

Read what an Anchorage Attorney says about the Homosexual Ordinance

Sexual Orientation Ordinance is Poorly Written, Overbroad, and Unconstitutional

Posted by Attorney Kevin Clarkson of Anchorage on the Anchorage Daily News web site adn.com May 20, 2009 - 12:21 am

Well, Elise Patkotak's column regarding the sexual orientation Ordinance that is now being considered by the Anchorage Municipal Assembly certainly made some noise. It reminded me of that cringe evoking sound made by fingernails being run across a chalkboard. Whatever rational and thought provoking discourse there is to be had regarding this proposed Ordinance, and I believe that there is much, her hysterical rant did nothing to promote it. I sincerely hope that she finds peace with whatever bad religious experience it is that she had in her past.

My reaction to the proposed Ordinance is mixed. On the one hand, I am glad to see that the proponents of the Ordinance are pursuing their objective through the democratic process. Regardless of what you believe the outcome of this debate should be, you should be glad that the debate is at least occurring in a forum in which the people can have a say regarding the outcome. And, I also share some of the sentiment that lies behind this Ordinance, as I am confident does the vast majority of the Anchorage Christian Community. No one that I know would ever want a person to be unable to find a place to live, or work, or eat, or sleep, or obtain a loan, simply because of their sexual orientation. For the most part, in most all circumstances, we would prefer to not know someone's sexual preferences.

But on the other hand, apparently unlike Ms. Patkotak, my friends and I also deeply respect religious liberty, and we believe that the right of a person or a group of persons to act, or to associate, based upon their sincere religious convictions is of paramount importance -- and also is constitutionally protected. If this proposed Ordinance simply prohibited discrimination on the basis of homosexuality, and then exempted persons or associations of persons based upon sincere religious conviction, you wouldn't hear me objecting to it. In fact, if asked, I just might say "why not."

But, unfortunately the proposed Ordinance does a lot more than to simply try to protect homosexuals from discrimination. And, it makes only an empty gesture toward exempting religious organizations, and absolutely no effort at all to exempt religiously motivated individuals.

This Ordinance prohibits discrimination in housing rental, employment, and public accommodation, not solely on the basis of homosexuality, but on the basis of "sexual orientation." The Ordinance then defines "sexual orientation" to include "gender expression or identity" which in turn is defined to mean "having a self-image, appearance, or behavior different from that traditionally associated with the sex assigned to that person at birth." In less convoluted form, that means

men who dress and act like women and vice versa -- i.e., cross-dressing, transvestitism (if that's the right "ism").

Now let's put the ordinance into context. Under the current version of the law, "public accommodations" include any and every business and professional providing services or goods to the public. So, if a male cross-dresser comes to your restaurant or shop or business and wants to use the women's bathroom?

The religious exemption to this Ordinance applies only to "bona fide" religious institutions, organizations, corporations, associations, schools or societies. I guess it leaves to the municipal enforcement authority, or a court, to decide what religious entities are in truth "bona fide" -- potentially entangling government with religion in a way that the Establishment Clause forbids.

The Ordinance then gives these religious entities merely the right to give or withhold preferences based upon whether a person is "of the same religion or denomination." It does absolutely nothing to exempt a church, like Dr. Prevo's Anchorage Baptist Temple, from the homosexual or transvestite who might profess to be both Christian and Baptist -- a person of the same religion and denomination. You see, ABT "remain[s] subject to the other provisions [of the Ordinance] with regard to sexual orientation." Is a court going to be asked to decide whether a "homosexual" or "transvestite" who professes to be a Christian and a Baptist is genuinely so? Or that the Church which thinks that he or she is not, is correct, or not? Once again, this sounds like entanglement of government with religion and religious doctrine.

Then, and most significantly, the Ordinance contains no exemption to accommodate the religious conviction of individuals. So, if a catholic attorney who provides adoption services is asked to assist a homosexual couple in adopting a child, he or she legally could not politely decline and then refer the couple on to another equally competent attorney who has no religious conviction. Or, if a Christian who provides wedding photography services is asked to take photos of a homosexual couple's reenactment of their Massachusetts wedding, they also legally could not politely decline and then refer the couple on to another photographer who has no religious conviction. Freedom of religion is an individual constitutional right, and belongs not to just associations.

A law that exempts religious organizations but not religiously convicted individuals sounds like a law that is not "generally applicable" and thus subject to First Amendment strict scrutiny. There is a substantial split of opinion among federal courts across our nation about how laws with selective exemptions (or that burden multiple constitutional rights in the same context -- like religion, association and speech) are evaluated for constitutional compatibility. The United States Supreme Court has not yet given definitive guidance. But, in any event, if Tolerance is to have meaning, then it needs to include tolerance for sincere religious conviction in addition to other things. Tolerance isn't really tolerance if it is selectively distributed to some and not to others. Religious liberty was important enough to our founding fathers that they protected it with the first Clauses of the First Amendment to the Constitution. We should continue to give it such respect today.