



TO BAKE OR NOT TO BAKE, IS THAT THE QUESTION?



Edward H. Trent

"How the Court reached its holding ... send[s] a clear message to governmental agencies that they may not base decisions ... on anti-religious prejudice ..."

..... that some messages are worthy of protection, while others are not. Accordingly, the Court's opinion is an interesting one in ongoing culture war over marriage, sexuality, and religious freedom in the marketplace.

In legalizing same-sex marriage, the Supreme Court held, in the words of the retiring Justice Anthony Kennedy, that "[t]he First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." However, the question here is whether a business that provides certain wedding services, such as custom-made wedding cakes, may decline to provide such a service on the basis of the owner's religious convictions on the nature of marriage. In *Masterpiece Cake, LTD v. Colorado Civil Rights Commission*, the Supreme Court offered a variety of opinions on that, but no clear answer. What was clear in this case is that the government in evaluating that question cannot have the process tainted by religious hostility.

On June 4, 2018, the five-year saga of an unmade wedding cake came to a close. The United States Supreme Court, by a vote of 7 to 2, ruled in favor of Masterpiece Cake shop and its owner Jack Phillips on the issue of whether the State of Colorado could require him to make a custom wedding cake for a same-sex marriage, contrary to his religious beliefs. How the Court reached its holding, however, leaves some important questions for another day, while sending a clear message to governmental agencies that they may *not* base decisions - or the application of even neutral laws - on anti-religious prejudice or a determination

Jack Phillips, the owner of Masterpiece Cake, operates his bake shop in Colorado in accordance with his Christian religious beliefs. He declines to make cakes or other baked goods that promote certain messages he finds offensive, or to celebrate certain events such as Halloween. In 2012, when a same-sex couple came into his shop looking to purchase a wedding cake for their reception, Mr. Phillips declined on the basis that he does not create wedding cakes for same-sex weddings. He was willing to sell them any other baked goods they wanted or for any other events they wished to celebrate, but due to his religious convictions on marriage, he would not participate in a same-sex wedding by making a custom wedding cake for the event. At the time of the request, same-sex marriage was not recognized in Colorado, so the wedding would take place in Massachusetts with a reception following in Colorado.

The State of Colorado has a law prohibiting discrimination in public accommodations that makes it "a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to any individual or a group, because of ... sexual orientation ... the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation." The law covers any "place of business engaged in any sales to the public and any place offering services ... to the public." In this case, the Colorado Civil Rights Commission (the "Commission") claimed that refusing to make a wedding cake for a same-sex couple - when the business offered to make wedding cakes for heterosexual couples - violated the statute and constituted discrimination on the basis of sexual orientation.

Mr. Phillips argued that he was entitled to an exception to the statute because participating in the same-sex wedding, even as tangentially as making the wedding cake, would violate his sincerely-held religious beliefs. Additionally, he claimed that a custom wedding cake expressed a message about the particular wedding itself, and in this case, such compelled expression would violate his free speech rights under the First Amendment.

The Supreme Court ruled 7-2 to reverse the Commission's

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decision that Jack Phillips was required to make a custom wedding cake for a same-sex wedding on the same basis that he made them for others. However, the Court was fiercely divided on the most significant issues in the case. The Court was divided on whether Jack Phillips has a constitutional right to refuse to make a wedding cake for a same-sex wedding due to his religious beliefs. Likewise, the Court was divided on whether the making of a custom wedding cake was expressive conduct protected by the free speech clause of the First Amendment. Yet, seven justices agreed that because the Colorado Commission's decision was so tainted by anti-religious bias, it could not stand.

