CLASH OF INTERESTS CONCERNING RELIGION VERSUS GAY RIGHTS

The clash of rights between those who assert a First Amendment religious privilege to practice their religion freely with civil rights promoted by the gay, lesbian and transgender community has occurred in the past. *Fulton v. City of Phila*., 2019 U.S. App. LEXIS 11711 is just such a case. The Philadelphia Department of Human Services ceased referring foster children to an agency that would not work with same-sex couples as foster parents. Catholic Social Services ("CSS") sued claiming the City violated its rights under the First Amendment's Free Exercise, Establishment and Free Speech Clauses as well as under Pennsylvania's Religious Freedom Protection Act. The Third Circuit, Ambro, Scirica and Rendell determined that CSS was not entitled to a preliminary injunction. "The City's nondiscrimination policy is a neutral, generally applicable law, and the religious views of CSS do not entitle it to an exemption from that policy." At LEXIS p. 6.

The question is, whether the Free Exercise Clause goes beyond the right simply to believe as one wishes? As the Third Circuit panel noted, the Free Exercise Clause does not "relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).'" *Emp't Div. v. Smith*, 494 U.S. 872 at 879, quoting *United States v. Lee*, 455 U.S. 252, 263 n. 3 (1982) (Stevens, J., concurring in the judgment).

Felix Frankfurter is quoted as having said that, "Conscience scruples" do not relieve the individual from obedience "to a general law not aimed at the promotion or restriction of religious beliefs." Quoting *Minersville School District Board of Education v. Gobitis*, 310 U.S. 586, 594-95 (1940) (Frankfurter, J.).

The Supreme Court recently encountered a similar issue in *Masterpiece Cake Shop, Ltd. v. Colorado Civil Rights Commission*, 138 S.C. 1719, 1727 (2018) and *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez,* 561 U.S. 661, 694 n. 24 (2010). Religious exemptions do not permit organizations or individuals to violate the law which, generally speaking, are intended to preserve the rights of citizens.

The case law, as it is developed, requires an organization such as the Catholic Social Services ("CSS") to show that it was treated differently **because** of its religion. "Put another way, it must show that it was treated more harshly than the government would have treated someone else who engaged in the same conduct but held different religious views." LEXIS page 11 of 20.

Most of the public attention given to these class of cases revolve around whether the public approves or disapproves of gay conduct and lifestyle. It is often asserted that in this country everyone should have a right to live according to their conscience. But what happens to when there is a collision of conscience? The conscience of a gay couple is that they should be able to go to any public facility and have their cake created, but the conscience of the cakemakers is that they should have the right to refuse the request.

In *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993), the City of Hialeah, Florida adopted an ordinance prohibiting the slaughter of animals except in certain recognized circumstances. The history of the law's adoption showed that it had nothing to do with animal welfare, but rather was an attempt to suppress the practice of Santeria, a fusion of traditional African religion and Catholicism that developed in Cuba in the Nineteenth Century and incorporates animal sacrifice in many of its rituals. The court concluded that the ordinance was specifically adopted to suppress a disfavored religion.

In the *Masterpiece Cake Shop* litigation, Denver baker Jack Phillips refused to make a cake for a gay couple's wedding reception because of his religious convictions. *Masterpiece Cake Shop* resulted in a suit under Colorado's Public Accommodation statute. The Colorado Civil Rights Commission expressed open hostility towards Phillips and his religion. It treated him differently from others similarly situated because of their religion. It was that animosity which caused the Supreme Court to opine that Phillips was being treated unfairly.

The Third Circuit in *Tenafly Eruv Association v. Borough of Tenafly*, 309 F.3d 144 (3rd Cir. 2002), struck down an ordinance passed by the Borough of Tenafly which effectively prohibited an Eruv on utility poles. The Borough violated the free exercise clause of Jewish residents who needed to have an Eruv in order to be able to carry possessions on the Sabbath.

The *Fulton* court, ultimately arrived at the conclusion that the District Court did not abuse its discretion in finding CSS had failed to demonstrate a likelihood of success on the merits of its Free Exercise claim. Said the court: "The ordinance in *Fulton* was not gerrymandered as in *Lukumi*, there was no issue of ignoring widespread secular violations as in *Tenafly*, or animosity against religion found in *Masterpiece.* The City of Philadelphia showed that in fact wanted to work with CSS, but for the problem that arose when CSS would not work with gay couples."

CSS also argued that the act of the City violated the Establishment Clause. The Court found the City was not punishing CSS for refusing to adopt its preferred view of Catholic teaching. That no doubt would be an impermissible establishment of religion. The court distinguished what happened in *Fulton* as inappropriate religious compulsion.

The Court examined a number of other issues including the Pennsylvania Religious Freedom Protection Act. The City's actions, ruled the Court, would survive strict scrutiny as well. In addition to the undergirding principle that CSS was unlikely to succeed on the merits, the Court also found that there was not a prospect of irreparable harm. "The City stands on firm ground in requiring its contractors to abide by its non-discrimination policies when administering public services." Discrimination, ruled the Court, could not be justified if otherwise improper and illegal unless it was a specific attempt by the law or the lawmakers to undermine a religious doctrine. In essence, the Court reasoned that a facially neutral anti-discrimination law could be applied even in the face of serious religious and consciences objections to the contrary.

Perhaps the United States Supreme Court will have a look at this.

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