

CHRISTIAN BUSINESS & MINISTRY LEGAL ISSUES

DEFENDING RIGHTS OF CONSCIENCE

(DEEPLY HELD RELIGIOUS BELIEFS)

OVERVIEW

- I. The Law
- II. The Moving Center
- III. Attacks on Religious Liberty
- IV. Ways to Protect Your Christian Business
- V. 8 Ways to Protect Your Ministry
- VI. Q & A

US CONSTITUTION

The First Amendment

“Congress shall make no law
respecting an establishment of religion,
or
prohibiting the free exercise thereof.”

US CONSTITUTION

First Amendment

- It prohibits the government from unduly preferring religion over non-religion, or non-religion over religion.

UNCONSTITUTIONAL BEHAVIOR

Unconstitutional Tests:

Kavanaugh confirmation hearings

Unconstitutional Curtailing:

Religious beliefs are reduced to fit a changing society

LAWSUITS

Forbid playing Christian music in assisted living facility

Forbid having Christmas lights on a house in a neighborhood

Forbid saying "Merry Christmas" at work

Forbid creating Christian clubs in schools

Require appointing atheists to boards of Christian clubs

Forbid coach from going down on one knee after football game

FIXED CENTER VS. NO CENTER

Fixed Center: Biblical world view (God at the center)

+ Constitution (God at the center)

Solid, predictable foundation for law and society

VS.

No Center: Non-biblical world view (man at the center)

+ Constitution = living document that changes to conform to majority

Shifting, unpredictable foundation for law and society (relativism)



“THE CENTER IS NOT THE CENTER”

1960s Jacques Derrida – Philosophies change

God is center to Man is center to No origin (Freud, Nietzsche)

= Deconstruction of ideas

Philosophy & literary theory are same

Marxism as philosophy and literary theory

Deconstruction of words

Modernism, Post Modernism – fractured form, text, & chronology

CONSEQUENCES OF NO CENTER...

Nietzsche said man could find pleasure in being in “a world of signs without fault, without truth, and without origin.”

No right or wrong

No truth or falsity

No origin, no God



CHRISTIAN PHILOSOPHERS

1970s

- Francis Schaeffer – philosophy of Non-Reason
- Truth is subjective

1990s

- RC Sproul
- Consequences of philosophy combined with linguistics
 - Definitions of words are lost.

LINGUISTICS - DECONSTRUCTION OF WORDS

Abortion – *Roe v. Wade*: 14th Amendment, no state can “deprive any person of life, liberty, or property, without due process of law.”

“person” = one capable of qualifying for president of the US under Constitution

if “not a person” then it can’t be deprived of “life”

“*Liberty*” = “*Choice*”

“Choice” = an inferred “right of privacy”

Therefore a private act involving consequences of a sexual act is a right of privacy protected by the 14th Amendment.

Current New York law: “Born baby” = “born fetus,” not human, no right to medical care

SAME SEX MARRIAGE

Marriage - Obergefell v. Hodges

Married couple = same sex (14th Amendment)

Male + Male

Female + Female

Male identifying as Female + Male identifying as Female

Objective: Sex (male female) = *Subjective: Sexual orientation (desire)*

Objective: Gender (male female) = *Subjective: feeling of identity despite physical*

CONSTITUTIONAL CRISIS!

1st Amendment

Freedom of Religion



14th Amendment

Equal Protection & Due Process

SOGI LAWS

Sexual Orientation

Gender Identity

FEDERAL LAW

Fair Labor Standards Act (FLSA)

FLSA prohibits employment discrimination based on race, color, religion, **sex**, national origin, or age.

TITLE VII of the Civil Rights Act 1964

CURTAILING RELIGIOUS LIBERTY (1990)

Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872 (1990).

- Curtailed the religious-liberty protection.
- First Amendment does not protect against burdens on religion imposed by neutral and generally applicable laws.

RELIGIOUS FREEDOM RESTORATION ACT (1999)

Strict Scrutiny test:

In order for religious liberty to be curtailed by the federal government, there must be:

- A “compelling interest”
- And it must be “narrowly tailored” or the “least restrictive means” to achieve the goal of the law.

So, show that the law would impose a burden or restrain religious liberty.

**WAYS
TO PROTECT YOUR
CHRISTIAN BUSINESS**

EXAMPLES OF DISCRIMINATION CHARGES BASED ON SEX OR GENDER

Refusal to perform marriages

Refusal to take photos of an event

Refusal to bake a cake for an event

Refusal to admit members

Refusal to print t-shirts

FIRST AMENDMENT DEFENSES

Type I: Expression Related:

Compelled Speech Defense

- Even if paid service and unpopular belief
- *Rumsfeld v. FAIR*, 547 U.S. 47, 61-65 (2006): Gov't can't:
- compel an individual or entity to engage in unwanted “direct expression.”
- punish an individual or entity for refusing to facilitate another's speech.

COMPELLED SPEECH DEFENSE CONT...

Show the compelled expression is protected speech.

- Photography is protected speech. It communicates a point of view.

Show:

- Performing the activity would require expressing a view that violates your beliefs.
- Hosting or accommodating another speaker's message, stifles your own speech.

TYPE II: FREE EXERCISE DEFENSE

The Religious Freedom Restoration Act holds that any curtailing of religious liberty must be determined under a strict scrutiny standard of review:

- “compelling interest”
- “narrowly tailored” or “least restrictive means”
- Argue application of the nondiscrimination law would impose a burden or restriction on the client’s free exercise of religion.
- Then, the burden shifts to the party seeking to apply the nondiscrimination law to demonstrate that strict scrutiny is satisfied.

SOGI

“How can I protect my ministry against Sexual Orientation and Gender Identity non-discrimination laws?”

