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Public Accommodation Laws

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Understand how discrimination laws affect which outside groups can use church facilities.

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Generally and broadly speaking, a place of public accommodation is a place that offers the public some sort of goods and or service. Most states and many cities have enacted laws prohibiting various forms of discrimination by places of public accommodation. Many of these laws prohibit discrimination by places of public accommodation on the basis of sexual orientation or gender identity, and these provisions have raised a number of questions for some pastors, including the following:

- Can churches or clergy be penalized under a state or local public accommodations law for sermons and other teachings that reject, on doctrinal grounds, same-sex marriages or gender identity different from one's gender at birth?
- Can churches or clergy be penalized under a state or local public accommodations law for refusing to allow same-sex marriages to be performed on church property?
- Can churches or clergy be penalized under a state or local public accommodations law for denying access to certain programs and activities on the basis of sexual orientation, same-sex marriage, or gender identity?

To enable church leaders to assess the potential application of the nondiscrimination provisions in a public accommodation law, this article will offer an analysis of three key questions—in light of existing precedent.

1. Is the church a "place of public accommodation" under applicable local, state, or federal laws?

Obviously, the first question to resolve in investigating the application of a public accommodations law to a church is whether churches satisfy the definition of a "place of public accommodation" under the law. There are three possibilities:

- The law excludes churches from the definition of a "place of public accommodation."
- Churches are excluded from the definition of a "place of public accommodation" but only if certain conditions are met. For example, a church does not rent its property to the general public for weddings and other events.
- Churches are included in the definition of a place of public accommodation even if they do not rent their property to the general public or engage in any other commercial activity. To illustrate, four churches challenged a 2016 Massachusetts law that was construed by the state attorney general to include "houses of worship" within the definition of a place of public accommodation regardless of rental or other commercial activity. The state attorney general later announced that "while religious facilities may qualify as places of public accommodation if they host a public, secular function, an unqualified reference to 'houses of worship'" was inappropriate.

Whether churches are deemed to be places of public accommodation under state or local law will depend on the language of the applicable public accommodations law. What follows are summaries of most of the court cases, listed in chronological order, that have addressed this question. Note that quotations without attributions are statements made by the court.

Traggis v. St. Barbara's Greek Orthodox Church, 851 F.2d 584 (2d Cir. 1988)

A church had not violated a Connecticut law banning several kinds of discrimination in places of public accommodation because a church is not a place of public accommodation.

Roman Catholic Archdiocese v. Commonwealth of Pennsylvania, 548 A.2d 328 (Penn. 1988)

Parochial schools run by a Catholic church are not places of public accommodation under Pennsylvania law.

Wazeerud–Din v. Goodwill Home & Missions, Inc., 737 A.2d 683 (1999)

A church's addiction program was not a place of public accommodation under New Jersey law; the group was essentially religious in nature in that it devoted time to the study of Christian tenets and "a religious institution's solicitation of participation in its religious activities is generally limited to persons who are adherents of the faith or at least receptive to its beliefs."

Donaldson v. Farrakhan, 762 N.E.2d 835 (Mass. 2002)

The Massachusetts Supreme Judicial Court considered whether a public accommodation law applied to a religiously affiliated event that was not open to women. The event in question was a speaking event promoted, organized, and funded by a mosque, and presented by minister Louis Farrakhan at a city-owned theater, to address drugs, crime, and violence in the community. The court found that the event was not a "public, secular function" of the mosque.

The court also found that application of the public accommodation law to require the admission of women to the event "would be in direct contravention of the religious practice of the mosque" because it would impair the "expression of religious viewpoints" of the mosque with respect to the "separation of the sexes" and the role of men in the community. The court thus further held that the "forced inclusion of women in the mosque's religious men's meeting by application of the public accommodation statute" would "significantly burden" the mosque's First Amendment rights of expression and association.

Sailant v. City of Greenwood, 2003 WL 24032987 (S.D. Ind. 2003)

"The church is not a place of public accommodation."

Vargas–Santana v. Boy Scouts of America, 2007 WL 995002 (D.P.R. 2007)

"As a matter of law, a church is not a place of public accommodation."

