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# Kentucky court rejects government attempt to punish printer for refusing to print 'Lexington [Gay] Pride Festival' T-shirt

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Blaine Adamson, the co-owner and manager of a printing business in Kentucky, has religious objections to printing various types of messages, such as those that promote "adult entertainment products and establishments," messages containing demeaning terms such as "bitches" and depictions of Jesus that he views as disrespectful (examples included "Jesus dressed as a pirate or selling fried chicken").

Because of this Adamson refused to print, for the local Gay and Lesbian Services Organization, T-shirts that promoted the fifth annual Lexington Gay Pride Festival. (The GLSO wanted T-shirts to bear the words "Lexington Pride Festival 2012," the number "5" and a series of rainbow-colored circles around the "5.") The Lexington Fayette Urban County Human Rights Commission ruled that this violated the Lexington County law banning sexual orientation discrimination in places of public accommodation.

In Friday's *Lexington Fayette Urban County Human Rights Comm'n v. Hands On Originals, Inc.* (Ky. Ct. App. May 12, 2017), a three-judge panel ruled, on a 2-1 vote, that Adamson's actions didn't violate the ordinance (and thus avoided having to decide whether he had a First Amendment right, under the "compelled speech" doctrine, not to be forced to print messages of which he disapproved).

1. First, the panel split on whether the refusal to print a gay pride message was sexual orientation discrimination against particular individuals. (All three judges agreed that the T-shirt store was, under the ordinance and under Kentucky law, a place of public accommodation.) The majority said no:

For example, a shopkeeper's refusal to serve a Jewish man, not because the man is Jewish, but because the shopkeeper disapproves of the fact that the man is wearing a yarmulke, would be the legal equivalent of religious discrimination. A shopkeeper's refusal to serve a homosexual, not because the person is homosexual, but because the shopkeeper disapproves of homosexual intercourse or same-sex marriage, would be the legal equivalent of sexual orientation discrimination.

By contrast, however, it is not the aim of public accommodation laws, nor the First Amendment, to treat *speech* as this type of activity or conduct. This is so for two reasons. First, speech cannot be considered an activity or conduct that is engaged in exclusively or predominantly by a

particular class of people. … Second, the right of free speech does not guarantee to any person the right to use someone else's property, even property owned by the government and dedicated to other purposes, as a stage to express ideas. …

Nothing of record demonstrates HOO, through Adamson, refused any individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations it offered to everyone else *because* the individual in question had a specific sexual orientation or gender identity. … Don Lowe, the only representative of GLSO with whom [Adamson] spoke regarding the t-shirts[,] … testified he never told Adamson anything regarding his sexual orientation or gender identity. The GLSO itself also has no sexual orientation or gender identity: it is a gender-neutral organization that functions as a *support network* and *advocate* for individuals who identify as gay, lesbian, bisexual, or transgendered….

[GLSO's] membership and its Pride Festival welcome people of all sexual orientations. It functions as a support network and advocate for *others* (i.e., gay, lesbian, bisexual, or transgendered individuals). And, the t-shirts the GLSO sought to order from HOO are an example of its support and advocacy of *others*…. [T]he symbolism of [the proposed t-shirt] design, the festival the design promoted, and the GLSO's desire to sell these shirts to everyone clearly imparted a *message*: Some people are gay, lesbian, bisexual, and transgendered; and people of their sexual orientations have as much claim to unqualified social acceptance as heterosexuals.

The act of wearing a yarmulke is conduct engaged in exclusively or predominantly by persons who practice Judaism. The acts of homosexual intercourse and same-sex marriage are conduct engaged in exclusively or predominantly by persons who are homosexual. [The court had earlier given these as examples of activities that "may be such an irrational object of disfavor that, if they are targeted, and if they also happen to be engaged in exclusively or predominantly by a particular class of people, an intent to disfavor that class can readily be presumed." -EV] But anyone — regardless of religion, sexual orientation, race, gender, age, or corporate status — may espouse the belief that people of varying sexual orientations have as much claim to unqualified social acceptance as heterosexuals.

