



LGBT LAW: YEAR IN REVIEW 2018

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MASTERPIECE CAKESHOP

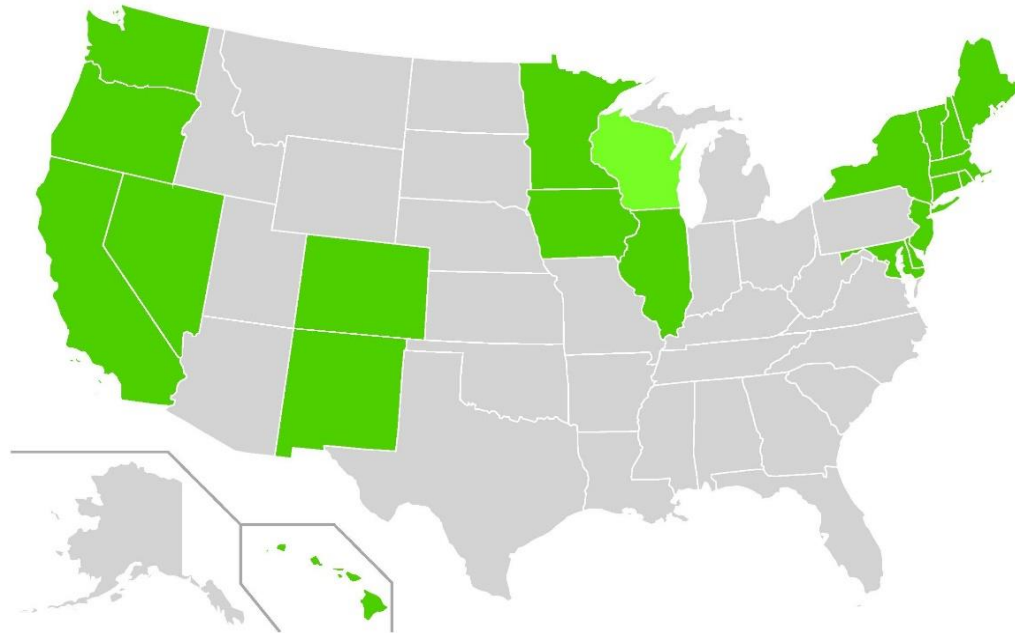
138 S. Ct. 1719 (2018)





HUMAN
RIGHTS
CAMPAIGN

PUBLIC ACCOMMODATIONS



Updated June 11, 2018

Public accommodations refers to both governmental entities and private businesses that provide services to the general public such as restaurants, movie theaters, libraries and shops. It does not encompass private clubs that have a membership or dues process.

Prohibit discrimination based on sexual orientation and gender identity (20 states & D.C.): California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington

Prohibit discrimination based on sexual orientation only (1 state): Wisconsin

Public Accommodations Laws in Louisiana

- Statewide: La. R.S. 51:2247 – prohibits denial of access to goods, services, facilities . . . on the grounds of race, creed, color, religion, sex, age, disability . . . or national origin. [not sexual orientation or gender identity]
- Shreveport: Section 39-2 – prohibits denial of the services, accommodations,. . . on the basis of race, color, sex, disability, age, ancestry, national origin, *sexual orientation, gender identity*, or political or religious affiliations, provided that nothing contained in this section shall prohibit the provision of separate bathroom, restroom, shower or similar facilities for males and females.
- New Orleans: Sec. 86-33 – similar to Shreveport

- Bakery in Lakewood, Colorado
- Owner Jack Phillips averred his religious beliefs prevented him from making a cake for a same-sex wedding
- Colorado law prohibited refusal to deny access to goods or services on to someone on the basis of sexual orientation
- Colorado administrative process found that Masterpiece violated the nondiscrimination law



