



Balancing the Equality Act with
School Mission

1

Contents 

- A. Disclaimer
- B. Cultural context and recent developments
- C. Not so hypotheticals
- D. Employment discrimination
- E. Public accommodation

2

Disclaimer 

This presentation involves issues at the heart of current culture wars between religious freedom and LGBTQ equality. The presentation attempts to give an accurate statement of current law and trends. The primary intended audience is faith-based schools that hold more traditional religious positions, but others may find some of it helpful in terms of what current Washington state law requires of non-religious schools.

3

Cultural Context



- The social and legal climate around sexuality has changed dramatically in the last decade
- There are stark generational differences among evangelicals in views about human sexuality
- Washington State is becoming more secular and more politically progressive
- Public awareness of transgender issues is increasing and religious institutions are behind the curve
- The legal impact of culture wars are starting to touch religious institutions
- Religious institutions that avoid engaging LGBTQ issues well risk losses to moral credibility and legal protection

4

Recent Developments



- 2014 – Washington State Supreme Court decides *Ockletree v. Franciscan Health System*, weakening religious employer exemption under state law.
- 2014 – *Zmuda v. Eastside Catholic High School* – Vice Principal of Catholic high school sues school and Catholic archdiocese for sexual orientation discrimination (case settles).

5

Recent Developments



- 2015 – U.S. Supreme Court decides *Obergefell v. Hodges*, holding that there is a Constitutional right to same-sex marriage.
- 2015 – Washington State Department of Early Learning brings enforcement actions against two church-operated childcare centers because they only hired professing Christians.
- 2015 – Washington State Human Rights Commission released rules requiring “covered entities” to allow transgender individuals to use the facilities of the gender with which they identify (regardless of anatomical sex).

6

Recent Developments



- 2017 – Washington State Supreme Court decides *Arlene’s Flowers*, holding that private business owner illegally discriminated in refusing to provide flowers for same sex wedding.
- 2017 – *Richardson v. Northwest Christian University* – Federal district court in Oregon rules that Christian university discriminated against employee who was fired after getting pregnant out of wedlock (case settled for undisclosed amount).
- 2017 – two more Washington churches sued for discrimination for sexual orientation and marital status, respectively (same theory as *Eastside Catholic*) (cases pending, more below)

7

Recent Developments



- 2018 – U.S. Supreme Court decides *Masterpiece Cakeshop*, ruling for baker on basis of bias by Colorado Civil Rights Commission, but leaving issue of First Amendment defense undecided.
- 2019 – Equality Act passes U.S. House of Representatives with all D’s and eight R’s in support (pending in Senate; will not pass in the next 12 months).
- 2019 – Washington State Supreme Court re-affirms *Arlene’s Flowers* in light of *Masterpiece*.

8

Recent Developments



- 2019 – Oral argument before U.S. Supreme Court in *Bostock v. Clayton County* and *Altitude Express v. Zarda* (sexual orientation under Title VII); *Harris Funeral Home v. EEOC* (gender identity under Title VII). Decisions expected June 2020.
- 2019 – Oral argument before Washington Supreme Court in *Woods v. Seattle’s Union Gospel Mission* (sexual orientation and religious exemption in Washington law against discrimination). Decision sometime in 2020.
- 2019 – Presidential Candidate (Beto) urges revocation of tax-exempt status for religious organizations with traditional views on marriage and sexuality

9

Not-So-Hypotheticals



#1 – Transgender accommodation

- Church rents space to homeschool co-op
- Homeschool co-op has teenage student who is anatomically male but identifies as female
- Student uses women’s bathroom. Another student complains to parents, who complain to church leadership
- What should church do?

10

Not-So-Hypotheticals



#2 – Religious discrimination

- Church has a licensed daycare for 6-months through pre-K
- Church requires all employees to subscribe to statement of faith
- DEL licensor says this is a violation of licensing regulations and writes church up for noncompliance
- What should church do?

11

Not-So-Hypotheticals



#3 – Pregnant single employee

- Church employee who is a single woman gets pregnant
- Employee instructed to marry the father or resign
- Employee alleges discrimination
- What should church do?

12

Not-So-Hypotheticals



#4 – Same-sex marriage

- Church-operated school hires new volleyball coach. Coach attested to agreement with school's statement of faith at time of hire
- Coach later discloses that he is in a same-sex marriage
- School believes some parents will be upset if coach is retained; others will be upset if coach is fired
- What should it do?

