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Paul M. Secunda

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FOREWORD: WEDDING CAKES, RELIGION, AND SEXUAL ORIENTATION DISCRIMINATION

Paul M. Secunda*

The Southeastern Association of Law Schools (SEALS) is a boondoggle-cum-legal academic conference, which takes place in a lovely, usually too-hot spot in the southern United States in July or August every year. I was fortunate enough to be included as a discussant on a Discussion Group Panel¹ entitled, *Trends and Tension Between Religious Freedom and Workplace Protections and Benefits* in August 2017. It then became apparent to me that the participants had novel insights and ideas to add to not only the then-pending wedding cake case of *Masterpiece Cakeshop v. Colorado Civil Rights Commission*,² itself not an employment law case, but also to the larger debate about how religion and sexual orientation law clashes should be mitigated in the employment setting.

So, although the primary focus of this Symposium is on the clash between sexual orientation and religion in the workplace, the first piece in this Symposium volume by Professor William Araiza introduces the *Masterpiece Cake* case, noting its complex mixture of case issues involving compelled speech, freedom of religion, and sexual orientation discrimination.³ In *No Cake for You: Discrimination, Dignity, and Refusals to Serve*, Professor Araiza sets out the basic fact pattern of *Masterpiece Cakeshop*.⁴ The owner of a cake shop in Colorado, Jack Phillips denied cake-creation services to Charlie Craig and David Mullins's wedding

* Professor of Law and Director, Labor and Employment Law Program, Marquette University Law School. Founder and Faculty Advisor, Marquette Benefits and Social Welfare Law Review. Professor Secunda would like to thank all the participants of this Symposium for their very timely and meaningful scholarly contributions to the debate surrounding sexual orientation discrimination and religion.

1. See Paul M. Secunda, *SEALS Discussion Groups and Other Arcane Observations*, 86 UMKC L. REV. 593 (2018) (discussing evolution and nature of SEALS discussion group panels).

2. No. 16-111, *cert. granted*, 137 S. Ct. 2290 (2017).

3. William D. Araiza, *No Cake for You: Discrimination, Dignity, and Refusals to Serve*, 19 MARQ. BENEFITS & SOC. WELFARE L. REV. 115 (2018).

4. *Id.*

reception.⁵ At issue, among other things, is whether Mr. Phillips' refusal to provide a cake to the same-sex couple for religious reasons constituted constitutionally-protected expression, also protected by his freedom of religion, and not impermissible under discrimination and public accommodations law.⁶ Professor Araiza focuses on one aspect of the case: "the couple's (and the [Colorado] Civil Rights Commission's) claim that application of Colorado's public accommodation law to this case vindicates an important interest in the couple's dignity."⁷ Using nothing less than the Soup Nazi example from *Seinfeld* to make his point, Araiza argues that the denial of cake-creating services to the same-sex couple amounts to pain and insult that people feel when they have been humiliated.⁸ Araiza concludes by maintaining that there is at least one easy answer to the *Masterpiece Cakeshop* case: that dignity interests exists in non-discriminatory access to public accommodations—even to a wedding cake.⁹ Needless to say, the same dignity interests exist when discussing non-discriminatory access to the workplace by same-sex individuals.

Expanding on similar constitutional free speech rights revolving around the clash between sexual orientation and religious rights, Professor Scott Bauries asks whether public employees, where the Constitution applies directly because of state action, are protected from religious expression which may be deemed homophobic.¹⁰ The underlying question that Bauries discusses is whether public employers may place limitations on the religious rights of their employees.¹¹ Conceptualizing this question by using a Hohfeldian framework, he seeks to distinguish between free speech and free exercise jurisprudence in the public workplace.¹² Rather than focus on the *Masterpiece*

5. *Craig v. Masterpiece Cakeshop, Inc.*, 370 P.3d 272 (Colo. App. 2015). The Colorado Supreme Court denied review. Transcript of Oral Argument, *Masterpiece Cakeshop Ltd., et al. v. Colo. Civil Rights Comm'n, et al.*, (2017) (No. 16-111). Oral argument was heard on December 5, 2017, with forty amicus briefs being filed in favor of Mr. Craig and Mr. Mullins. The decision in the case is pending as of the writing of this Foreword.