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Opinion by Justice Kennedy

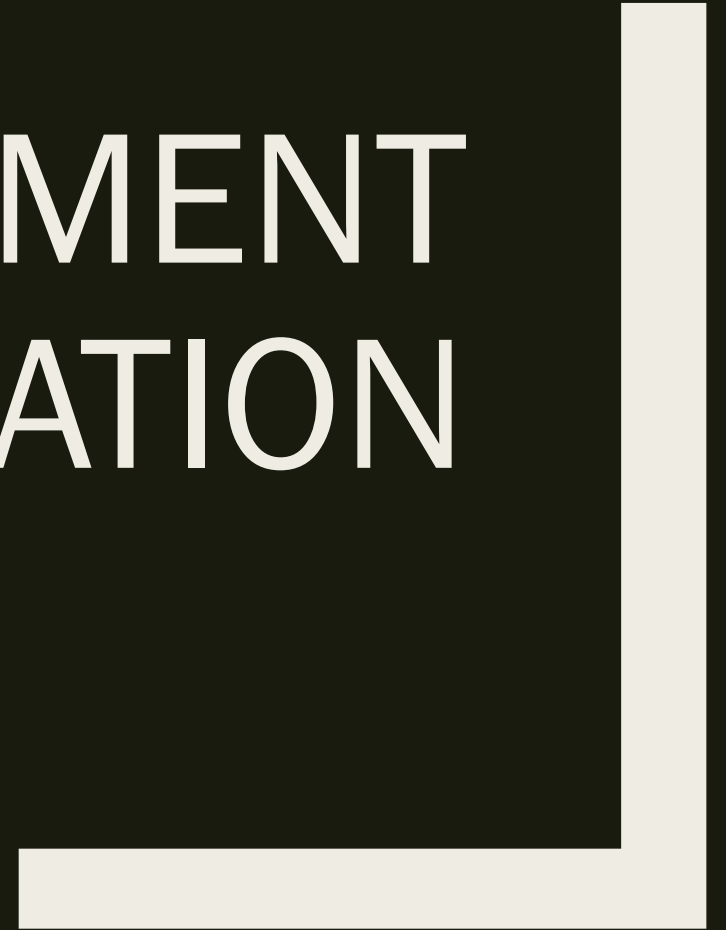
- Recognizes dignity of gay/lesbian individuals: “Our society has come to the recognition that gay persons and gay couples cannot be treated as social outcasts or as inferior in dignity and worth.” 138 S. Ct. at 1727.
- Yet, opposition to gay marriage may also be a religious view protected by freedom of expression. *Id.*
- “[I]f a baker refused to sell any goods or any cakes for gay weddings, that would be a different matter and the State would have a strong case . . . That this would be a denial of goods and services that went beyond any protected rights . . .” *Id.* at 1728.
- In this case, however, the baker found it difficult to “find a line where the customers’ rights to goods and services became a demand for him to exercise the right of his own personal expression for their message. . .” *Id.*
- At the time of the complaint, gay marriage was illegal.

Opinion by Justice Kennedy (continued)

- The Colorado Civil Rights Commission displayed “impermissible hostility” toward Phillips’ religious beliefs. *Id.* at 1729.
- Statement of one commissioner:

“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 . . . 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 use their religion to hurt others”
- This statement (and others) disparaged Phillips’ religion by describing it as despicable and as insincere. Court found that it was “inappropriate for a Commission charged with the solemn responsibility of fair and neutral enforcement of Colorado’s antidiscrimination law.” *Id.*
- Court contrasted Phillips’ treatment with those of cases involving requests for cakes expressing disapproval of same-sex marriage.
- Thus, “the Commission’s treatment of Phillips’ case violated the State’s duty under the First Amendment not to base laws or regulations on hostility to a religious viewpoint.”

