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CHURCHES AND LAWS BASED ON SEXUAL ORIENTATION OR GENDER IDENTITY

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INTRODUCTION

Church leaders should review policies in light of laws that include “sexual orientation” or “gender identity.” Whether in a policy, doctrinal statement, or in the bylaws, churches should be proactive in addressing these issues in order to be best prepared for potential challenges they might face. As used herein, the term “bylaws” could include bylaws, policies, or doctrinal statements. Each church should determine which is best to address these matters.

DISCUSSION

I. USE OF CHURCH FACILITIES.

While it is infrequent at this time, a court in New Jersey did force an organization closely affiliated with a church to allow its property to be used for a same-sex union ceremony. However, if churches include certain safeguards in their bylaws and refrain from unwittingly agreeing to public accommodations regulations, courts are not likely to force churches to accommodate events that violate church doctrine and practices.

In *Bernstein v. Ocean Grove Camp Meeting Association*, the Ocean Grove Camp Meeting Association was sued by a same-sex couple wanting to use property owned by a church-affiliated, nonprofit organization that “operates a number of religious institutions” for a same-sex union ceremony.¹ The nonprofit organization was closely associated with the United Methodist Church, and the voting members of its Board of Trustees were required to be clergy from or voting members of the United Methodist Church.² The same-sex couple petitioned the court to compel the church-affiliated nonprofit to provide the facility for its use under the New Jersey Law Against Discrimination, which forbids withholding access to a public place because of an

¹ *Bernstein v. Ocean Grove Camp Meeting Association*, OAL DKT. NO. CRT 6145-09 (January 12, 2012).

² *Id* at 2.

individual's sexual orientation.³ The court based its finding for the same-sex couple on several factors. First, the open-air gazebo the same-sex couple wanted to use was not physically connected to an actual church building and was open to public use.⁴ The gazebo was determined to be a public accommodation because the defendants had no policy restricting who could reserve the gazebo and the reservation request form did not question the applicant's religious beliefs or whether the applicant was a member of the church.⁵ Furthermore, the church affiliate applied for a tax exemption from the local government, in which the church affiliate stipulated that it would not discriminate against anyone who wished to use the facility but would provide it on an equal basis to all.⁶

Certainly, this church affiliate erred on two fronts: it did not have a facility-use policy and it stipulated away its authority to discriminate against those who intended to use the facility for purposes that undermine the church's doctrine and mission. This New Jersey decision shows the importance of having clear policies in a church's bylaws that dictate how its facilities may be used.

A facility-use policy should address two questions: who may use the facility and what it may be used for. The crafted policy should be applied in every situation, without exception. Liberty Counsel encourages churches to adopt a facility-use policy in their bylaws that states:

Permitted Uses of Facilities

Neither property nor facilities owned or controlled by the Church (or used with permission obtained by the Church) shall be used or permitted to be used for any activity or speech that is contrary to any stated or implied doctrine or religious belief or practice of the Church.

Optional Additional Statement:

Neither property nor facilities owned by the Church (or used with permission obtained by the Church) shall be used by persons other than Members of the Church.

Note: if the above statement is added, the Church will be forced to limit access to Church members. This could be problematic because it restricts the Church to only members and requires that the Church identify its members.

The Church should have a Statement, Policy, or Doctrinal position regarding each human being created in the image of God, that God created male and female, that marriage is the union of one man and one woman, and that marriage and the family are the foundation of civil society.

³ N.J. Stat. Ann. § 10:5-4 (West).

⁴ *Id* at 2.

⁵ *Id* at 3.

⁶ *Id*.

In anticipation of people with gender confusion, it is wise for Churches to adopt policies that address proper use of sex-oriented facilities, such as restrooms. Liberty Counsel encourages Churches to adopt a facility-use policy in their bylaws that states:

Permitted Access to Facilities and Activities

A person's sex is either male or female and is determined before birth.

Participation in any program or activity that is limited to individuals of one sex is exclusively limited to individuals who are persons of that sex.

Access to facilities that are designated for use by only one sex is exclusively limited to individuals who are persons of that sex.

Optional Additional Statement:

Individuals should not intentionally present their physical features or dress to be that of the opposite sex.

Churches should note that the above policy addresses what a Church facility may be used for and who may use the facilities. States and municipalities generally do not apply public accommodations laws to facilities that are restricted for use by members. Thus, requiring persons who use or rent the Church's facilities to be members provides an additional layer of protection. However, limiting facilities or activities to members has significant drawbacks. While limiting use or activities to members will provide more protection, doing so also limits the Church's outreach. If the Church does limit facilities or activities to members, the Church should have a clear policy on membership and enforce it. Below is a sample membership policy:

Membership

Persons who are actively and unrepentantly engaged in any sinful practice or practice that contradicts or undermines the doctrine of the Church are not eligible for membership with the Church. Similarly, active and unrepentant engagement in any sinful practice or practice that contradicts or undermines the doctrine of the Church is grounds for church discipline, up to and including disfellowshipping or revocation of membership. A practice is "sinful" when it is contrary to the teachings of the Holy Bible.