6. Araiza, *supra* note 3.

7. *Id.*

8. *Id.*

9. *Id.*

10. Scott Bauries, *The Logic of Speech & Religion Rights in the Public Workplace*, 19 MARQ. BENEFITS & SOC. WELFARE L. REV. 137 (2018).

11. *Id.*

12. *Id.*

Cakeshop case, Bauries considers the well-known case of Kim Davis, the Rowan County, Kentucky, Clerk who refused to issue marriage certificates to same-sex couples a number of years ago.¹³ Bauries concludes by noting a Hohfeldian duty on public employees to express themselves in a way that does not interfere with the effective running of government services, and this is why litigation has been so frequent in public employment speech cases.¹⁴ On the other hand, Bauries maintains that the duties of government employers and employees are co-extensive when it comes to religious expression in the workplace, which is why there is a paucity of free exercise or establishment law claims in the public sector workplace.¹⁵

Focusing on a case concerning the intersection of religion and another controversial sexual matter (requiring employers to provide contraception coverage), Professor Richard Carlson asks whether a profit-seeking corporation, one that does not exist for purely religious purposes, can be sincerely religious.¹⁶ The U.S. Supreme Court in *Burwell v. Hobby Lobby Stores, Inc.*,¹⁷ answered this question in the affirmative by holding that a closely-held corporation with sincerely-held religious beliefs cannot be subject to the contraception mandate under the Affordable Care Act.¹⁸ As Carlson points out, after *Hobby Lobby*, “[n]on-human persons created and operated for secular purposes – such as earning profit for owners – can exercise religion and might be entitled to accommodation.”¹⁹ Carlson seeks to set up a framework for determining which corporations are sincerely religious as opposed to those acting opportunistically so as not to have to comply with the law.²⁰ Carlson tackles the complexities inherent in such an exercise.

Professor Marcia McCormick focuses on the increasingly antagonistic relationship between those who focus on gender or sex-based rights and those who focus on religious rights.²¹ She points out that those who tend to oppose sexual orientation

13. *Id.*

14. *Id.*

15. *Id.*

16. Richard Carlson, *The Sincerely Religious Corporation*, 19 MARQ. BENEFITS & SOC. WELFARE L. REV. 164 (2018).

17. 134 S. Ct. 2751 (2014).

18. *Id.* at 2759.

19. Carlson, *supra* note 16, at 167.

20. *See id.*

21. Marcia L. McCormick, *The Growing Gender/Religion Divide*, 19 MARQ. BENEFITS & SOC. WELFARE L. REV. 197 (2018).

rights are those who have strongly-held religious beliefs, even though some proposed laws like the still-to-be-enacted Employee Non-Discrimination Act (ENDA) (which would have added sexual orientation to the protected categories under Title VII) have exemptions for religious employers.²² McCormick makes the thought-provoking point that not allowing the religious to discriminate may be discrimination.²³ Although the recognition of same-sex marriage in *Obergefell v. Hodges*²⁴ promised a new era of tolerance for LGBTQ individuals, this watershed decision has not yet easily translated into additional rights for LGBTQ individuals in the workplace, and in fact, has led to a backlash in the form of many different forms of federal and state religious freedom legislation that McCormick discusses.²⁵ Working her way back to *Masterpiece Cake*, McCormick argues that the case is nothing less than a focal point of the asserted clash between rights to be free from discrimination on the basis of sex, sexual orientation, and gender identity, and asserted rights to religious accommodation of conduct consistent with religious belief.²⁶ She concludes by seeking to ease tensions on each side of the debate by asking the court to protect both religious and LGBTQ minorities from “weaponization” of the First Amendment by “empowered majorities.”²⁷