TITLE VII EMPLOYMENT DISCRIMINATION



LGBT Employment Discrimination Persists

- Report by the Williams Institute, UCLA Law (Nov. 2015)
- Estimated 88,400 LGBT adults part of Louisiana's workforce
- Discrimination against LGBT workers is persistent and prevalent:
 - *47% of LGBT national survey respondents reported experiencing employment discrimination (HRC survey 2015)*
 - *21% nationally reported being treated unfairly by an employer in hiring, pay, or promotions (Pew Research 2013)*
- Average man in a same-sex Louisiana couple earns \$32,611, which is less than the average of \$43,865 for all married men (Williams Institute 2008 study)

Transgender Employment Statistics

- National statistics:
 - *Estimated 1.4 million adults in U.S. identify as transgender (0.6% of the population)*
 - *78% of transgender respondents reported harassment or mistreatment at work*
 - *47% reported having been discriminated against in hiring, promotion, or job retention because of their gender identity*

Unsuccessful Legislative Proposals

- Federal Level: Equality Act
 - *Formerly the Employment Nondiscrimination Act (ENDA)*
 - *Introduced in every Congress since 1990's*
 - *Cleared Senate in 2013 but no House vote*
 - *Current bill has support from 100+ corporate*
- Louisiana Level: LANA, Louisiana Nondiscrimination Act
 - *Would have prohibited employment discrimination on basis of sexual orientation or gender identity*

Key Supreme Court Precedent

Price Waterhouse v. Hopkins, 490
U.S. 228 (1989)

*Oncale v. Sundowner Offshore
Services, Inc.*, 523 U.S. 75 (1998)

Is Sexual Orientation Discrimination a
Form of Sex Discrimination?

Cases holding NO

- *Evans v. Georgia Regional Hospital*, 850 F.3d 1238 (11th Cir. 2017)
- *O'Daniel v. Industrial Service Solutions*, No. 17-190 (M.D. La. Jan. 2, 2018)

*Zarda v.
Altitude
Express,
Inc.*



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Zarda

- Majority: “Sexual orientation discrimination is motivated, at least in part, by sex and is thus a subset of sex discrimination.”
 - *Sex is necessarily a factor in sexual orientation.*
 - *Sex stereotyping: sexual orientation discrimination is predicated on assumptions of how persons of a certain sex should be*
 - *Associational discrimination: discrimination is based in part on the employee’s sex*

Zarda:

Per Se Rationale

“Because one cannot fully define a person’s sexual orientation without identifying his or her sex, sexual orientation is a function of sex.”

Zarda:

Comparative Test

“To determine whether a trait operates as a proxy for sex, we ask whether the employee would have been treated differently ‘but for’ his or her sex. In the context of sexual orientation, a woman who is subject to an adverse employment action because she is attracted to a woman would have been treated differently if she had been a man who was attracted to a woman. We can therefore conclude that sexual orientation is a function of sex and, by extension, sexual orientation discrimination is a subset of sex discrimination.”

Zarda:

Gender Stereotyping

When an employer acts on the basis of a belief that men cannot be attracted to men, or that they must not be, but takes no such action against women who are attracted to men, the employer has acted on the basis of gender.

Zarda:

Associational
Discrimination

“[W]e now hold that the prohibition on associational discrimination applies with equal force to all the classes protected by Title VII, including sex.”

Zarda dissent

“I would be delighted to awake one morning and learn that Congress had just passed legislation adding sexual orientation to the list of grounds of employment discrimination prohibited under Title VII.... I am confident that one day...I will have that pleasure.

I would be equally pleased to awake to learn that Congress had secretly passed such legislation more than a half century ago [but] we all know that Congress did no such thing.”

EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560 (6th Cir. 2018).

- Employer, a funeral home, discriminated against a transgender employee who complied with gender-specific dress code, thus violating Title VII as a form of sex stereotyping.
- In addition, discrimination on the basis of transgender or transitioning status violates Title VII as a form of discrimination based on sex.
- Funeral home also did not qualify for a ministerial exception to Title VII under the Religious Freedom Restoration Act.

Circuit Split: *Bostock v. Clayton County Board of Commissioners*, 723 Fed. Appx. 964, rehearing denied en banc, 894 F.3d 1335 (11th Cir. 2018).

- “Discharge for homosexuality is *not* prohibited by Title VII.” citing *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979).
- Rehearing denied over dissenters.
- Petition for Certiorari pending before the Supreme Court as of November 26, 2018.

