

1-2022

Anchorage Homeless Shelter Denied Injunction in Challenge to Revised Anti-Discrimination Ordinance

Arthur S. Leonard

Follow this and additional works at: https://digitalcommons.nyls.edu/fac_other_pubs



Part of the [Law and Gender Commons](#)

Anchorage Homeless Shelter Denied Injunction in Challenge to Revised Anti-Discrimination Ordinance

By Arthur S. Leonard

When a transgender homeless woman seeking shelter in Anchorage, Alaska, in 2018 was dropped off by police at Hope Center, a non-profit religious organization that operates a shelter for women called the Downtown Soup Kitchen, she was turned away for a variety of reasons, including the shelter's rules against providing housing for individuals who did not meet its definition of "biological woman" – that is, a person identified at birth as female. The Anchorage Equal Rights Commission received a complaint and initiated action against Hope Center, which then sued for injunctive relief in federal court, successfully arguing that it was not covered by the non-discrimination provisions of Anchorage's anti-discrimination ordinance. See *Downtown Soup Kitchen v. Municipality of Anchorage*, 406 F. Supp. 3d 776 (D. Alaska 2019).

In response to this litigation, the Anchorage Assembly undertook a revision of relevant provisions, repealing some, and enacting new sections. In response, Hope Center filed a new lawsuit, seeking injunctive relief again, arguing that it was in danger of being prosecuted under the revised ordinance. The city moved to dismiss for lack of standing, claiming that the revised ordinance would not subject Hope Center to prosecution for excluding transgender women from Downtown Soup Kitchen. On December 20, U.S. District Judge Sharon L. Gleason granted the motion with respect to the public accommodation provision, but denied the motion in part with respect to the real estate provision, finding ambiguity about whether an exemption for "places which are institutional in nature" would apply to shield Hope Center from enforcement, but that the municipality's representation, in an affidavit by the executive director of the Commission disavowing to seek enforcement against Hope Center, deprived it of standing for

injunctive relief, but not for damages for the chilling of its First Amendment rights for the few months between enactment of the revisions and the filing of the affidavit: May 25 to August 16, 2021. *Downtown Soup Kitchen v. Municipality of Anchorage*, 2021 WL 5999391 (D. Alaska).

The statutory interpretation task taken up by Judge Gleason was complicated, not least because the legislative history showed that members of the Assembly had differing views about whether the revised statute's real estate provisions would apply to the operation of a facility such as Downtown Soup Kitchen. Hope Center argues that the provision applies, and it still needs injunctive relief to protect its free exercise and free speech rights against potential enforcement actions. The executive director of the Commission contends that the exemption protects Hope Center.

What was not ambiguous was the Assembly's decision, in line with the Supreme Court's subsequent ruling in *Fulton v. City of Philadelphia*, 141 S. Ct. 168 (June 17, 2021), not to treat Hope Center's shelter operation as a public accommodation. In *Fulton*, the Supreme Court held, among other things, that a Catholic foster care agency was not a public accommodation within the meaning of Philadelphia's Human Rights Ordinance, because its services were not available to the general public, but only to those who met specific criteria as a result of a screening process. Similarly, Hope Center established that admission to its homeless shelter was not open to the general public, but only to cisgender women who met a detailed list of criteria.

On the other hand, the Assembly's attempt to clarify the operation of its ordinance with respect to housing facilities served only to muddy the waters. It repealed a provision that specifically exempted homeless shelters

from the real estate provisions, and instead adopted the following language: "It is unlawful for the owner, lessor, manager, agent, brokerage service, or other person having the right to sell, lease, rent [or] advertise . . . real property to . . . [r]efuse to sell, lease or rent, or to otherwise make unavailable, the real property to a person because of race, color, sex, sexual orientation, gender identity, religion, national origin, marital status, age, familial status, or physical or mental disability . . . [or] [d]iscriminate against a person because of race, color, sex, sexual orientation, gender identity, religion, national origin, marital status, age, familial status, or physical or mental disability." Another provision forbids communications "that indicate any preference, limitation, specification or discrimination" based on the same list of characteristics. However, the revision includes as a separate subsection a new "institutional-places" exemption, which states that the prohibition of discrimination "does not apply to places which are institutional in nature and for which housing is merely incidental to a broader purpose, such as rehabilitation or medical care."

