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SENT VIA ELECTRONIC MAIL

Aubrey Catanach, Investigator
Colorado Civil Rights Division
1560 Broadway, Suite 1050
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Re: *Rebuttal to Respondent's Position Statement regarding David Mullins and Charlie Craig
CCRD Charge Numbers P2013007X and P2013008X*

Dear Ms. Catanach:

I am writing to respond to the position statement submitted by Respondent Masterpiece Cakeshop in the above-captioned matter. This is among those rare cases in which the Respondent has clearly articulated its impermissible discriminatory rationale for refusing to provide service to the Charging Parties. While most cases require the fact finder to engage in a complicated analysis to ascertain the business owner's true motivation for denying equal access to a public accommodation, such analysis is not required here. To the contrary, Respondent has openly admitted that it refused service to Charlie Craig and David Mullins because of their sexual orientation.

Given that all parties agree about the facts supporting the Charging Parties' allegations, and that those facts clearly show that Respondent illegally discriminated against the Charging Parties and maintains a policy of discriminating against all customers who are similarly situated to the Charging Parties, a probable cause finding by the Division is appropriate in this case.

Factual Background

I. Masterpiece Cakeshop Discriminated Against Mr. Mullins and Mr. Craig by Refusing to Provide Equal Access to Goods and Services

On July 19, 2012, David "Dave" Mullins and Charlie Craig, along with Charlie's mother, Deborah Munn, went to Masterpiece Cakeshop to order a wedding cake. Charlie and Dave were planning to travel to Massachusetts to marry, and intended to hold wedding reception in their hometown of Denver when they returned.

When the group walked into the bakery, they were greeted by a man at the counter, who told them to have a seat. After they sat down, the owner of the store, Jack Phillips, approached and sat down. Charlie and Dave began to discuss options for the cake and told Mr. Phillips that the wedding cake was for their wedding. Mr. Phillips immediately told the couple that it was his standard business practice not to sell cakes for same-sex weddings. Dave, Charlie and Deborah were extremely offended and let Mr. Phillips know they were upset about his refusal to serve them. Realizing that Mr. Phillips did not intend to provide them service, the group left the bakery.

The following day, Deborah contacted Mr. Phillips by telephone to seek more information about why he had refused service to her son and his fiancé. In response to her questions, Mr. Phillips stated that it was because he is a Christian that he was opposed to making cakes for the weddings of same-sex couples. Mr. Phillips subsequently commented to news organizations that he has a history of turning away same-sex couples for this same reason, and he made his policy against serving same-sex couples very clear.¹ Masterpiece Cakeshop has not argued that it is a business principally used for religious purposes, nor can it do so given its nature as a retail business engaged in the secular function of selling baked goods to the public at large. Thus, Mr. Phillips' purported justification for discrimination does not save Masterpiece Cakeshop from violating the Colorado Anti-Discrimination Act.

II. Masterpiece Cakeshop Widely Enforces Its Policy of Discrimination Against Customers Based on Sexual Orientation

Over the past several months, Dave and Charlie become aware of several other couples who suffered similar illegal discrimination by Masterpiece Cakeshop. These examples illustrate that Masterpiece Cakeshop has a longstanding policy of discriminating against gay and lesbian customers, and of openly admitting that it does so.

A. Stephanie Schmalz

On January 16, 2012, Stephanie Schmalz and her long-time partner, Jeanine Schmalz, visited Masterpiece Cakeshop in order to purchase cupcakes for their planned Family Commitment Ceremony. Ex. 1, *Schmalz Statement*, ¶¶ 2-4. Stephanie and Jeanine met with a