The two main factors that caused the Supreme Court to reverse the Commission's decision were (1) comments by at least two of the Colorado Commissioners expressing hostility toward Mr. Phillips' religious beliefs on marriage, and (2) a seemingly inconsistent approach to handling complaints from another individual when three Colorado bakers refused to make him a cake expressing negative views toward same-sex marriage based on Biblical teaching. With regard to the first issue, the Court noted: "At several points during its meeting, commissioners endorsed the view that religious beliefs cannot legitimately be carried into the public sphere or commercial domain, implying that religious beliefs and persons are less than fully welcome in Colorado's business community." One commissioner suggested that Phillips can believe "what he wants to believe," but cannot act on his religious beliefs "if he decides to do business in the state." Another commissioner was quoted as saying, "Freedom of religion and religion has been used to justify all kinds of discrimination throughout history, whether it be slavery, whether it be the holocaust, whether it be – I mean, we – we can list hundreds of situations where freedom of religion has been used to justify discrimination. And to me it is one of the most despicable pieces of rhetoric that people can use to – to use their religion to hurt others." The Court noted "This sentiment is inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado's anti-discrimination law – a law that protects discrimination on the basis of religion as well as sexual orientation."

Regarding the second issue, anti-religious bias, the Court took note of the Commission's inconsistent application of the statute when it came to the provision of custom-made cakes. While the proceedings against Masterpiece Cake were pending, the Commission considered a complaint from another consumer who was denied a custom cake by three different Colorado bakers. The individual requested two cakes be made, both in the shape of an open book. On one were two Bible verses describing homosexuality as a sin and on the other was a picture of two groomsmen holding hands with a red X over them and the words "God loves sinners" and "While we were yet sinners, Christ died for

us." All three bakers refused to make the cakes, finding the messages offensive or derogatory, a sentiment with which the Commission agreed. Yet, when Mr. Phillips objected to making a cake for a same-sex wedding - believing the making of the cake would express approval for a union he found contrary to his faith - the Commission found his justification irrelevant and "irrational." The Commission's divergent outcomes were based on the Commission's determination of what messages are offensive and which are not. As the Court held, such a rationale failed to provide a neutral application of constitutional principles to the issue at hand. According to the Court, it showed that the Commission made its determination out of a hostile view of Mr. Phillips' religious convictions; messages disapproving of same-sex marriage were not protected, but messages promoting same-sex marriage were mandatory. As Justice Thomas explained in more detail in his concurring opinion, the government does not get to determine which messages are appropriate and which are not, and the government cannot force its citizens to adopt one particular point of view over another.

So, while the Court in this case was clear that the government may not act in a way that is hostile towards religion, it left for another day whether Jack Phillips has a right to decline to make a wedding cake for a same-sex wedding due to his religious beliefs. Four justices (Justices Ginsburg, Sotomayor, Stevens, and Kagan) expressed the view that the statute was neutral; so if Jack Phillips is going to make and sell wedding cakes, he must do so for same-sex couples as well. They also expressed their opinion that the differing treatment given to the consumer who requested cakes deemed derogatory of same-sex marriage was constitutionally permissible. Three justices (Justices Thomas, Alito, and Gorsuch) would have ruled for Mr. Phillips on the merits, finding that the government could not force him to make a custom cake for an event that violated his religious beliefs. They also expressed the opinion that there was no justification for the difference in treatment between Mr. Phillips' case and that of the customer who wanted a cake expressing the view that same-sex marriage was wrong. The Chief Justice did not disclose his thinking, while retiring Justice Kennedy was clearly conflicted on the appropriate resolution of those fundamental questions.

So the battle between culture and religion in the area of marriage and sexuality continues, and business owners remain caught in the middle. It is important to note that this case does not change the ongoing legal requirement for a business to provide reasonable accommodations for its employees' religious beliefs and practices. However, the Supreme Court made clear that government officials cannot act out of anti-religious bias when deciding these difficult questions. Our next Supreme Court Justice may have to bring clarity to these difficult issues.

HARASSMENT REMAINS IN THE HEADLINES



Ann E. Sartwell

"In just a two day period in June, the EEOC brought eight separate harassment-based lawsuits ... Three of the eight cases allege harassment by owners."