13

Employment Discrimination



Federal Law (Title VII)

- Applies if 15 or more employees
- Prohibits discrimination on the basis of race, color, sex, national origin, or religion
- Sexual orientation, gender identity, and marital status not explicitly protected

14

Employment Discrimination



Federal Law (Title VII)

- Religious employer exemption
 - Applies to all types of employees – *Amos* case
 - Applies to “religious corporation, association, educational institution, or society”
 - Religious discrimination only – does not apply to race, sex, color, or national origin

15

Employment Discrimination 

Federal Law (Title VII)

- Pending Supreme Court cases: some courts or agencies interpret “sex” as applying to sexual orientation, pregnancy, or gender identity. Supreme Court to resolve sexual orientation and gender identity. Argument October 8, 2019; decisions June 2020.
- *Bostock v. Clayton County* and *Altitude Express v. Zarda* (sexual orientation)
- *Harris Funeral Home v. EEOC* (gender identity)
- All three cases involve for-profit employers
- Supreme Court could craft a religious exemption or hint at one if it rules for employees

16

Employment Discrimination 

Federal Law (Title VII)—*impact of Equality Act*

- Equality Act would add by statute what the plaintiffs seek in the pending Supreme Court cases
- “sexual orientation” and “gender identity” would be explicitly protected by Title VII
- No explicit religious exemption
- Passed U.S. House; only likely to become law if Democrats also control Senate and White House

17

Employment Discrimination 

Federal Law (other non-discrimination)

- ADEA (20+ employees)
- ADA (15+ employees)

18

Employment Discrimination



- Ministerial exception
 - Ministers not protected by antidiscrimination laws due to First Amendment
 - Court in *Hosanna Tabor* (2012) affirms, but no clear definition of “minister”
 - In that case, court considered four factors:
 - How the employer held the employee out (job title);
 - Substance and training reflected by title;
 - How the employee held themselves out;
 - Whether employee performed “important religious functions”

19

Employment Discrimination



- Limits of ministerial exception illustrated by *Richardson v. Northwest Christian University*

Based on the undisputed facts in the summary judgment record, I conclude the ministerial exception does not apply in this case. First, plaintiff’s title, assistant professor of exercise science, was secular. Second, plaintiff did not undergo any specialized religious training before assuming her position. Third, although there is ample evidence plaintiff held herself out as a *Christian*, there

20

Employment Discrimination



is no evidence she held herself out as a *minister*. With respect to the fourth factor, there is evidence plaintiff performed some important religious functions in her capacity as a professor. She was expected to integrate her Christianity into her teaching and demonstrate a maturing Christian faith. But any religious function was wholly secondary to her secular role: she was not tasked with performing any religious instruction and she was charged with no religious duties such as taking students to chapel or leading them in prayer. If plaintiff was a minister, it is hard to see how any teacher at a religious school would fall outside the exception. Courts have properly rejected such a broad reading of *Hosanna-Tabor*, which would permit the ministerial exception to swallow the rule that religious employers must follow federal and state employment laws. *See, e.g., Dias*, 2013 WL 360355 at *4 (rejecting the argument that any teacher at a religious school who is a “role model” is a minister). The ministerial exception does not bar plaintiff’s claims.

21

Employment Discrimination 

- Ministerial exception prediction
- Current Supreme Court would extend the scope of the ministerial exception (what's required by the First Amendment) further where the protected class triggers direct conflict with religious expression (e.g. Equality Act)
- Could change if balance of court tips back progressive (Thomas is 71; Alito is 69; Roberts is 64)
- Will take time to sort out; uncertainty in meantime

22

Employment Discrimination 

State Law (RCW 49.60)

- Much more extensive list of protected classes:
"age, sex, marital status, sexual orientation, race, creed, color, national origin, honorably discharged veteran or military status, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a person with a disability"

23

Employment Discrimination 

State Law (RCW 49.60)

- Sexual orientation broadly defined:
"heterosexuality, homosexuality, bisexuality, and gender expression or identity. As used in this definition, "gender expression or identity" means having or being perceived as having a gender identity, self-image, appearance, behavior, or expression, whether or not that gender identity, self-image, appearance, behavior, or expression is different from that traditionally associated with the sex assigned to that person at birth."

24

Employment Discrimination



State Law (RCW 49.60)

- Applies if 8 or more employees
- Pre-empts local / municipal law
 - First *Franciscan* case
 - Cities and counties cannot close the religious exemption in state law
- Only applies to discrimination – local ordinances such as Seattle sick leave or minimum wage not pre-empted

25

Employment Discrimination



State Law (RCW 49.60)

- Until *Ockletree*, broad religious exemption
 - “Religious or sectarian organization not organized for private profit” excluded from definition of employer
 - Exemption therefore not limited to religion as in federal law
- 2014 *Ockletree* decision
 - 4-4-1 decision – no majority
 - Janitor of Catholic hospital could sue for race and disability discrimination where job and discrimination unrelated to religion
 - *Eastside Catholic* lawsuit followed a few months later (settled)
 - Two more lawsuits in 2017 (pending)

26

State Law (RCW 49.60)



