have to be sufficiently constrained, lest all purveyors of goods and services who object to gay marriages for moral and religious reasons in effect be allowed to put up signs saying 'no goods or services will be sold if they will be used for gay marriages,' something that would impose a serious stigma on gay persons."

In sum, the Court noted that "the outcome of cases like this in other circumstances must await further elaboration in the courts, all in the context of recognizing that these disputes must be resolved with tolerance, without undue disrespect to sincere religious beliefs, and without subjecting gay persons to indignities when they seek goods and services in an open market."

THE ICING ON THE CAKE: WHAT THIS MEANS FOR BUSINESSES

"Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth," the Supreme Court said in today's majority opinion, and businesses should heed these words when making decisions about the work they perform for their guests and customers. Although the Court acknowledged that religious objections to gay marriage might in some limited cases be considered a legally protected view and even a protected form of expression, "it is a general rule that such objections do not allow business owners and other actors in the economy and in society to deny protected persons equal access to goods and services under a neutral and generally applicable public accommodations law."

The Court instructed the Colorado Civil Rights Commission to review the case once again and apply the law in a manner consistent with the Constitution's guarantee that all laws be applied in a manner neutral toward religion. A subsequent decision from the Commission may provide certain employers in that state with a defense allowing them to establish that their product or service is a form of artistic expression that should be protected by the First Amendment.

However, today's decision should not be read to permit employers to discriminate on the basis of sexual orientation or other protected category, no matter the strength of a business owner's religious beliefs. If an issue arises which pits your religious beliefs against a law of general application, you should seek counsel on the appropriate course of action—but recognize that today's decision affords you no safe harbor.

If you have any questions about the implications of this decision, contact your local Fisher Phillips attorney.

This Legal Alert provides an overview of a specific Supreme Court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.