Harassment remains in the headlines. In just a two day period in June, the EEOC brought eight separate harassment-based lawsuits under a variety of theories. Three of the eight cases allege harassment by owners. All allege sex harassment, but several include explosive racial language as well. And then there is the touching; lots of it. Add in a dash of non-existent policies, training, and investigatory follow-through, and infuse the mixture with a soupcon (or sometimes a goblet) of apparent retaliatory animus, and it is sure-fire recipe for employer trouble.

A few days earlier, Acting Chair Victoria Lipnic, along with Commissioner Chai Feldblum, reconvened the Select Taskforce on the Study of Harassment in the Workplace, which had issued recommendations in 2016. Since the report's release, the commission has been busy advocating for and providing employers new training programs that focus on respect and inclusivity rather than legal definitions. The EEOC has still not finalized its *Proposed Guidance on Sexual Harassment in the Workplace*, and it is unlikely to do so unless and until the President's nominees are confirmed and/or there is greater clarity from the courts on hot-button issues like Title VII's application to sexual orientation discrimination.

Significant portions of the meeting focused on the introduction of legislation at local, state and national levels, including the passage of industry specific measures such as Chicago's "Hands Off Pants On" Ordinance that requires safety alert buttons and employee protective policies for housekeeping staff. The meeting also spotlighted innovations like third party administered employee complaint platforms. Business owners also presented their own ideas.

Erin Wade, a former lawyer, shared a solution tailored for her mac-and-cheese restaurant. Three years ago she confronted a disconnect between her vision of her business as a safe place for employees and her workers' reality. She and the staff devised a simple color-coded system. Now, if a staff member reports

"yellow" behavior (unsavory staring or creepiness) and requests that a manager take over a table, they do so, no questions asked. "Orange" behavior (comments with sexual undertones) means the manager must take over the table. "Red" behavior (overtly sexual comments or touching, or repeated inappropriate comments, especially after being told they are unwelcome) means the patron must go.

Lipnic reminded the attendees that the EEOC plays multiple roles - as the agency with expertise, as an educator, and as enforcer. Two days later, the agency's role was clear: "With the suits filed this week," Lipnic said, "we are enforcing the law." It also appears that the EEOC's harassment enforcement efforts reflect some of the broader #MeToo and Time's Up storylines.

One case filed by the EEOC has factual allegations akin to some leveled at celebrity chef Mario Batali in recent months. Brought against Georgina's Taqueria in Michigan on behalf of sous chef Jessica Wethern and a class of similarly situated female employees, it alleges that chef and owner Anthony Craig engaged in a pattern of egregious verbal and physical sexual harassment. When Wethern complained to Craig, she was allegedly immediately stripped of authority and had her hours cut. Days later, she gave a written complaint to a manager. Ten minutes later, Craig fired her. If Craig had had the benefit of counsel before making this particular employment decision, the advice would likely have been a resounding, "No, chef!"

In California, the EEOC sued Tapioca Express, a small bubble tea franchise chain, and two of its franchisees (with interconnected ownership) for subjecting a class of female employees to sexual harassment. The agency said the owner routinely inappropriately touched young women and made repeated sexual comments. The behavior was reported to Tapioca Express in 2013; however, the franchisor took no action against the harasser/owner. More than two female employees felt compelled to quit as a result of the escalating abuse, the EEOC alleges.

The EEOC Tapioca Express filing falls on the heels of recent near-simultaneous EEOC charges against McDonalds stores by 10 individuals in different cities represented by attorneys from Altshuler Berzon and Outten & Golden LLP. Those complaints are being supported with funding from Time's Up Legal Defense Fund, administered by the National Women's Law Center Fund, and are organized with the help of the Service Employees International Union advocacy group

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Fight for \$15. Ironically, the SEIU and Fight for \$15 fired or accepted the resignations of several key leaders in the wake of internal sex harassment and misconduct investigations last Fall, just as the #MeToo wave was breaking.

