8-16-2020

Federal Court Bars Enforcement of Louisville Public Accommodations Ordinance Against A Wedding Photographer Who Opposes Marriage Equality

Arthur S. Leonard

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Posted on: August 16th, 2020 by Art Leonard No Comments

Justin Walker, recently confirmed by the Senate to be a judge of the U.S. Court of Appeals for the District of Columbia Circuit, completed some unfinished business on his docket as a U.S. District Judge in Louisville, Kentucky, by issuing an order on August 14 barring the Louisville Metro Human Relations Commission from enforcing the sexual orientation provision of the city's public accommodation ordinance against a wedding photographer who does not want to photograph same-sex weddings and wants to be able to announce and explain her opposition on her website. Chelsey Nelson Photography LLC v. Louisville/Jefferson County Metro Gov't, 2020 U.S. Dist. LEXIS 146246 (W.D. Ky, Aug. 14, 2020).

In 1999, Louisville became the first municipality in Kentucky to ban anti-gay discrimination. Among other things, the ordinance prohibits businesses from denying goods or services because of the sexual orientation of a patron, or to communicate to the public that it will refuse such services or treat people as unwelcome because of their sexual orientation. The Commission concedes in this case that a photographer's refusal to photograph same-sex weddings would violate the ordinance, and has not "disavowed" any intention to prosecute such an action.

Chelsey Nelson is a photographer whose business includes weddings. Although she has not been asked to photograph any same-sex weddings, she claims that her religious beliefs would compel her to refuse such business, and she would like to avoid such confrontations by being able to advertise on her website that she will not provide such service. Represented by Alliance Defending Freedom, the anti-gay litigation group, she filed a lawsuit seeking a court order that she is not required to comply with the ordinance and can publish her views without fear of liability. She claims that the existence of the ordinance has chilled her ability to exercise her constitutional freedom of speech and free exercise of religion rights under the First Amendment by deterring her from using her website to communicate this message.

Judge Walker is a family friend and protégé of Senator Mitch McConnell, who recommended his appointment to President Trump and has shepherded his nomination through two rounds of Senate confirmation votes. Walker is a leader of the conservative Federalist Society branch in Louisville, where he worked as a lawyer and law professor before taking the bench. Thus, his decision to deny the city's motion to dismiss the case in large part, as well as his decision to grant in part Nelson's motion for preliminary relief pending an ultimate trial of the merits (presumably before a different district judge as Walker leaves for Washington), is not surprising.

What may be surprising, however, is some of the gay-friendly language that permeates his decision. Assuming the sincerity of what he has written, the youthful Walker (born 1982) is part of a generation of young conservatives who have generally accepted gay rights. He begins his decision praising the activists who campaigned for many years to get the Louisville ordinance passed, and comments that our society is "better" for prohibiting anti-gay discrimination.

Finding that the plaintiff has a good chance of prevailing on the merits of her claim is a prerequisite for ordering preliminary injunctive relief against enforcement of a law that, on its face, is not unconstitutional. Walker premises his conclusion that Nelson meets this test by reference to the Supreme Court's unanimous decision in Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, in which the Court held that the organizers of the Boston St. Patrick's Day parade were not required to allow a gay Irish-American group to march under their own banner if the parade organizers did not want to include a gay rights message in their parade. The Massachusetts Supreme Judicial Court had ruled by 4-3 that Massachusetts' public accommodations law, which prohibited sexual orientation discrimination, required the parade organizers to let the gay group march.

In reversing, the Supreme Court found that the parade was an expressive activity protected by the First Amendment's freedom of speech provision. The Court held that forcing the organizers to include the gay group would be unconstitutional compelled speech, imposing the gay group's message on the parade organizer's expressive activity.

In this case, Judge Walker embraced the analogy to requiring a photographer to take pictures she did not want to take as compelled speech, and that the provision making it unlawful for her to publicize her refusal to photograph same-sex weddings was a content-based restriction on her speech. Because her speech was motivated by her religious beliefs, the constitutional problem was compounded, in Judge Walker's view. And he noted that the Supreme Court has found that government-compelled speech and punishment of religious expression impose irreparable injury, another test for preliminary relief.

Court decisions on this issue are divided. In 2013, New Mexico's Supreme Court found that a wedding photographer violated the state's public accommodation law by refusing to photograph a same-sex commitment ceremony, and the Supreme Court of the United States denied a petition to review that case.

But more recently the 8th Circuit Court of Appeals ruled in favor of a videographer who did not want to film same-sex weddings, and the Arizona Supreme Court ruled that a custom stationer did not have to create invitations for a same-sex wedding, both relying on First Amendment free speech rights. What the more recent cases have in common is that they are part of a broader litigation strategy by Alliance Defending Freedom and other conservative litigation groups, which having lost the battle against marriage equality, seek to establish broad constitutional exemptions for religious

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ABOUT THE AUTHOR

Arthur S. Leonard, a professor at New York Law School since 1982, edits the monthly newsletter Lesbian/Gay Law Notes, and is co-author of Sexuality Law (Carolina Academic Press) and AIDS Law in a Nutshell (West Publishing Co.). He writes on legal issues for Gay City News (New York), and serves as a trustee of the Jewish Board of Family & Children's Services of New York.

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opponents of marriage equality from having to comply with anti-discrimination laws. These are "affirmative litigation" cases brought to challenge the application of the law. They do not involve actual denials of service to particular individuals, unlike the famous Masterpiece Cakeshop case, or similar cases in other jurisdictions where same-sex couples have filed discrimination claims after being denied goods or services.

The municipal defendants in this case could seek to appeal the grant of injunctive relief to the 6th Circuit Court of Appeals (in Cincinnati), or could decided to await a final ruling on the merits before instituting an appeal. At this point, local media coverage of the case has undoubtedly solved Chelsey Nelson's problem of communicating her stance to the public, so it seems unlikely that any same-sex couples planning their weddings in Louisville are going to approach her for service. The injunction specifically protects her from being investigated by the Louisville Commission, but does not prevent the Commission from enforcing the ordinance against any other business that is actually violating the anti-discrimination ban, so there is no pressing urgency for an appeal.

Tags: Alliance Defending Freedom, Chelsey Nelson Photography v. Louisville, free exercise exemption from public accommodation law, free speech exemption from public accommodation law, Hurley v. Irish-American Gay Lesbian Group of Boston, Judge Justin Walker, marriage equality, Mitch McConnell, preliminary injunction against enforcement of law, religious objections to same-sex marriage, same-sex marriage, wedding photographer