Judge Gleason found that the possible application of this exemption to Hope Center's homeless shelter for women was ambiguous or unclear. "The meaning of 'institutional in nature' is not clear," she wrote, "and it is ambiguous whether Hope Center is a 'place . . . for which housing is merely incidental to a broader purpose.' This question may depend," she continued, "on the unit of analysis; housing is not 'merely incidental to a broader purpose' if the women's shelter is the 'place' in question, but might be 'merely incidental' if the 'place' is Hope Center as a whole – an organization that offers many services in addition to its shelter operations. Thus, the plain text of section 5.20.020, including the institutional-places exemption, does not clearly indicate whether Hope

Center's shelter operations would be covered under the provision" and thus exempt from complying with the non-discrimination requirements.

The court also found the legislative history ambiguous on this point, noting comments from members of the Assembly indicating differing views about whether the institutional-places exemption applies to Downtown Soup Kitchen. The judge notes that in this litigation, the Municipality "only asserts that the institutional-places exemption 'may well apply' to Hope Center depending on 'facts regarding to what extend Hope Center's homeless sheltering is "incidental" to the other aspects of its religious ministry.'" Thus, she found, Hope Center "has offered a colorable argument" that the non-discrimination obligation under the real estate provisions applies to it, interfering with its ability to operate the shelter consistent with its religious precepts and to communicate its access policy to the public.

In terms of Hope Center's application for injunctive relief, the court determined that Hope Center's intention to operate in violation of the statute seems clear, but that the likelihood that the challenged provisions will be enforced against it are slim. Certainly, the affidavit filed by the executive director of the Commission suggests that the Commission will not initiate any action, based on its present view of the exemption, and that if any individual files a charge with the Commission, it is likely to be dismissed. On the other hand, the Center argued that the Commission's disavowal is "not legally binding" and that "nothing prevents this Director, or the next, from changing his or her mind about enforcement and again turning on Hope Center." However, the court found that the disavowal "indicates a low likelihood of enforcement." Hope Center replied that it was just the executive director, not the full Commission, that was taking this position, and furthermore that anybody who claimed discrimination could file a complaint with the Commission, setting in train a mandatory investigative process and potential civil and criminal sanctions, but defendants responded

that under the ordinance the power to dismiss complaints lies with the executive director, who could forestall these activities by simply dismissing a complaint as falling within the exemption.

On this point, Judge Gleason concluded, "Given that the Executive Director exercises primary responsibility for screening out non-cognizable complaints, the Bolanos Anderson affidavit is sufficient to establish that enforcement against Hope Center is unlikely."

On that basis, she concluded, Hope Center lacked standing for prospective injunctive relief, but could seek compensation for the chilling of its First Amendment rights during the short period between enactment of the ordinance and the filing of the affidavit in response to this lawsuit. Hope Center lacked standing to seek injunctive relief against enforcement of the public accommodation provision, in light of the court's conclusion, consistent with the earlier litigation and the *Fulton* decision, that Hope Center and its shelter are not public accommodations under the ordinance.

Alliance Defending Freedom is litigating on behalf of Hope Center, so one must anticipate the likelihood of an appeal to the 9th Circuit. Judge Gleason was appointed by President Barack Obama. ■



U.S. District Court Rules Against Maryland School Choice Program's Anti-Discrimination Policy on Free Speech Grounds

By Joseph Hayes Rochman

In *Bethel Ministries, Inc. v. Salmon*, 2021 WL 5882343, 2021 U.S. Dist. LEXIS 236859 (D. Md. December 10, 2021), Judge Stephanie A. Gallagher (D. Md., Northern Div.), ruling on a motion for summary judgment, found that a Maryland school-choice program, Broadening Options and Opportunities for Students Today ("BOOST"), violated the Free Speech Clause of the First Amendment by revoking Bethel Christian Academy's ("Bethel Christian") eligibility because its admissions policy was inconsistent with the program's policy prohibiting discrimination in admissions on the basis of sexual orientation. Judge Gallagher concluded that requiring Bethel Christian to remove the discriminatory section of its admissions policy regulated Bethel Christian's speech, not its conduct. Revoking eligibility based on the admissions policy was viewpoint-based discrimination which imposed an unconstitutional condition on the taxpayer-funded public benefit program, in the court's opinion.

Bethel Ministries is a Pentecostal Christian Church in Savage, Maryland. The church operates Bethel Christian which serves Kindergarten through 8th grade. BOOST is a scholarship-based school-choice program enacted by the Maryland legislature in 2016. The program provides scholarships directly to students eligible for the reduced-price lunch program to attend eligible private schools of their choice. The BOOST Advisory Board reviews and certifies applicants and sets scholarship amounts. The program's 2017 budget was \$5.5 million, and it has increased