- Washington Supreme Court to decide again—*Woods v. Seattle’s Union Gospel Mission*
 - Applicant for legal aid lawyer at religious nonprofit
 - Job had explicit religious qualifications and duties
 - Does the religious exemption in the statute violate the state constitution’s privileges and immunities clause
 - Argued October 10, 2019 – decision likely in 2020
 - Second case trails and pending in court of appeals; involves marital status discrimination for church bookkeeper living with boyfriend while still married

27

Employment Discrimination



Summary

- Don't discriminate on the basis of race, sex (except ministers), color, national origin, age, or disability
- Permissible to prefer employees on basis of religion
- Marital status and sexual orientation are current battleground – free exercise of religion or illegal discrimination?
- Be careful and thoughtful about sexuality expectations for employees

28

Public Accommodation



Federal law

- Title II of the Civil Rights Act applies to lodging, restaurants, gas stations, theaters, sports stadiums
- applies to race, color, religion, national origin (sex not included)
- Religious conflict historically not an issue

29

Public Accommodation



Federal law

- Equality Act would add sex, sexual orientation, and gender identity
- Would expand list of establishments; still does not explicitly mention schools, but expect litigation on this issue

30

Public Accommodation 

State law

- Broad list of protected classes
- Basis for *Arlene's Flowers* case
- Vague religious exemption: does not apply to: "educational facility, columbarium, crematory, mausoleum, or cemetery operated or maintained by a bona fide religious or sectarian institution"
- Religious exemption not yet interpreted by courts

31

Public Accommodation 

State law

- Washington State Human Rights Commission's interpretation:

Are there exclusions to what is considered to be a place of public accommodation?

Groups that are distinctly private are not included in the definition of place of public accommodation. Examples would be some fraternal organizations with limited outside activity and groups such as book clubs that meet in members' homes. In addition, a church or other religious entity in the activity of conducting worship services is not a place of public accommodation, and neither are religious educational institutions. However, other church-sponsored activities, such as a soup kitchen or public bake sale, might be considered a place of public accommodation.

7
Guide to Sexual Orientation and Gender Identity
Laura Lindstrand
Updated 2/19/2014

32

Public Accommodation 

State law

- Washington State Human Rights Commission attempted enforcement against religious higher education organization, but then changed course
- Washington State Department of Early Learning (now DCYF) attempted enforcement against two religious preschools, but then backed off

33

Public Accommodation



State law

- Same-sex marriage
 - No new regulation – RCW 49.60 still governs employment, real estate, public accommodation in sexual orientation and marital status
 - Religious organizations exempt as to “solemnization” (the ceremony) and “celebration” (the reception)
 - Religious leaders exempt from “recognizing” same-sex marriage

34

Transgender Issues



- Protected class under state employment and public accommodation law
- More difficult in practice than sexual orientation
 - Not a private issue – impacts dress code, sex-segregated facilities
 - Orientation / behavior dichotomy not as applicable
 - Affects all ages
 - Theological debate less well-developed

35

Transgender Issues



- New state regulations—WAC 162-32
 - Effective December 26, 2015
 - Effort to overturn by legislature is dead
 - Must allow leave/accommodation for medical needs of transgender employees
 - Dress and grooming standards follow gender identity, not anatomical sex
 - Bathrooms, locker rooms, etc. follow gender identity, not anatomical sex
 - Applies to “covered entities” – presumably same religious exemptions apply in employment and public accommodation

36

Recommendations



- Engage the theological and pastoral issue (helpful resource is <https://www.covenantseminary.edu/resources/francis-schaeffer-lecture-series-2014-fall-homosexuality-church-toward-faithful-pastoral-care/>)
- Reduce to expectations for leaders, staff, volunteers, students, etc.
- Be up front about expectations (does not mean be obnoxious or display it prominently)
- Be explicit about how expectations relate to religious expression
- Be gracious and pastoral (the statistics about the faith and well being of sexual minorities in faith community are tragic)
- Check insurance coverage for public accommodation coverage (in addition to EPLI)
- Check facility use policy for consistency (and property tax compliance)

37

Q&A



38

Nat Taylor has twenty-two years' experience representing well over one hundred church, school, and other nonprofit clients on employment, governance, risk management, property, and tax issues. He is a graduate of the University of Washington Law School where he was managing editor of the Washington Law Review. He serves on the Washington State Bar Association's nonprofit corporations committee. He is an elder in his local church and serves on the board of the Children's Law Center of Washington, a nonprofit law firm that helps children get out of the foster care system into permanent homes. His children attend a faith-based WFIS member school where his wife is currently board president.

Nathaniel L. Taylor
 2025 First Avenue, Penthouse A
 Seattle, WA 98121-3125
 Tel: 206.682.0565
 www.elmlaw.com
 ntaylor@elmlaw.com



39