Abington Friends School, 207 WL 1489498 (E.D. Pa. 2007)

This case involved the interpretation of the exemption of religious organizations from the public accommodations discrimination provisions in the Americans with Disabilities Act (ADA). The court quoted from the ADA regulations:

> Although a religious organization or a religious entity that is controlled by a religious organization has no obligations under the rule, a public accommodation that is not itself a religious organization, but that operates a place of public accommodation in leased space on the property of a religious entity, which is not a place of worship, is subject to the rule's requirements if it is not under control of a religious organization. When a church rents meeting space, which is not a place of worship, to a local community group or to a private, independent day care center, the ADA applies to the activities of the local community group and day care center if a lease exists and consideration is paid. *28 C.F.R. Pt. 36, App. B (2007).*

Sloan v. Community Christian School, 2015 WL 10437824 (M.D. Tenn. 2015)

This case addressed the definition of "a place of public accommodation" under Title III of the ADA rather than a state or local public accommodations law. Nevertheless, its discussion of this key term provides some clarification, even if by inference. It suggests that churches that operate "a day care center, a nursing home, a private school, or a diocesan school system," may be places of public accommodation subject to the nondiscrimination provisions of a local or state public accommodations law.

Barker v. Our Lady of Mount Carmel School, 2016 WL 4571388 (D.N.J. 2016)

"Although churches, seminaries and religious programs are not expressly excluded from the definition of 'place of public accommodation,' the legislature clearly did not intend to subject such facilities and activities to the [public accommodations law]. Thus, the claims against these institutional defendants fail as a matter of law."

Fort Des Moines Church v. Jackson, 2016 WL 6089642 (S.D. Iowa 2016)

A federal district court in Iowa refused to issue an injunction preventing state and local public accommodation laws from being enforced against a church, since there was no injury to be redressed. The court referenced an exception in the law for churches, and

an affidavit from the state and city defendants that they had never applied the law to churches. But the court cautioned that a church that "engages in non-religious activities which are open to the public" would not be exempt, and it cited for example "an independent day care or polling place located on the premises of the place of worship."

Hitching Post Weddings v. City of Coeur d'Alene, 172 F.Supp.3d 1118 (D. Idaho 2016)

A federal district court in Idaho ruled that the ordained ministers who ran a wedding chapel lacked "standing" to challenge the constitutionality of a municipal public accommodations law that they believed violated their constitutional rights of speech and the free exercise of religion because of their apprehension that they would be punished for refusing to perform same-sex marriages.

The court concluded that the religious organization lacked standing to litigate its claims since its concerns over future punishment for violating the ordinance was not a sufficient injury to satisfy the standing requirement. The court noted that no religious organization had ever been prosecuted for violating the ordinance, and that the city attorney had informed the wedding chapel that it would not be prosecuted.

2. What forms of discrimination are prohibited by places of public accommodation?

The forms of discrimination forbidden by public accommodations laws vary from jurisdiction to jurisdiction. And they are often amended, so it is important for church leaders to be familiar with the current text of applicable public accommodation laws.

3. Can a church ever assert the First Amendment as a defense against public accommodation laws?

As noted in the court cases above, several courts and administrative agencies have said that there are constitutional limits on the authority of government agencies to enforce the nondiscrimination provisions of public accommodation laws against churches. To elaborate on one of those cases, a federal district court in Iowa ruled that a church's fear of being sued for violating a public accommodations law as a result of sermons on biblical sexual morality was too fanciful to give the church "standing" to pursue its

claim in federal court. *Fort Des Moines Church v. Jackson, 2016 WL 6089642 (S.D. Iowa 2016).*

The court concluded:

> Plaintiff alleges that it fears prosecution under the state and municipal discrimination bans if . . . its pastor delivers his sermon about biological sex and the Bible. However [this fear] is not objectively reasonable. All of the statutes, the ordinances, and the interpretations of the provisions appearing in the [state civil rights agency's] guidance documents include an exemption for religious institutions when conducting religious activities. Although the definitive scope of this exemption is yet to be determined, the court concludes the delivery of a sermon by a pastor of a church is undoubtedly an act intended to serve "a bona fide religious purpose." Indeed, it is a quintessential religious activity. See *Fowler v. State of R.I., 345 U.S. 67 (1953)* . . . [in which the Supreme Court ruled] that it is not within "the competence of courts under our constitutional scheme to approve, disapprove, classify, regulate, or in any manner control sermons delivered at religious meetings," and "sermons are as much a part of a religious service as prayers." Hence, plaintiff's allegedly chilled course of conduct is not even arguably proscribed by the statute. Rather, it is expressly permitted. Accordingly, plaintiff's fear of enforcement consequences if it delivers the sermon is not objectively reasonable because it does not face a credible threat of prosecution on that basis. . . . A plaintiff cannot show a threat of prosecution under a statute if it clearly fails to cover his conduct.