The EEOC’s Birmingham District Office sued Master Marine, Inc., for allowing lead welder Chad Carr to sexually and racially harass a male Asian-American welder at its Bayou La Batre, Alabama, headquarters. The behavior included multiple touchings in the buttocks and genital areas and blatantly racist remarks. The EEOC claims Carr also racially harassed African American employees, regularly referring to them as “n---r,” “monkey,” and “boy,” and that he threatened to discipline at least one of them. The employees made oral and written complaints regarding Carr, who left the company for unrelated reasons at least six months after the behavior is alleged to have begun. Expect questions about Carr’s supervisory status, the timing of the company’s knowledge of his behavior, and the conduct of its investigation (if any) to be important in this case.

The Los Angeles District Office filed suit against Sierra Creative Systems, alleging it subjected a class of mostly Spanish speaking female workers to ongoing verbal and physical sexual harassment and retaliation. The supervisor rubbed the backs of female employees while making comments about their underclothes and “accidentally” grazed their breasts with his elbows while they were working at printing machines. The EEOC also charged that employees were called (in Spanish) “whores,” “sluts,” “cows” and “donkeys,” “useless,” “stupid,” and “ignorant.” Acquiescence to his conduct was demanded in exchange for shift assignments and hours. Despite repeated oral and written complaints (even notarized ones) the company did nothing to stop this abuse, and those who reported the misconduct were told that the supervisor was just “machismo,” and were subjected to harassment and retaliation.

Real Time Staffing, Inc., was sued for allegedly allowing a group of female employees on temporary assignment at the Inspection of Public Records Act Unit of the Albuquerque Police Department to be harassed. The EEOC said the women were subjected to pervasive comments about breasts and buttocks; referred to as “prostitutes,” “sluts” and worse. It also claimed they were grabbed on their breasts, hit on their rears, had objects thrown at them, and that one was even kicked in the vaginal area. That case arises in the middle of a separate whistleblower lawsuit brought by the ousted public

records supervisor who is at the heart of the underlying facts of this case.

The agency’s Dallas District Office in turn sued G2 Corporation, doing business as Screen Tight, for harassment and constructive discharge. The company had no harassment policy or training. Marta Luna claims she was subjected to unwelcome physical and verbal harassment at the hands of her production manager and another high-level corporate officer. The complaint alleges the manager made up a task of cleaning restrooms in order to create an opportunity to make sexual comments and attempt to force himself on her. The attempted assault was interrupted only by the surprise arrival of a coworker. The EEOC said that the vice president also made graphic, intimidating comments to her, and that the production manager made a physical gesture threatening harm at her the next day. She quit thereafter.

The EEOC’s St. Louis District Office sued Prime Inc., a large trucking company. The EEOC stopped using the alleged harasser as a trainer because of his behavior but kept him on as an “independent contractor” and continued providing him with Prime employees as co-drivers. It did not warn a new female driver about the harasser’s past misconduct or warn him not to harass her. For six weeks he allegedly talked nonstop about sex in graphic and violent terms and told her she would lose her job and commercial driver’s license if she reported his behavior.

The EEOC also sued Total Maintenance Solutions, a Cincinnati-based cleaning company, for allegedly subjecting an employee to a sexually hostile work environment and retaliation. Aaliyah Thomas endured unwanted touching, sexual comments, overtures, ogling, hugging, comments about her body and repeated calls at night during non-work hours suggesting a sexual relationship. She complained repeatedly to the harassing owner, including by text, and was subsequently fired in retaliation for her complaints, the EEOC said.

Of course, all of the facts in the above paragraphs are just the “facts” as alleged in the complaints. Regardless of the ultimate outcome of these cases, this much remains clear- employers need to set clear boundaries for behavior, create policies and procedures that take the unique circumstances of their workforces and environments into account, and follow through with swift and appropriate consequences for anyone who violates expectations.