¹ Fox 47 News, *Colorado Cake Shop Won't Make Gay Couple's Wedding Cake*, YOUTUBE (Aug. 6, 2012), <http://www.youtube.com/watch?v=PmX2-Y3twCU>; Billy Hallowell, *Activists Call for Boycott on Cake Shop After Owner Refused to Bake Gay Wedding Cake*, THE BLAZE (July 30, 2012, 2:20 PM), <http://www.theblaze.com/stories/activists-call-for-boycott-on-cake-shop-after-owner-refuses-to-bake-gay-wedding-cake/>; Lauren Hendrick, *The Owner of Masterpiece Cake Shop Says He'll Close Before Selling Wedding Cake to Gay Couples*, EATER DENVER (July 31, 2012), <http://denver.eater.com/archives/2012/07/31/the-owner-of-masterpiece-cakeshop-refuses-gay-couple-wedding-cake-says-hell-close-bakery-before-comp.php>; *Lakewood Cake Shop Refuses Wedding Cake to Gay Couple*, CBS DENVER (July 28, 2012, 7:06 PM), <http://denver.cbslocal.com/2012/07/28/lakewood-cake-shop-refuses-wedding-cake-to-gay-couple/>; Mark Meredith & Will C. Holden, *Cake Shop Says Business Booming Since Refusal to Serve Gay Couple*, FOX 31 DENVER (July 30, 2012, 9:03 AM), <http://kdvr.com/2012/07/30/denver-cake-shop-refuses-service-to-gay-couple/>; Erin Udell, *Cake Shop Owner Will Continue to Reject Orders for Same-sex Weddings*, DENVER DAILY POST (Aug. 2, 2012, 01:00 AM), http://www.denverpost.com/news/ci_21238009/cake-shop-owner-will-continue-reject-orders-same.

female representative at Masterpiece Cakeshop in order to discuss and place a large cupcake order. Ex. 1, *Schmalz Statement*, ¶ 5. The woman at the cake shop explained the different options for flavors, delivery, stand rental, pricing, and so forth. Ex. 1, *Schmalz Statement*, ¶ 5. After several minutes, the female representative paused and asked, “Wait, who is this for? Is it for the two of you?” Ex. 1, *Schmalz Statement*, ¶ 6. Once Stephanie confirmed that the celebration was for the two women, the female representative said that she would not be able to take the order because the company had a policy of not selling baked goods to same-sex couples for this type of event. Ex. 1, *Schmalz Statement*, ¶ 6. Stephanie and Jeanine left the bakeshop. Ex. 1, *Schmalz Statement*, ¶ 7.

Later that same day, Stephanie called Masterpiece Cakeshop in an effort to determine whether the woman had articulated what was truly a company policy. Ex. 1, *Schmalz Statement*, ¶ 8. Stephanie learned that the female representative was an owner of the cake shop and that it was the company’s stated policy not to provide cakes or other baked goods to same-sex couples for wedding-type celebrations. Ex. 1, *Schmalz Statement*, ¶ 9. In response to the discrimination she suffered at Masterpiece Cakeshop, Stephanie posted a review on the website Yelp describing her experiences. Ex. 1, *Schmalz Statement*, ¶ 11. Someone identifying himself as “Jack P. of Masterpiece Cakeshop” posted a reply to Stephanie’s review, in which he stated that “...a wedding [for gays and lesbians] is something that, so far, not even the State of Colorado will allow” and did not contest that he refuses to serve gay and lesbian couples planning weddings or commitment celebrations. Ex. 1, *Schmalz Statement*, ¶ 11.

More recently, after learning of Masterpiece Cakeshop’s continued discrimination against other same-sex couples, including Dave and Charlie, Stephanie was curious about the extent to which Masterpiece Cakeshop’s policy prohibited the sale of goods and services. Ex. 1, *Schmalz Statement*, ¶ 12. Stephanie called the cake shop and told Mr. Phillips that she was a dog breeder and planned to host a celebration for a “dog wedding” between one of her dogs and a neighbor’s dog. Ex. 1, *Schmalz Statement*, ¶ 12. Mr. Phillips did not object to preparing a cake in the shape of a bone for the “dog wedding,” and he quoted her a price for the cake. Stephanie was understandably outraged that the owners of Masterpiece Cakeshop were willing to take a cake order for a supposed wedding between two dogs, but were not willing to take an order for a celebration of the love and commitment between herself and her partner. Ex. 1, *Schmalz Statement*, ¶ 13.