Similarly, in *Presbytery of New Jersey v. Florio, 40 F.3d 1454 (3rd Cir. 1994) aff'd 99 F.3d 101 (1996),* a federal district court in New Jersey ruled that the New Jersey Law Against Discrimination (NJLAD), which prohibits discrimination on various grounds including gender identity and sexual orientation in any "place of public accommodation," did not apply to a church. The court relied on an affidavit submitted by the director of the state division of civil rights (the "Stewart affidavit") setting forth the position of the division and state attorney general regarding enforcement of the nondiscrimination provisions in the state public accommodations law against religious institutions. The Stewart affidavit affirmed that the state did not consider churches places of "public

accommodations," and so the sections relating to public accommodations were "inapplicable to the church plaintiffs."

The Stewart affidavit also made the following general statement:

> It has been the consistent construction and interpretation of the [law] that, consonant with constitutional legal barriers respecting legitimate belief and free exercise protected by the First Amendment, the state was not authorized to regulate or control religious worship, beliefs, governance, practice or liturgical norms, even where ostensibly at odds with any of the law's prohibited categories of discrimination. . . .
>
> Moreover, the division has not and has no intention to engage in any determination or judgment as to what is or is not a "religious activity" of a church, or to determine what is or is not a "tenet" of religious faith. Within First Amendment limits, all of plaintiffs' claimed religiously-based free exercises of faith are unthreatened by a reasoned construction of the NJLAD consistent with its meaning and long enforcement history.

Conclusions

While the definition of a "place of public accommodation" varies from jurisdiction to jurisdiction under laws prohibiting various forms of discrimination by places of public accommodation, the following two generalizations may be helpful.

First, it is likely that a church that does not invite or solicit the general public to come onto its premises, whether to raise revenue or not, for events or activities unrelated to the core mission of the church, will not be deemed a place of public accommodation and therefore will not be subject to the nondiscrimination provisions in a state or local public accommodations law. This is a generalization that likely will be true in many, perhaps most, cases, but not all. As noted previously, Massachusetts enacted a law in 2016 adding gender identity to the forbidden forms of discrimination by places of public accommodation. The Massachusetts law states:

> An owner, lessee, proprietor, manager, superintendent, agent or employee of any place of public accommodation, resort or amusement that lawfully

> segregates or separates access to such place of public accommodation, or a portion of such place of public accommodation, based on a person's sex shall grant all persons admission to, and the full enjoyment of, such place of public accommodation or portion thereof consistent with the person's gender identity.

The law directed the Massachusetts Commission Against Discrimination (MCAD) and state attorney general to issue regulations or guidance facilitating the implementation of the new law. The MCAD issued "Gender Identity Guidance," which states that "a church could be seen as a place of public accommodation if it holds a secular event, such as a spaghetti supper, that is open to the public."

The attorney general also issued its "Gender Identity Guidance for Public Accommodation" and stated on its website that "houses of worship" are places of public accommodation. The attorney general later clarified its position as a result of a lawsuit brought by four churches, and concluded that "while religious facilities may qualify as places of public accommodation if they host a public, secular function, an unqualified reference to 'houses of worship'" as an example of a place of public accommodation was inappropriate.

Second, it is likely that a church that invites the general public onto its premises for purposes unrelated to worship or other activities in furtherance of the church's religious purposes, will be deemed a place of public accommodation, especially if the primary purpose in doing so is raising revenue.

> **Key point.** The court in the Iowa case referenced above cautioned that its conclusion that the church was not a place of public accommodation might have been different had the church "allowed the use of its facility as commercially available space with no religious limitations placed on such use."

These two conclusions cover some cases but not all. For example, what about churches that invite the public onto their premises without charging rent? Does a public invitation transform a church into a place of public accommodation, even if no rent or fees are charged? The answer to this question is unclear. There is no doubt that some courts would deem the public invitation to be sufficient to make the church a place of

public accommodation, even if no rent or other fees are charged. But this likely would not be the conclusion of all courts.

Given the various legal opinions on this matter, it is essential for church leaders to remain informed about the text and interpretation of the public accommodation laws in their state and city, and to seek legal counsel for guidance.

Additional Reading

For more about this issue, see the follow:

- "Places of Public Accommodation," "Discrimination in Public Accommodations," and "The Americans with Disabilities Act" in *Pastor, Church & Law* (on this website or in book format)
- *Church Issues: Same-Sex Marriage and Gender Identity*
- "Masterpiece Cakeshop Ruling and Religious Freedom"

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