Express Yourself – Supreme Court Rules that Businesses May Deny "Expressive Services" to the Public Based on Their Owner's Beliefs

A Practical Guidance® Article by
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This article discusses the U.S. Supreme Court's decision in 303 Creative, LLC v. Elenis which impacts LGBTQ rights.

- The First Amendment's protection of free speech trumps legislation designed to ensure full and equal access to the goods and services private businesses provide to the public.
- Businesses providing goods and services to the public cannot be forced to provide expressive goods and services that are contrary to their beliefs.

On June 30, 2023, the Supreme Court issued its decision in 303 Creative, LLC v. Elenis. In a 6-3 opinion authored by Justice Gorsuch, a divided Supreme Court held that the First Amendment's free speech protection bars Colorado from requiring a website designer to create expressive designs that convey messages with which the designer disagrees.

Background

This case began when the owner and founder of 303 Creative, a website design company, prepared to enter the wedding website market. The owner wanted to publish a statement explaining that providing a wedding website for same-sex couples would compromise her Christian beliefs that marriage is between one man and one woman. Because Colorado's Anti-Discrimination Act (CADA) prohibits discrimination by a place of public accommodation against members of the LGBTQ+ community, however, the owner did not publish the statement or expand her business to create wedding websites. Instead, she brought a pre-enforcement lawsuit to challenge CADA claiming that enforcing it in this instance would violate her First Amendment rights to free speech and free exercise of religion.

CADA, like similar laws in nearly half the states, prohibits places of public accommodation from refusing services to a person based on their "disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry." The trial court denied her claims following the Supreme Court's 2018 ruling in Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission. On appeal, the United States Court of Appeals for the Tenth Circuit affirmed the district court in a 2-1 decision. As to the free speech challenge, the Tenth Circuit found that Colorado's compelling interest in ensuring equal access to publicly available goods and services was sufficiently narrowly tailored to survive strict scrutiny, the highest level of

review. Additionally, the Tenth Circuit found the Colorado law was not unconstitutionally vague or overbroad.

The dissenting judge asserted that CADA violated the First Amendment by forcing the owner to "violate her conscience" by prohibiting her from having religious-based business practices and by penalizing her if she spoke out on matters in ways Colorado found undesirable, compelling her to silence. The Supreme Court granted review only on the question of whether the enforcement of CADA violated the free speech clause of the First Amendment.

SCOTUS Decision

The Supreme Court reversed the Tenth Circuit, holding the First Amendment prohibits Colorado from forcing the owner to create expressive designs that would violate her free speech rights. According to the majority, CADA compelled speech in that it forced the owner to express herself in a manner inconsistent with her beliefs. Citing prior Supreme Court rulings, including Hurley v. Irish-American Gay, Lesbian, & Bisexual Group of Boston, the Court stated CADA could not interfere with the owner's speech by promoting a state-approved message over a state-disfavored message, just as Massachusetts could not compel parade organizers to include an LGBTQ+ group in a parade based on the state's public accommodation laws because doing so would compel the group to espouse a view it did not share. Accordingly, CADA failed strict scrutiny review because it is content- and viewpoint-based in requiring business owners and their businesses to accept and espouse a state-approved message.

The Court recognized that eliminating discrimination in public accommodations is undeniably a compelling state interest. Colorado failed to narrowly tailor CADA to meet this compelling interest, however. Instead, CADA both compelled protected speech and suppressed it when it required the owner of the business to express her support of same-sex marriage by creating a wedding website for same-sex couples or, alternatively, silenced her by not allowing her to state her beliefs regarding same-sex couples. Further, CADA did not contain an exception applicable to expressive art. Because CADA failed to address objectors to Colorado's preferred message, it did not meet strict scrutiny.

The Court relied heavily on the parties' stipulations of facts to agree with the Tenth Circuit that what the website's owner would design and produce was "pure speech," and it only parted from the Tenth Circuit in its legal conclusions. Additionally, the Court relied on the parties' stipulation that the website was expressive in nature, potentially limiting the scope and reach of this decision. In sum, the Court found CADA forced the owner to adopt a message that she did not support, violating the First Amendment's prohibition on compelled speech.

In her dissent, Justice Sotomayor expressed serious concerns both with the Court's reasoning and with the how courts will assess what types of goods and services are "expressive," a question the Court did not resolve – because the only goods at issue were wedding websites that the parties stipulated were "expressive" – and will likely be litigated in the future.