B. [REDACTED]

[REDACTED] and her partner, [REDACTED], faced similar discrimination on May 19, 2012 when they visited Masterpiece Cakeshop for the purpose of exploring cake options and potentially ordering a cake for their planned commitment ceremony. Ex. 2, [REDACTED] *Statement*, ¶¶ 2-4. At the cake shop, the couple met with a female representative who asked them to sit at a table, showed them a book of cake pictures, and explained some of the types and sizes of cake they could order. Ex. 2, [REDACTED] *Statement*, ¶ 5. After speaking with the woman and learning about their options, [REDACTED] asked [REDACTED] a question about the type of cake they would prefer to have. The cake shop representative immediately interjected, “Wait, are you both the brides?” [REDACTED] replied that yes, they were. Ex. 2, [REDACTED] *Statement*, ¶ 6. At that point, the woman closed the book of cake pictures and stated that Masterpiece Cakeshop would not be able to

provide a cake because, according to the company, [REDACTED] and [REDACTED] were doing something “illegal.”² Ex. 2, [REDACTED] Statement, ¶ 7. [REDACTED] and [REDACTED] left the store without placing a cake order. Ex. 2, [REDACTED] Statement, ¶ 8.

C. Katie Allen and Alison Sandlin

Katie Allen and her long-time partner, Alison Sandlin, were likewise refused service by Masterpiece Cakeshop because of their sexual orientation. On August 6, 2005, Katie and Alison went to Masterpiece Cakeshop for the purpose of tasting cakes and potentially ordering a cake for their planned commitment ceremony. Ex. 3, *Allen Statement*, ¶¶ 2-4; Ex. 4, *Sandlin Statement*, ¶¶ 2-4. Katie and Alison met with a female representative of the cake shop, who described the cake flavors and served them samples of those flavors. Ex. 3, *Allen Statement*, ¶ 5; Ex. 4, *Sandlin Statement*, ¶ 5. The couple talked with the woman about their cake preferences and wedding plans for several minutes. Ex. 3, *Allen Statement*, ¶ 5; Ex. 4, *Sandlin Statement*, ¶ 5.

The female representative eventually asked which one of the couple would be the bride in the wedding. Ex. 3, *Allen Statement*, ¶ 6; Ex. 4, *Sandlin Statement*, ¶ 6. Alison clarified that she and Alison were marrying each other. Ex. 3, *Allen Statement*, ¶ 6; Ex. 4, *Sandlin Statement*, ¶ 6. The woman at the cake shop responded, “We can’t do it then,” meaning that the business would not sell the couple a cake. Ex. 3, *Allen Statement*, ¶ 7; Ex. 4, *Sandlin Statement*, ¶ 7. She explained that she was an owner of Masterpiece Cakeshop and that company policy prevented her from selling cakes for a same-sex wedding. Ex. 3, *Allen Statement*, ¶ 7; Ex. 4, *Sandlin Statement*, ¶ 7. The woman explained that Masterpiece Cakeshop had established a policy of not taking cake orders for same-sex weddings because the owners believed in the word of Jesus. Ex. 3, *Allen Statement*, ¶ 8; Ex. 4, *Sandlin Statement*, ¶ 8. Katie and Alison later spoke directly with Jack Phillips. He further attempted to explain the company’s refusal to serve them by stating that he is not willing to make a cake for a same-sex couple’s commitment ceremony, just as he would not be willing to make a pedophile cake. Ex. 3, *Allen Statement*, ¶ 9; Ex. 4, *Sandlin Statement*, ¶ 11. Katie and Alison left the store in shock without placing an order for a cake.

Legal Analysis

For several decades, Colorado’s public accommodations law has required businesses that choose to offer goods and services in the commercial marketplace to serve all customers equally. Once a business decides to advertise or open its services to the public at large, it gives up the prerogative to pick and choose which customers to serve – even when its commercial service involves some form of speech or expression. Since 2008, Colorado law has prohibited businesses from discriminating against customers because of their sexual orientation.

Masterpiece Cakeshop’s actions as described above violated the Colorado Anti-Discrimination Act (“CADA”) in two ways. First, as the owner of a place of business that is engaged in sales to the public or the provision of services (that is not “principally used for religious purposes”), Mr. Phillips refused or denied Charlie and Dave the full and equal enjoyment of goods and services because of their sexual orientation. C.R.S. 24-34-601(2).