Following Professor McCormick’s focus on the workplace and public accommodations law more generally, Professors Elizabeth Sepper and Jessica Roberts explore more narrowly the scope of the religious exemptions to health nondiscrimination in the Affordable Care Act (ACA).²⁸ One category of controversy, also discussed in the *Hobby Lobby* context, is whether religiously-oriented employers must provide certain contraceptive services.²⁹ Section 1557 of the ACA is a new type of sex discrimination law, which prohibits in the provision of healthcare discrimination based on sex.³⁰ Sepper and Roberts contend that Section 1557 does not incorporate the provisions of

22. *Id.*

23. *Id.*

24. 135 S. Ct. 2584 (2015).

25. McCormick, *supra* note 21.

26. *Id.*

27. McCormick, *supra* note 21 at 216.

28. 42 U.S.C. § 18116 et seq. (2012); Elizabeth Sepper & Jessica L. Roberts, *Sex, Religion, & Politics, or the Future of Healthcare Antidiscrimination Law*, 19 MARQ. BENEFITS & SOC. WELFARE L. REV. 217 (2018).

29. See Sepper & Roberts, *supra* note 28, at 226.

30. 42 U.S.C. § 18116(a) (2012).

Title IX of the Education Amendments of 1972³¹ with regard to the meaning of “sex” in this context, and more specifically, do not incorporate the religious exemptions from Title IX.³² For one, the ACA has its own set of separate religious exemptions.³³ Also, and significantly for the relationship between the ACA and sexual orientation, the consequence of this statutory dynamic is that sexual orientation discrimination may or may not be permitted under the ACA when it comes to provision of healthcare services like contraception.

Our final professorial contribution is a fitting capstone to this discussion, as it focuses on how law professors should teach their students about issues of religious and disability accommodation in the workplace.³⁴ Professor Kerri Lynn Stone writes in, *A Prescription for Teaching the Law of Reasonable Religious and Disability Accommodation*, that it is important to teach students how to resolve conflicts between competing individual rights and beliefs.³⁵ By discussing the difference between the rather *de minimis* standard of religious discrimination under Title VII versus the much more rigorous duty of accommodation under the American with Disabilities Act (ADA), Stone shows how it is possible to teach students how to accommodate competing interests under different legal schemes.³⁶ She ends by explaining that a proper pedagogical approach for any reasonable accommodation discussion should be grounded in the policy surrounding the law itself and in considering a particular type of employee, like a pharmacist, in different scenarios that implicate different concerns and issues.³⁷

* * *

All of these submissions, whether dealing with public accommodations, public employment, or the Affordable Care Act, will challenge the reader of this Symposium Volume to consider how best to balance the competing interests of the religious and

31. 20 U.S.C. § 1681 et seq. (2012).

32. Sepper & Roberts, *supra* note 28, at 239-40.

33. 20 U.S.C. § 5000A(d)(2)(A) (2012).

34. Kerri Lynn Stone, *A Prescription for Teaching the Law of Reasonable Religious and Disability Accommodation*, 19 MARQ. BENEFITS & SOC. WELFARE L. REV. 247 (2018).

35. *Id.*

36. *Id.*

37. *Id.*

those who identify with the LGBTQ community. Although these two camps of individuals are not mutually exclusive (as there are many religious LGBTQ individuals), Professor McCormick does help establish in her contribution that there is a “drift” between what may be called loosely gender and sex rights on the one side and religious rights on the other.³⁸ Whether in teaching students about reasonable accommodation law or watching the daily disputes over the Affordable Care Act, it is important that both sides consider the competing interests of the other side. The overall hope of this Volume of scholarship, then, is to make sure that the outcome of cases like *Masterpiece Cakeshop* help to bring our pluralistic, diverse society closer together by teaching tolerance of others who have different ways of living and loving than we ourselves do.

38. See McCormick, *supra* note 21.