What Does this Ruling Mean for Companies?

The ruling is important for businesses that serve the public that provide goods and services that may be deemed to express the owner's views because the Court clarified that public accommodation laws, while based on compelling state interests, can run afoul of business owners' constitutional rights.

Although the decision does not involve employment law, employers must still be cognizant of their employees' rights. The Supreme Court's ruling did not alter employers' obligations to prohibit discrimination and harassment against employees or their ability to require employees to attend non-discrimination training programs.

Importantly, the decision does not change the fact that the First Amendment does not apply to employees of private employers. Employers can create rules ensuring that they provide a respectful, welcoming, and safe environment for their customers and employees. Further, employers may still discipline employees who discriminate against customers. Nevertheless, the case is a reminder that employers should remain vigilant of their employees' differing perspectives and expression of viewpoints in the workplace and ensure that employees and customers are not being subjected to discrimination or harassment.

Related Content

Practice Notes

- Free Speech or Discrimination Podcast
- LGBTQ Protections and Best Practices under Title VII and the ADA

Cases

- 303 Creative LLC v. Elenis, 29 Fla. L. Weekly Fed. S. 1133 (U.S. 2023)
- Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n, 138 S. Ct. 1719 (2018)

Gregory Henninger, Associate, Littler Mendelson P.C.

Gregory E. Henninger advises and represents employers of all sizes, from mom-and-pop businesses to Fortune 500 companies, in various labor and employment matters. Such matters include claims of wrongful termination, discrimination, harassment, retaliation, whistleblowing, confidentiality agreements, noncompetition agreements, wage and hour violations, and failure to accommodate before state and federal courts, agencies, arbitration panels, and at mediation.

Some highlights of his experience include the following:

- Representing a Fortune 200 company at trial before the National Labor Relations Board
- Multiple representations of a Fortune 10 company in arbitrations
- Conducting pre-litigation investigations for a Rhode Island nonprofit
- Representing a national company in EEOC proceedings across the country

In his practice, Greg has obtained numerous successful outcomes for employers, including: obtaining multiple dismissals of various discrimination claims in state and federal agencies; assisting in obtaining summary judgment in a whistleblower claim in federal court; and assisting in obtaining summary judgment in a race discrimination claim in arbitration.

Greg also advises employers regarding various human resources matters, including accommodation requests, hiring and termination decisions, and compliance with state and federal laws and regulations. His advice has been cited by publications, such as the *Providence Business News*.

Before joining Littler, Greg worked at a Providence law firm where he handled criminal and civil defense cases, including significant matters for insurance companies and healthcare providers. Previously, he served as a judicial law clerk at the Connecticut Superior Court. While in law school, Greg was a notes and comments editor of the *Roger Williams University Law Review*.

Sean O'Brien, Associate, Littler Mendelson P.C.

Sean O'Brien focuses his practice on employment discrimination, harassment, and leave and accommodation matters. He represents employers in both federal and state courts for both trial and appellate issues and in administrative proceedings. While trials and hearing may be necessary, Sean assists in assessing whether alternative dispute resolution, such as mediation, may be a viable path for an efficient resolution.

In his practice, Sean assisted in obtaining a dismissal of a plaintiff's $2,500,000 claim against a large national staffing agency. He also obtained a dismissal of an action against a large national supply company brought by a creditor of a former employee seeking payment of the judgment taken against the former employee. Outside of court, he assisted in advice related to incentive bonuses and protected leave requirements and represented multiple employers in mediation and administrative proceedings.

Prior to joining Littler, Sean was a litigation attorney at a Memphis law firm where he focused on construction and consumer protection litigation. He was first chair in approximately 10 bench trials in state court, obtained favorable rulings on motions to dismiss, for summary judgment, and for injunctive relief, and obtained remands in two interlocutory appeals without full appellate briefing.

During law school, Sean was the symposium editor for *The University of Memphis Law Review*. He externed for a judge on the U.S. Court of Appeals for the Sixth Circuit, and clerked for the Tennessee Attorney General and the Shelby County Attorney's office. His student note, *The Highly Sensitive Person's Redress for Intentional Infliction of Emotional Distress: Utilizing Experts in the Court Room*, was published and awarded Best Student Note, Runner Up in 2019.

Jim Paretti, Shareholder, Littler Mendelson P.C.