Indeed, the posture of the case before us underscores that very point: this case was *initiated* and *promoted by* Aaron Baker, a non-transgendered man in a married, heterosexual relationship who nevertheless functioned at all relevant times as the *President* of the GLSO. For this reason, conveying a message in support of a cause or belief (by, for example, producing or wearing a t-shirt bearing a message supporting equality) cannot be deemed *conduct* that is so closely correlated with a protected status that it is engaged in exclusively or predominantly by persons who have that particular protected status. It is a *point of view* and form of *speech* that could belong to any person, regardless of classification. …

Nothing in the fairness ordinance prohibits HOO, a private business, from engaging in *viewpoint* or *message* censorship. Thus, although the menu of services HOO provides to the public is accordingly limited, and censors certain points of view, it is the same limited menu HOO offers to every customer and is not, therefore, prohibited by the fairness ordinance.

The dissenting judge, Judge Jeff S. Taylor, disagreed:

HOO's conduct was discriminatory against GLSO and its members based upon sexual orientation or gender identity…. GLSO serves gays and lesbians and promotes an "alternative lifestyle" that is contrary to some religious beliefs. That lifestyle is based upon sexual orientation and gender identity that the United States Supreme Court has recently recognized. In *Obergefell v. Hodges*, the Supreme Court held that the fundamental right to marry [including in a same-sex marriage] is guaranteed to same sex couples under the Due Process Clause and the Equal Protection Clause. … Regardless of personal or religious beliefs, this is the law that courts are duty bound to follow.

The majority takes the position that the conduct of HOO in censoring the publication of the desired speech sought by GLSO does not violate the Fairness Ordinance. Effectively, that would mean that the ordinance protects gays or lesbians only to the extent they do not publicly display their same gender sexual orientation.

This result would be totally contrary to legislative intent and undermine the legislative policy of LFUCG since the ordinance logically must protect against discriminatory *conduct* that is inextricably tied to sexual orientation or gender identity. Otherwise, the ordinance would have limited or no force or effect. The facts in this case clearly establish that HOO's conduct, the refusal to print the t-shirts, was based upon gays and lesbians promoting a gay pride festival in Lexington, which violated the Fairness Ordinance.

Finally, it is important to note that the speech that HOO sought to censor was not obscene or defamatory. There was nothing obnoxious, inflammatory, false, or even pornographic that GLSO wanted to place on their t-shirts which would justify restricting their speech under the First Amendment. … Likewise, there is nothing in the message that illustrates or establishes that HOO either promotes or endorses the Festival. …

While free speech is not without its limitations, nothing in the promotion of the Festival by GLSO came close to being outside the protections of the First Amendment. The Fairness Ordinance in this case is simply an extension of civil rights protections afforded to all citizens under federal, state and local laws. These civil rights protections serve the societal purpose of eradicating barriers to the equal treatment of all citizens in the commercial marketplace.

2. Judge James H. Lambert appears to have joined the majority opinion on the question whether HOO's conduct was discriminatory (since he labeled that opinion "the majority opinion," which it could be only with his vote). But he also reasoned that the ordinance was preempted by the Kentucky Religious Freedom Restoration Statute, which is modeled on the federal Religious Freedom Restoration Act applied in *Hobby Lobby* and other recent cases. He concluded that the ordinance, as interpreted by the commission, burdened the HOO owners' religious practice, and thus the owners were entitled to an exemption unless denying the exemption was the least restrictive means of serving a compelling interests — a showing the government could not make:

There is little doubt LFUCG has a compelling interest in preventing local businesses from discriminating against individuals based on their sexual orientation. LFUCG must be able to market itself as a place where all people can acquire the goods and services they need.

Accordingly, by the plain text of [the state RFRA], the central issue here is whether the fairness ordinance is the least-restrictive way for LFUCG to prevent local business from discriminating against members of the gay community without imposing a substantial burden on the exercise of

religion. … [I]nstead of providing an owner of a closely-held business, or the like, with an alternative means of accommodating a patron who wishes to promote a cause contrary to the owner's faith [footnote: Here, the owners of HOO offered to find a printer who would do the work at the same price quoted initially to accommodate the needs of the customer], the fairness ordinance forces the owner to either join in the requested violation of a sincerely held religious belief, or face a penalty, *i.e.*, support the furtherance of the offending cause or take a class on how to support it. Such coercion violates [the state RFRA]. …

Taylor disagreed:

[As to the religious exemption claim,] the holding in *Hobby Lobby* was limited solely to the issue of whether a closely held corporation could raise a religious liberty defense to the insurance contraceptive coverage mandate of the Affordable Care Act. And, I do not believe [the Kentucky RFRA] is implicated in this case, as the statute does not prohibit a governmental entity from enforcing laws or ordinances that prohibit discrimination and protect a citizen's fundamental rights. Moreover, the United States Supreme Court has held that religious beliefs or conduct may be burdened or limited where the compelling government interest is to eradicate discrimination. *See Bob Jones Univ. v. U.S.* (1983) (holding that the government has an overriding interest in eradicating racial discrimination in education).

3. Here's my view, which was expressed in this amicus brief that my student Ashley Phillips and I filed on behalf of the Cato Institute: Whether or not the ordinance bars discrimination against messages supporting pro-gay-rights events, a printer has a First Amendment right to refuse to print messages of which he disapproves. As the amicus brief argued,

The government may not require Americans to help distribute speech of which they disapprove. The Supreme Court so held in *Wooley v. Maynard*, 430 U.S. 705 (1977), when it upheld drivers' First Amendment right not to display on their license plates a message with which they disagree. The logic of *Wooley* applies equally to printers' right not to print such messages.

The government's interest in preventing discrimination cannot justify restricting Hands On Originals' First Amendment rights. Hands On Originals is not discriminating based on the sexual orientation of any customer. Rather, its owners are choosing which messages they print. In this respect, the owners' actions are similar to the actions of the parade organizers in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557 (1995), who also chose not to spread a particular message through their parade.

In *Hurley*, the Supreme Court noted that the state, in trying to force the organizers to include a gay pride group in a parade, was applying its antidiscrimination law "in a peculiar way": to mandate the inclusion of a message, not equal treatment for individuals. And the Court held that this application of antidiscrimination law violated the First Amendment. The Commission's attempt to apply such law to Hands On Originals' choice about which materials to print likewise violates the First Amendment.

The Supreme Court has held that large organizations, such as cable operators or universities, might be required to convey messages on behalf of other organizations with which they disagree. But Hands On Originals is a small owner-operated company, in which the owners are necessarily closely connected to the speech that Hands On Originals produces. In this respect, the owners of

Hands On Originals are much closer to the Maynards in *Wooley v. Maynard*, whose "individual freedom of mind," secured the right not to help distribute speech of which they disapproved.

Moreover, the dissenting judge's argument about the free speech protections offered to the Lexington Pride Festival strikes me as entirely beside the point: The T-shirt would certainly have been constitutionally protected *against government suppression*, just as the motto "Live Free or Die" would be so protected. But people also have a First Amendment right *not* to display the message (as in *Wooley*) or to print the message.

Likewise, the dissenting judge's argument that requiring HOO to print the T-shirt wouldn't suggest "that HOO … endorses the Festival" is also beside the point. That was precisely the argument the dissenting justices made in *Wooley* (quoting the New Hampshire Supreme Court): "The defendants' … [having] to display plates bearing the State motto carries no implication … that they endorse that motto or profess to adopt it as matter of belief." But the *Wooley* majority was unswayed by that: The Maynards, the court held, had a First Amendment right to "refuse to foster … an idea they find morally objectionable," and thus could not be forced to display the motto even in a context where no one would think that they were endorsing the motto. The same is true of people who don't want to foster an idea by participating in the creation (rather than display) of messages expressing that idea.

You can read the whole brief here, but let me close with these hypotheticals:

Say members of the Westboro Baptist Church come to a printer — a printer who supports gay rights or who is gay himself or who just thinks the Westboro belief system is appalling — and demand that he print a "Westboro Baptist Church Pride" T-shirt.

Or say that an anti-illegal-immigrant group comes to a printer in Seattle and demands that he print a "Build a Wall / Deport Them All" T-shirt. (Seattle bans public accommodation discrimination based not just on race, religion, sexual orientation and the like but also "political ideology," defined as "any idea or belief … relating to the purpose, conduct, organization, function or basis of government and related institutions and activities, whether or not characteristic of any political party or group.")

Should the government be able to punish the printer for refusing, on the theory that this constituted impermissible religious or political ideology discrimination in public accommodations?