8 WAYS TO PROTECT YOUR MINISTRY

1. Follow Corporate Governance
2. Statement of Faith
3. Statement on Marriage, Gender, Sexuality
4. Statement on Sanctity of Life
5. Statement on Final Authority in Matters of Faith



6. Adopt Code of Conduct / Employee Handbook
7. Religious Expression Insurance – intentional infliction of emotional distress in employment discrimination
8. Draft Job Descriptions with Ministerial Functions



PUBLIC ACCOMMODATION

- **Fees** - nominal, covering utilities and cleaning.
- **Activities** – of a religious nature that do not violate your Statement of Faith or Code of Conduct

Danger:

Your Non-Profit Status Is At Risk!

You may be deemed subject to public accommodation requirements

MINISTERIAL EXCEPTION

The Ministerial Exception expands “minister” from pastor to any employee charged with

- ministering,
- teaching, or
- communicating beliefs.

MINISTERIAL EXCEPTION

US Supreme Court held in *EEOC v. Hosanna-Tabor Evangelical Lutheran Church* that “Religious organizations” may consider an applicant or employee’s religious beliefs in hiring and firing.

- The “**Ministerial Exception**” - churches, Christian schools, and ministries are **exempt** from employment non-discrimination laws for hiring and firing their **ministerial employees** = those who perform the organization’s rituals or teaching and explain its beliefs.

EMPLOYMENT

Be careful:

- Set out religious grounds for limiting employment opportunities in job announcements.
- Consistently apply all employment standards.

EMPLOYMENT

- Many states and municipalities prohibit discrimination in employment based on unbiblical behavior related to sexual orientation and gender identity.
- Most **state laws and local ordinances** provide exemptions for religious organizations.
- REMEMBER:
 - The **First Amendment provides the highest authority / protection** over state and local laws, even those that do not recognize exemptions for religious organizations.

Florida Statutes

761.061 Rights of certain churches or religious organizations or individuals.—(1) The following individuals or entities may not be required to solemnize any marriage or provide services, accommodations, facilities, goods, or privileges for a purpose related to the solemnization, formation, or celebration of any marriage if such an action would cause the individual or entity to violate a sincerely held religious belief of the individual or entity:

- (a) A church;
- (b) A religious organization;
- (c) A religious corporation or association;
- (d) A religious fraternal benefit society;
- (e) A religious school or educational institution;
- (f) An integrated auxiliary of a church;
- (g) An individual employed by a church or religious organization while acting in the scope of that employment;
- (h) A clergy member; or
- (i) A minister.

EMPLOYMENT

Require Employees and Volunteers to sign the Statement of Faith and Code of Conduct.

EMPLOYMENT

When possible,

- Assign employees **ministerial duties**.
- Require **ministerial qualifications**.
- Require participation in **daily devotions and prayers**.
- **Link duties** to the furtherance of the **religious mission**.
 - Example: Secretary – job description requires ability to answer questions on organization's faith, share the gospel, refer to appropriate religious resources, and pray with guests and callers.

A “minister” is based on the “Totality of the Circumstances”:

- Formally commissioned or ordained as a “minister”
- Perform “important religious functions” in addition to secular tasks
- Administer sacraments
- Qualified and authorized to perform religious ceremonies
- Hiring based on religious criteria
- Carry out religious activities
- Attend to the faithful
- Religious qualifications required for employment
- Employee receives benefits associated with ministers (housing allowance)



COURT CASE EXAMPLES – “MINISTERS”

- Ministerial administrators
- Lay administrators
- Music director
- Organists, music leaders, choir leaders
- Religious school teacher
- Clergy/non-ordained clergy
- Pastoral counselors
- Maintenance worker (with religious duties)

FREE EXERCISE DEFENSE

Businesses and their owners each have separate Free Exercise of Religion Rights under the First Amendment.

- The compelling interest test asks, “does the government have a compelling interest in forcing *this person* to not discriminate?”
- Try to demonstrate that there are other businesses that would be glad to serve the offended person.

EXPRESSIVE ASSOCIATION DEFENSE

Rumsfeld v. FAIR, 547 U.S. 47, 68 (2006) (“We have recognized a First Amendment right to associate for the purpose of speaking, which we have termed a ‘right of expressive association.’”).

- Thus, a right to associate with like-minded people.
- But the government may violate an organization’s right of expressive association by “interfer[ing] with the internal organization or affairs of the group,” *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622-23 (1984), or by “ma[king] group membership less attractive,” *Rumsfeld v. FAIR*, 547 U.S. 47, 69 (2006).

EXPRESSIVE ASSOCIATION DEFENSE

Two steps to establish a defense for organizational clients

1. Show that the entity engages in expressive association, e.g., teaching, preaching, evangelism.
2. Determine whether the challenged application of the nondiscrimination law “would significantly affect [the group’s] ability to [express its] public or private viewpoints.” *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 650 (2000).
 - Introduce evidence regarding the specific expression that will be negatively affected by this particular application of the nondiscrimination law.

EXPRESSIVE ASSOCIATION DEFENSE

The ministry's message will be negatively affected because:

- Admitting certain people would change the message.
- The expression or conduct would be associated with your organization.
- The expression or conduct would make involvement or membership with the organization less desirable or attractive to others and harm the composition of your organization.

LEGAL DEFENSE RESOURCES

- Alliance Defending Freedom: www.adflegal.org
- First Liberty: www.libertyinstitute.org
- American Center for Law and Justice: www.aclj.org

POTENTIAL NEW LEGISLATION

- Equality Act – no exemption for religious organizations or beliefs
- Fairness for All Act
- Virginia (state level Equality Act applies to ALL businesses, churches, ministries, schools)

ULTIMATE SOLUTION

Return to the center.

Appointment of conservative or constitutional judges

Questions?

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