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## *Masterpiece Cakeshop Case:* The Supreme Court Follows The Maxim "Why Do Today What You Can Put Off To Tomorrow"

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By now you've heard and read about the case, *Masterpiece Cakeshop, Ltd., et al. v. Colorado Civil Rights Commission, et al.*, Case No. 16-111, decided by the U.S. Supreme Court on June 4, 2018. It involved a Colorado bakery owned and operated by a devout Christian. In 2012, the owner/baker told a same-sex couple that he would not bake a cake for their wedding because of his religious opposition to same-sex marriages (Colorado did not recognize same-sex marriages at that time). He would sell them anything else, though, such as birthday cakes. He viewed their request as asking him, in effect, to endorse and participate in the celebration of their marriage, which he opposed on religious grounds.

The couple filed a discrimination complaint against the bakery with the Colorado Civil Rights Division. The operative provision of the Colorado Anti-Discrimination Act is found at Colo. Rev. Stat. §24-34-601(2)(a), which states:

It is a discriminatory practice and unlawful for a person, directly or indirectly, to refuse, withhold from, or deny to an individual or a group, because of disability, race, creed, color, sex, sexual orientation, marital status, national origin, or ancestry, the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.

The couple said that the bakery violated the law because (1) the bakery is a place of "public accommodation" and (2) it had denied them "the full and equal enjoyment of" its goods and services (3) because of their sexual orientation. Ultimately, the Commission held that the bakery had violated the law when it refused to make the wedding cake.

After a rather involved legal process, the case ended up before the U.S. Supreme Court. Many Court watchers were hoping the Court would issue a sweeping ruling. On one side, some were hoping the Court would categorically declare that places of public accommodation like the bakery (but also hotels and every other place open to the public) could not refuse service to same-sex couples as a matter of Constitutional law. On the other side, some were hoping the Court would declare that no law (here, the Colorado Anti-Discrimination Act) could require a person to endorse or participate in acts they believed were in violation of their religion. Both sides were disappointed.



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## SO WHO WON THE CASE?

**In the short run, the baker.** The Court ruled that the determination that the bakery had violated the Colorado Anti-Discrimination Act had to be overturned—thrown out. But not because the Court agreed that the baker’s religious freedom had been trammled. Instead, the Court held that the Commission had not provided the bakery with a fair process, pointing to certain statements made by a member of the Commission during the hearing that revealed that member’s prejudice against the baker’s religious convictions. In short, at least arguably, the bakery had not been given a fair and neutral hearing.

**What about the long run?** The Court did not really tip its hand on whether, if the case had been decided on its merits (instead of the procedural infirmity of the case when it was heard by the Commission), the Court would have declared “religious freedom trumps anti-discrimination laws, so the bakery wins” or whether “anti-discrimination laws trump religious freedoms, to the extent that religion is used to deny any member of the public goods and services otherwise provided to the public, so the bakery loses.” (That’s my summary, not the Court’s!)

## SO NOW WHAT?

Well, because the bakery owner said he will continue to refuse to bake wedding cakes for same-sex couples, it is likely that the whole process will start all over again. But next time the Commission will be more circumspect and ensure impartiality. It likely will again rule against the bakery, and then someday the case will make its way back to the Supreme Court for a definitive outcome in the battle of “Right to the Free Exercise of Religion vs. Equal Treatment under the Law to Same-Sex Couples.”

## TWO TAKEAWAYS FOR EMPLOYERS:

### 1. **Ensure Applicants and Employees Are Not Discriminated against Based on Sexual Orientation.**

Colorado is one of 22 states that prohibit employment discrimination on the basis of sexual orientation. The federal law is moving in that direction, and some federal courts have held that federal law (Title VII) also prohibits sexual orientation—those courts deem it a form of “sex” discrimination. So, don’t be fooled by the *Masterpiece Cakeshop* decision: IT DOES NOT AUTHORIZE DISCRIMINATION AGAINST PERSONS BASED ON SEXUAL ORIENTATION—actually, it ducked that issue.

### 2. **Don’t Forget: Employers Must Attempt to Reasonably Accommodate Religious Beliefs.**

Here again, don’t be fooled by the *Masterpiece Cakeshop* decision: IT DOES NOT MEAN THAT INTOLERANCE BASED ON RELIGION IS PERMITTED IN THE WORKPLACE—indeed, that issue wasn’t ever a part of the case. The anti-discrimination laws require that employers reasonably accommodate an employee’s religious beliefs, including religious expression in the workplace, so long as the accommodation doesn’t cause an “undue hardship” to the employer. (What is or isn’t an “undue hardship” requires legal consultation and analysis—this is not an issue to try to solve on your own.)

Please contact BAHRA, your attorney, or Pete Bulmer (BulmerP@jacksonlewis.com) to discuss gender or sexual orientation issues or religious accommodations in the workplace.

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