² It should be noted that the couple was planning to have a commitment ceremony, and that there is clearly nothing even remotely “illegal” about two people publicly affirming their personal commitment to one another.

Second, Mr. Phillips directly published and/or circulated communications indicating that his business will refuse or deny the full and equal enjoyment of its goods and services to individuals or groups because of their sexual orientation. C.R.S. 24-34-601(2).

I. Masterpiece Cakeshop Violated the Colorado Anti-Discrimination Act by Refusing to Provide Services to Same-Sex Couples

The CADA provides that it is a “discriminatory practice...to refuse...or deny...because of...sexual orientation...the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation.” C.R.S. 24-34-601(2). In order “to prevail on a discrimination claim under § 24-34-601(2), a plaintiff must show that, ‘but for’ [his sexual orientation], he or she would not have been denied the full privileges of a place of public accommodation, but need not establish that [his sexual orientation] was the ‘sole’ cause.” *Tesmer v. Colo. High Sch. Activities Ass’n*, 140 P.3d 249, 253 (Colo. App. 2006). Here, Mr. Mullins and Mr. Craig are clearly able to prove a causal link between their sexual orientation and the discriminatory act of Masterpiece Cakeshop refusing to sell them a wedding cake.³ *Id.*

Mr. Phillips’ personal religious beliefs do not trump Colorado law. Business owners are not allowed to turn away customers because of their race, or because they are divorced, or because of their sexual orientation. Everyone is entitled to their own religious beliefs, but Mr. Phillips chose to operate his business in the public sphere and his beliefs do not give him a right to discriminate.

II. Masterpiece Cakeshop’s Owners Violated the Colorado Anti-Discrimination Act Publicly Stating That Same-Sex Couples’ Patronage is Unwelcome at the Cake Shop

The CADA further prohibits business owners from making it known that the company has a policy of refusing service to certain individuals. The CADA makes it “a discriminatory practice...to publish, circulate, [or] issue...any written, electronic, or printed communication...that indicates that the full and equal enjoyment of the goods, services, facilities, privileges, advantages, or accommodations of a place of public accommodation will be refused...or denied an individual or that an individual's patronage...at a place of public accommodation is unwelcome, objectionable, unacceptable, or undesirable because of...sexual orientation.” C.R.S. 24-34-601(2). When Mr. Phillips stated his company’s policy of turning away same-sex couples simply because of their sexual orientation in interviews with local news media and in written comments on Yelp reviews, Masterpiece Cakeshop again violated Colorado law.

³ In some of his public communications regarding this matter, Mr. Phillips has claimed that Masterpiece Cakeshop policy does not preclude selling baked goods to gay and lesbian individuals for birthdays or other non-wedding occasions. Even if true, this would not excuse the Cakeshop’s acknowledged policy of turning away gay and lesbian customers who seek to place orders for wedding cakes. Discrimination on the basis of sexual orientation is illegal in Colorado, whether a business practices such discrimination across the board or selectively. Turning away customers in the midst of shopping for or sampling baked goods, for the explicit reason that the business has learned the customer is part of a gay or lesbian couple rather than the previously presumed heterosexual couple, constitutes illegal discrimination on the basis of the customer’s sexual orientation.

Conclusion

All the available and uncontroverted evidence demonstrates that Respondent discriminated against Charlie Craig and Dave Mullins because of their sexual orientation. Masterpiece Cakeshop clearly violated the Colorado Anti-Discrimination Act when it refused to sell them goods otherwise made available to the public. Based on the foregoing, and the admissions of Respondent, the Division must make a probable cause finding that Masterpiece Cakeshop discriminated against the Charging Parties, and that it continues to operate its business in a manner inconsistent with Colorado law.

If there is anything further we can do to assist in the Division's investigation of this matter, or if you have any questions regarding this matter, do not hesitate to contact me. I look forward to hearing from you.

Sincerely,



Sara J. Rich
Staff Attorney, ACLU Foundation of Colorado

cc: Amanda C. Goad
Staff Attorney, ACLU LGBT and AIDS Project