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Business Administrators' Roundtable *SBACS Oct. 2015*

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Agenda

- Impact of the Same-Sex Ruling
- Respondeat Superior Liability
- Community Covenant
- Scholarship Program Litigation

IMPACT OF THE SAME-SEX DECISION ON RELIGIOUS OPPONENTS

Obergefell v. Hodges

- Fourteenth Amendment requires a state to license marriage between two people of the same sex and to recognize a marriage between two people of the same sex when their marriage was lawfully licensed and performed out-of-state.
- The right to personal choice regarding marriage is inherent in the concept of individual autonomy.

What Risks for Opponents?

Majority

- Our decision will not prevent "religions and those who adhere to religious doctrines" from "advocat[ing] to the utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned."

Dissent

- The court did not guarantee a continued "freedom to 'exercise' religion," treated advocates of the traditional view as "bigoted," and has reached a decision with "potentially ruinous consequences for religious liberty."

Chief Justice Roberts

Hard questions arise when people of faith exercise religion in ways that may be seen to conflict with the new right to same-sex marriage--when, for example, a religious college provides married student housing only to opposite-sex married couples, or a religious adoption agency declines to place children with same-sex married couples. Indeed, the Solicitor General candidly acknowledged that the tax exemptions of some religious institutions would be in question if they opposed same-sex marriage.... There is little doubt that these and similar questions will soon be before the Court. Unfortunately, people of faith can take no comfort in the treatment they receive from the majority today.

Justice Thomas

In our society, marriage is not simply a governmental institution; it is a religious institution as well.... Today's decision might change the former, but it cannot change the latter. It appears all but inevitable that the two will come into conflict, particularly as individuals and churches are confronted with demands to participate in and endorse civil marriages between same-sex couples. The majority appears unmoved by that inevitability. It makes only a weak gesture toward religious liberty in a single paragraph.... And even that gesture indicates a misunderstanding of religious liberty in our Nation's tradition. Religious liberty is about more than just the protection for 'religious organizations and persons ... as they seek to teach the principles that are so fulfilling and so central to their lives and faiths.'... Religious liberty is about freedom of action in matters of religion generally....

Bakery Violated Colorado's Public Accommodations Law

- Colorado's public accommodation law applies to a bakery and its owner who would not create a wedding cake for a same-sex wedding because, as a Christian, the owner believed he would displease God.
- The defendants offer other baked goods to gay persons, which the defendants said underscored that they had not refused service "because of" the couple's sexual orientation, as opposed to their same-sex marriage.
- The court ruled that the defendants' conduct was not sufficiently expressive as to trigger First Amendment protection; it said: The court distinguished cases involving more expressive speech where a bakery refused to create bible-shaped cakes inscribed with the message, "Homosexuality is a detestable sin."
- Also, the court concluded that Colorado's public accommodation law was a neutral law of general applicability consistent with the free exercise clause notwithstanding exemptions for religious institutions and places that restrict admission to one gender.

Craig v. Masterpiece Cakeshop, Inc., No. 14CA1351, 2015 WL 4760453 (Colo.App. Aug. 13, 2015),

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What to do?

- Adopt a **Facilities Use Policy** to clarify the uses of your facilities consistent with your theological views.
- Evaluate and minimize public uses of your facilities not central to your religious mission.
- Evaluate and update your employment documents (e.g., employment handbook, job descriptions, etc.) to be sure you are maximizing constitutional and statutory defenses.

Facility Use Policy Architecture

- Preamble
- Limited Use
- Select Facilities
- Limited Users
- Fees and Charges
- Application; Agreement

Preamble

- Why is this policy important?
 - Who provided the facilities?
 - To what are the facilities dedicated?
 - Why would allowing use of facilities for purposes or by users opposed to the school's teaching matter?
 - To the school's religious exercise? Religious association? Speech?
- The facilities are not generally open to the public
- Uses of the facilities must have a nexus to:
 - Tax-exempt purposes
 - Religious purposes
 - Educational purposes

Limited Use

- Facilities may not be used for speech, conduct, worship, ceremony or activity contrary to ...
 - Statement of Faith
 - Code of Conduct
- In the event of a use in violation of these limitations...

Select Facilities

- The application should require the user to specify the facilities to be used
 - Take pains to inventory facilities available for use.
 - No other facilities or parts of facilities may be used.
- Attach fees and charges for use by facility.
 - Do these vary according to whether parents/members versus non-parents/non-members apply?

Limited Users

- All bona fide users must apply to use the facilities and comply with the facility use policy.
- Not all applicants will be permitted to use the facilities.
 - Persons who advance or advocate beliefs or practices in conflict with the school's ... may not use the facilities
- Some persons have priority access to Facilities
 - Parents/members?
 - First in time?
- The school will not discriminate on grounds of race, color, gender, national origin, age or disability among applicants.

Miscellaneous

- Waiver, indemnification, hold harmless
- Arbitration
- Insurance
- Security
- Janitorial
- Audio/video
- Equipment use
- Transferability

RESPONDEAT SUPERIOR LIABILITY

Respondeat Superior Liability

- Employers are vicariously liable to third parties under the principle of respondeat superior for damages and injuries caused by its employee's intentional torts or negligent acts that are committed within the scope and course of the employee's employment.
- The doctrine applies only when the alleged master has the ability and authority to direct and control the pertinent acts of the employee.