AFTER *OBERGEFELL*:
THE NEW LEGAL
LANDSCAPE FOR SAME-
SEX COUPLES

LGBT Parentage re: Birth Certificates

- Community Property or Co-Ownership
 - Child Custody and Support
- *Pavan v. Smith, 582 U.S. ____ (2017)*
 - *Clarified the Obergefell decision re: parentage presumption*

Presumption of Parentage

- The Arkansas law (and LA law) allow for the presumption of paternity even when the child is conceived through artificial insemination with the sperm of another man.
 - *i.e. Even when it is known that the husband is not the biological father, he is given the presumption of paternity nonetheless.*
 - *Plaintiffs brought suit against Arkansas Department of Health for not allowing the legal spouse/wife of the biological mother the same presumption*

Presumption of Parentage

- In cases where a married same-sex female couple used artificial insemination with an anonymous sperm donor, the non-biological mother had to undergo a step-parent adoption to legally bind herself to the child.

– Opposite-sex couples in the same circumstances were granted the presumption of paternity and no adoption was necessary.

- The trial court agreed with the Plaintiffs and stated that the law violated the *Obergefell* decision.
- The Arkansas Supreme Court reversed and the USSC took the case for review.

Rights and Privileges of Marriage

- The USSC clarified and reiterated their previous decision in *Obergefell*
 - *Because that differential treatment infringes Obergefell’s commitment to provide same-sex couples “the constellation of benefits that the States have linked to marriage,” id., at ____ (slip op., at 17), we reverse the state court’s judgment.*

Louisiana

- In practice, LA DCFS has indicated that the decision in *Pavan v. Smith* is the law of the land and step-parent adoptions are no longer necessary.
- It is imperative that the couples wishing to avail themselves of the benefits clarified in *Pavan* meet the specific criteria described.
- They must:
 - 1. *Be legally married or have been legally married at the time of birth*
 - 2. *The birth must have taken place AFTER the Obergefell decision (June 26, 2015).*
 - 3. *They must have used an anonymous sperm donor.*
 - ****Note that Pavan will in practice only effect female same-sex couples.*

Divorce and Break Ups

- Are they married? If so when and where?

- *If they were married in another state or country, treat it as any other divorce.*

- *Note that as of today there are no conclusive decisions from the LASC or Appeals courts about when community property started, but most practitioners believe it's the date of the marriage.*

- If they are not married, it is treated as a co-ownership relationship.

Child Custody Issues

- If the child was born prior to 2015 and the couple was married but no step-parent adoption has been done-the non biological parent has no established rights
- If the child was born before or after 2015 but the couple is not married, the non-biological parent has no established rights.
- Both sides will attempt to use this to their advantage. If the non-bio parent is the primary bread winner they may want to use this to avoid child support obligations and the bio parent will use this to hurt the non-bio parent.
 - *If they were married in another state or country, treat it as any other divorce.*

Finally, remember, just because marriage is now available to same-sex couples does not mean all of them will choose to marry - it's still incumbent upon lawyers to present the best information to each client about the advantages and disadvantages marriage may present based on his or her individual circumstances.

ASSISTING
TRANSGENDER
CLIENTS



- Name Changes

- Gender Marker Changes

- **Ask your client what pronouns they prefer**

Name Changes

■ -Requirements/Steps

- 1. Fairly simple and straightforward
- 2. File suit and name DA's office as Defendant
- 3. The only 'reason' you have to give is for personal preference

- **You can do a name change in the same petition as a Gender Marker change which will save the client some money

Gender Marker Changes

■ -Requirements/Steps

- 1. Must file in Parish where client was born; does not matter where the client currently lives (whether LA or elsewhere)
- 2. File suit against Vital Records
- 3. The client must be deemed to have medically transitioned into the other sex. You will have to submit post-operative reports and other documentation from their treating physician.
- 4. Essentially the State requires that they are no longer to reproduce as their assigned gender at birth.
- 5. Court appearance is necessary but the client can appear via Affidavit

**This usually happens when the client is living in another State

*****You can do a name change in the same petition as a Gender Marker change which will save the client some money*****

QUESTIONS?