

Chapter 2

Public Accommodations: Discrimination and Sexual Orientation

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ABSTRACT

The chapter examines potential issues posed by the wide variety of state public accommodation statutes in the context of sexual orientation and religious freedom. The historical approach to antidiscrimination will briefly be examined. A review of recent cases of discrimination due to the legalization of same-sex marriage are analyzed in the context of the arguments regarding freedom of speech and freedom of religion.

INTRODUCTION

Probably the most contentious issues surrounding same-sex marriage involve whether private individuals and companies can—primarily on religious grounds—legally refuse to provide services they generally provide to other couples (*Burwell v. Hobby Lobby Stores*, 2014). Can a private chapel or other venue refuse to host a same-sex wedding, a florist refuse to provide flowers, a bakery refuse to bake a wedding cake, a professional photographer refuse to photograph the reception, a transportation service refuse to rent a limo, a caterer refuse to provide food, a bridal boutique refuse to provide gowns, etc.? These issues were already cropping up around the United States well before *Obergefell v. Hodges* (2015) in those jurisdictions that permitted same-sex marriage and have since escalated (Wong, 2016).

Do the rights of freedom of speech and freedom of religion allow a business owner to refuse service to a potential customer or client because of the actual or perceived sexual orientation of that customer or client? Put another way, does the right to be free from discrimination of any kind override the business owner's rights to free speech or freedom of religion? Does one right trump another? The focus of this chapter is the change in our values and beliefs associated with the notion that all people, regardless of sexual orientation, have the right to be free from discrimination and how our courts are reconciling this notion with our fundamental First Amendment rights.

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This chapter is divided into three parts. First, the historical approach to antidiscrimination will be briefly examined. Second, the facts and situations of recent cases of discrimination due to sexual orientation will be discussed. Finally, the arguments regarding freedom of speech and freedom of religion are analyzed in the context of the antidiscrimination laws.

ANTIDISCRIMINATION AND VALUE CHANGES

In 1964, for the first time since the end of Reconstruction, Congress enacted a law banning race discrimination in public accommodations, Title II of the Civil Rights Act of 1964. It is difficult today to understand why this law, which forbade hotels, restaurants, gas stations, and places of entertainment to discriminate based on race, color, or national origin, gave rise to such heated opposition and the longest filibuster in the history of the U.S. Senate. Landsberg (2015) in *Public Accommodations and the Civil Rights Act of 1964: A Surprising Success?* stated that “today, Title II gets little attention, while other non-discrimination laws, such as fair employment, fair housing, and voting rights legislation continue to produce litigation and garner public attention; yet, in 1963 and 1964, Title II was considered a key provision, as well as a very controversial one.” This is certainly not the case today with the legalization of same-sex marriage. The ascendancy of gay rights has been accompanied by a rise in assertions of religious freedom. These assertions have primarily taken the form of state legislative initiatives (Barbaro & Eckholm, 2015; Eilperin, 2014). Supporters have cited perceived growing threats and hostility to religious liberty as a basis for such initiatives. As illustrated in an interview conducted by Kristina Torres (2015) in *Clergy Clash on ‘Religious Liberty’ Efforts at Capitol*, the executive director of the Georgia Baptist Convention, J. Robert White states:

... if there has been discrimination in this country, quite honestly, it has been against people of Christian faith, and it must stop.

Merriam-Webster dictionary defines *discrimination* as “the practice of unfairly treating a person or group of people differently from other people or groups of people.” In the context of this paper, discrimination will be viewed based on sexual orientation. *Sexual orientation* is defined by Merriam-Webster as “a person’s sexual preference or identity as bisexual, heterosexual, or homosexual.”

State statutes also define sexual orientation. As illustrated in Table 1, currently 22 states and the District of Columbia prohibit businesses deemed to be public accommodations from refusing to serve prospective patrons based on sexual orientation. Therefore, sexual orientation discrimination would be the practice of unfairly treating a person differently because of his or her preference for heterosexuality, homosexuality, bisexuality, or perhaps even gender expression or identity. Another important aspect of the cases to be discussed pertains to where instances of discrimination take place. In all but one of the cases, the discrimination takes place in a public accommodation.

In U.S. law, public accommodations are generally defined as facilities, both public and private, used by the public. Examples include retail stores, rental establishments, and service establishments as well as educational institutions, recreational facilities, and service centers.

Federal law requires that a public accommodation be accessible to the handicapped and that it may not discriminate based on “race, color, religion, or national origin” (Civil Rights Act of 1964). Private clubs were specifically exempted under federal law as well as religious organizations¹. The definition of

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