When is Conduct within the Course and Scope of Employment?

- If it is of the kind s/he is employed to perform.
- If it occurs substantially within the time and space limits authorized or required by the work to be performed.
- If it is activated, at least in part, by a purpose to serve the master.
- If employer knows or should know the employee is a threat to others.

Examples?

- Youth injured when staff have accident on trip to away game
 - Staff and youth decided on the way home to stop for dinner; accident occurs in parking lot
 - Staff and youth decided on their way home to stop at an arcade; accident occurs afterwards on way home
 - Staff were driving the youth as part of a spiritual retreat
- Teacher enters into a sexual relationship with a minor
 - A background check did not reveal/revealed the risk
 - The incident occurred/did not occur on campus
 - The incident occurred/did not occur at a school-sponsored function

COMMUNITY COVENANT

Compare

- Religious order
- Church
- Church-school
- Independent Christian school
- Parachurch
- Christian community

Social Compact

- Missional
 - Principled
 - Voluntary
 - Disciplinary
- Live, learn, work, serve and worship together as an educational community centered around Jesus
 - Adhere to Biblical standards of godliness and virtue; condemn the opposite
 - Attending the school is voluntary, but the social compact is mandatory for attendees
 - Violating the social compact will result in discipline.

How Deep Does It Run?

- Students
- Teachers
- Parents
 - Contracting
 - Noncontracting
 - Custodial
 - Noncustodial
- On campus
- Off campus
 - School-sponsored
 - School-related (e.g., web)
 - School unrelated

Disciplinary Penalties

Does the Church Have a Role?

Misconduct (on/off campus)

- Student
- Teacher
- Parent
 - Contracting
 - Noncontracting
 - Custodial
 - Noncustodial

Maximum Penalty

- Expulsion
- Termination
- Discuss

Type of Misconduct – Does it Matter?

- Sexual immorality
 - Nonmarital
 - Homosexual
 - Pornography
 - Adult
 - Child
- Violence
- Obscenity including blasphemy
- Dishonesty including plagiarism
- Gambling
- Drunkenness
- Abuse of drugs

SCHOLARSHIP PROGRAM LITIGATION

Nay - Plurality Enjoins Colorado Choice Scholarship Pilot Program

- A plurality permanently enjoined implementation of the Choice Scholarship Pilot Program, a grant mechanism that awards publicly funded scholarships to qualifying elementary through high school students to attend the private schools of their choice.
- The plurality ruled that article IX, section 7 of the Colorado Constitution – a Blaine Amendment – precludes the program.
- The plurality rejected as irrelevant the bigoted history of the amendment rendering "sectarian" code for Catholic.
- The plurality distinguished its prior ruling upholding a grant program that awarded public money to college students to attend all but "pervasively sectarian" schools. The plurality observed that this program has no such limit, impacts younger students who are more impressionable, does not benefit any public institutions, does not prevent schools from decreasing their own aid to scholarship students, and does not require a school to have open admissions.
- The plurality ruled that invalidating the program does not violate the Establishment Clause.

Taxpayers for Public Educ. v. Douglas Cnty. Sch. Dist., No. 13SC233, 2015 WL 3948220 (Colo. June 29, 2015)

Nay – Montana Dep't of Revenue

- Montana's new school choice program is scheduled to launch in January.
- Proposed rule based on the state Blaine amendment bars the use of tax-credit scholarships at
 - schools “owned or controlled in whole or in part by any church, religious sect or denomination.”
 - Schools accredited by a faith-based organization
- Public hearing scheduled for Nov. 5; comments through Nov. 17.

Yea - Alabama Tax Credit Scholarship Program Upheld

- The Alabama Accountability Act (AAA) does not violate the constitutional prohibition against appropriating money raised for public schools to the support of religious schools or the state Establishment Clause because:
 - It does not involve appropriations and because the AAA is neutral with respect to religion
 - Any governmental assistance to religious schools will flow only through the private choice of the students' parents
- AAA does not violate the state constitutional prohibition against appropriating money to non-state charitable or educational institutions because
 - “Appropriations” are directly related to moneys in the state treasury
 - the refundable tax credits in section 8 of the AAA are made to the parents of students transferring from a failing school and are not paid to a non-state charitable or educational institution
- AAA does not violate the state constitutional prohibition against creating new debt because the tax credits are determined on a yearly basis and paid only from that amount of sales tax revenue necessary to cover the income tax credits for that year;
- AAA was adopted using the appropriate legislative procedure.

Magee v. Boyd, No. 1130987, 1131020 and 1131021, 2015 WL 867926 (Ala. Mar. 2, 2015)

Yea – Florida Tax Credit Scholarship Program

Plaintiffs including the Florida Education Association, Florida School Boards Association, Florida Congress of Parents and Teachers, League of Women Voters of Florida, Inc., Florida State Conference of Branches of NAACP, and various individuals lack taxpayer standing to bring the lawsuit claiming violations of the state's paramount, uniform education constitutional provision (art. IX, s. 1) and Blaine amendment (art. I, s. 3).

- Plaintiffs lack special injury. It is entirely speculative whether the Program diverts resources from public schools.
- Tax credits do not involve legislative appropriations

On appeal
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Questions?

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