James A. Paretti, Jr. is an experienced management-side employment and labor relations attorney with in-depth political and policy knowledge of labor, pension, healthcare and employment law, regulations and legislation. Jim is well versed in all aspects of legislative and political processes with demonstrated knowledge in the substance of federal labor and employment policy. He has over two decades of experience working with federal legislators and policymakers, including former Speaker of the U.S. House of Representatives, Chairmen of the U.S. House Committee on Education and the Workforce, and senior level administration officials.

Prior to joining Littler, Jim was chief of staff and senior counsel to the acting chair of the Equal Employment Opportunity Commission. He provided legal and political counsel with respect to all aspects of agency business, administered and managed the Office of the Chair where he was responsible for over 2,200 employees and a 375 million dollar annual budget, and served as primary liaison to regulated stakeholders and Capitol Hill.

His extensive experience includes developing policy and providing legal counsel on the Committee on Education and Labor in the U.S. House of Representatives as well as coordinating external communications and media relations for a senior member of Congress. Jim represented corporate and nonprofit clients in employment litigation in federal and state court, before administrative agencies and in private arbitration while with two Boston firms.

During law school, he held positions as editor as well as note and comment editor for the *New York University Law Review*.

Mark T. Phillis, Shareholder, Littler Mendelson P.C.

With over 25 years of experience advising and representing employers, Mark T. Phillis helps guide employers in implementing effective accommodation policies and practices for individuals with disabilities, streamlining their Family and Medical Leave Act (FMLA) practices, and ensuring that their commission and incentive pay plans and other pay practices conform to the law.

Mark enjoys helping employers solve complex problems involving various intersecting laws that provide leaves of absence to employees such as the FMLA, similar state laws, paid sick leave laws, and parental leave laws. He helps employers both find creative ways to accommodate their employees while ensuring that employees continue to perform their jobs effectively and do not abuse their leave privileges. He has helped employers deal with employees using FMLA leave to plan their weddings, rein in employees whose use their leave around weekends and major sporting events, and manage employees who believe being eligible for FMLA leave prevents their manager from holding them accountable.

Mark counsels employers on their employment policies and practices, particularly those disability discrimination and accommodations for employees and members of the public under both Title I and Title III of the Americans with Disabilities Act (ADA). He has worked to find creative accommodations for employees who suffer from migraines, attention deficit disorder, mobility issues and myriad other impairments. Mark defends companies when their employment practices and decisions are challenged as being discriminatory or unlawful. He also works with companies to ensure that their facilities, websites, and mobile applications are accessible to individuals with disabilities.

For example, Mark has defended companies in disability access litigation, including in numerous purported class action lawsuits, and he has assisted retailers with assessments of their stores, hotels with assessments of their properties and reservations systems, brewers with ensuring that their public tours are accessible, and well over 100 companies across a broad range of industries with accessibility issues with their websites and mobile applications.

In addition to his work on leaves of absence and disability accommodation, as part of Mark's focus on compliance, he works extensively with employers across the country to ensure that their incentive compensation plans and commission plans provide proper incentives to their employees and that their plans comply with various state laws. Mark revises plan documents to not only ensure that they are legally compliant, but also to ensure that employees understand how their pay plans work and what behavior is being rewarded.

He defends employers when they face individual claims and class and collective actions over how they pay their employees and when overtime pay is due. He defends companies in class and collective actions and in U.S. Department of Labor audits, and he works with companies to prevent future litigation. For example, in recent years, Mark helped two companies, each with over a dozen subsidiaries, review their pay practices and policies to ensure that they comply with federal and state law in over 30 states.

As co-chair of Littler's Diversity & Inclusion Council, Mark devotes a good deal of his time working on the firm's diversity and inclusion initiatives. He works with clients to ensure that their diversity and inclusion initiatives are both effective and comply with the law.

Mark is a frequent lecturer on leaves and disability accommodations, employment and pay practices, and diversity and inclusion. He also regularly publishes articles on developments relating to accommodations for individuals with disabilities, leaves of absence, diversity and inclusion, and LGBTQ-related workplace issues. He is a frequent commentator in both trade and legal publications.

As an undergraduate, Mark studied at the Universidad de Salamanca in Spain and received an Organization of American States grant to study at the Universidad de Belgrano in Buenos Aires, Argentina. In law school, he was executive and production editor of the *Journal of Law Reform*.