Persons who are actively and unrepentantly engaged in any sinful practice, while not eligible for membership, are invited and welcome to attend the Church provided their actions on Church property and at Church functions are not inconsistent with the Church's rules regarding Permitted Uses of Facilities (refer to section ___ of the bylaws). In addition to not being eligible for membership without first repenting and turning from sin, such persons may not participate in any leadership or elevated or teaching role. A practice is "sinful" when it is contrary to the teachings of the Holy Bible.

II. CAN CHURCHES BE FORCED TO HIRE HOMOSEXUALS?

While some states do have laws that prohibit employment discrimination based on sexual orientation or gender identity, the Supreme Court of the United States has acknowledged an exception to these nondiscrimination laws for ministers. In 2012, the Supreme Court said,

Requiring a church to accept or retain an unwanted minister, or punishing a church for failing to do so, intrudes upon more than a mere employment decision. Such action interferes with the internal governance of the church, depriving the church of control over the selection of those who will personify its beliefs.⁷

While the Court declined to provide a clear, bright-line test regarding how a “minister” is defined, in determining that a teacher at a Church-sanctioned school was, in fact, a minister, the Court highlighted “the formal title given [the teacher] by the Church, the substance reflected in that title [including “a significant degree of religious training followed by a formal process of commissioning” that allowed her to “preach the word of God boldly], her own use of that title, and the important religious functions she performed for the Church,” which though significant in weight, only comprised about forty-five minutes of the teacher’s work day.⁸ In fact, the Court held that the amount of time an employee spends on religious functions is not determinative, but rather, must be considered in relation to the “nature of the religious functions performed,” as well as other considerations.⁹

While the Supreme Court has clearly affirmed the discretion of Churches in regard to employing ministers, it is important for Churches to include bylaws regarding standards for employment of individuals. The policy should state:

Employment with the Church

Except as a vendor or independent contractor, in order to be eligible for employment at the Church, the applicant or employee must be a member of the Church.

A purpose of the Church is to teach and instill biblical values in attendees and members of the Church. Because every employee of the church is a representative of the Church, and is hired for that purpose, in order to be eligible for employment at the Church, the applicant shall not be actively engaged in unrepentant sin and shall not be perceived to undermine or contradict, through his or her actions, behaviors, or speech, the tenets of the Bible or of the doctrine of the Church.

While the second provision of the recommended section on employment is likely sufficient, based on the Supreme Court’s willingness to “give deference to an association’s view of what would impair its expression,” including the first provision requiring church membership

⁷ *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 132 S.Ct. 694, 706 (2012).

⁸ *Id.* at 707-08.

⁹ *Id.* at 709.

would allow the church to claim additional freedom of association rights, should the Church's employment decision be challenged.¹⁰

III. MINISTERS AND MARRIAGE CEREMONIES.

Thus far, the courts have protected ministers from being forced to perform marriages or commitment ceremonies that are contrary to their religious beliefs. In fact, the Kansas Supreme Court recognized that ministers have the freedom to choose which marriage ceremonies they wish to officiate.¹¹

In *State v. Barclay*, the court did not require the minister to have any pre-existing policy; the only requirement was to show that his reason for refusal to perform a marriage ceremony was grounded in a sincere religious belief.¹² However, the court did note that Barclay produced Scriptures that he felt supported his beliefs¹³ and noted its duty was not to question the defendant's interpretation of the Scripture, but merely whether his beliefs were sincere.¹⁴ Thus, while the rights and privileges of ministers are currently secure, establishing a policy regarding the types of ceremonies in which ministers may not participate or officiate would be helpful in addressing frivolous lawsuits. Liberty Counsel suggests language such as the following:

Ministers, Members, Staff, and Ordained Persons

Church ministers, Church members, Church staff, and individuals ordained by the Church shall not use their title, position, or ordination in a way that contradicts or undermines the teachings of the Church and the Holy Bible by, including but not limited to, officiating over or solemnizing weddings or ceremonies joining more than two people or two people of the same-sex.

While some states, particularly those in which same-sex marriage is legal, do have statutory protections for religious facilities and the consciences of religious objectors,¹⁵ it is important for Churches to be proactive in including protections in their bylaws as well, as several states currently allow same-sex marriage and/or civil unions but do not have statutory conscience protections.¹⁶

¹⁰ *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 653 (2000).

¹¹ *State v. Barclay*, 238 Kan. 148, 152 (1985).

¹² *Id.*

¹³ *Id.* at 150.

¹⁴ *Id.* at 152.

¹⁵ Hawaii, Maryland, Rhode Island, the District of Columbia, Vermont, Minnesota, Washington, New York, New Hampshire and Connecticut currently have these statutory provisions. Utah and Arizona both have similar laws pending.

¹⁶ These states are: Colorado, Illinois, California, New Jersey, Delaware, Iowa, Maine, Massachusetts, New Mexico, and Oregon.

CONCLUSION

It is important for Churches to be proactive in adopting policies that protect their facilities, staff, and members from being coerced or manipulated into providing facilities or services that undermine the teachings in the Bible and doctrinal positions.

Attorneys at Liberty Counsel are available to provide counsel and assistance. Additional resources are available at Liberty Counsel's dedicated website www.PastorsAndChurches.org.