Butler v. Adoption Media, LLC: Eradicating Sexual Orientation Discrimination in Cyberspace

I. INTRODUCTION

Michael and Richard Butler had been registered domestic partners in the State of California for two years and had been certified to adopt in that state at the time their application to have their profile posted on ParentProfiles.com was rejected.[1] The Web site offers a service allowing prospective adoptive parents to post their profiles (for a fee) for review by women planning to give their children up for adoption.[2] Dale and Nathan Gwilliam are Arizona residents who own and manage limited liability companies that operate several adoption-related Web sites, including ParentProfiles.com.[3] When Michael Butler called to check on the status of the application Dale Gwilliam informed him that the couple would not be allowed to use the Web site's services, as the business had implemented a policy of permitting only opposite-sex couples to post their profiles.[4]

On January 12, 2004, the Butlers filed suit against the Gwilliams and their limited liability companies, Adoption Media, LLC and Adoption Profiles, LLC.[5] The Butlers claimed that the defendants had violated the Unruh Civil Rights Act, as well as California's unfair competition and false advertising laws and the California Business and Professions Code.[6] The Butlers sought damages and injunctive relief and moved for summary judgment on the issue of liability under the Unruh

1. *See* Butler v. Adoption Media, LLC, 486 F. Supp. 2d 1022, 1025 (N.D. Cal. 2007).
2. *See id.* at 1025-1026.
3. *See id.* at 1025.
4. *See id.* at 1026.
5. *See id.* at 1025.
6. *See id.*

Act.[7] The Gwilliams filed a cross-motion for summary judgment on various issues, arguing, among other things, that the injunctive relief sought would violate the First Amendment and that California substantive law could not be applied in the case.[8] The United States District Court for the Northern District of California *held* that California law was applicable and that injunctive relief was appropriate. *Butler v. Adoption Media, LLC*, 486 F. Supp. 2d 1022, 1025 (N.D. Cal. 2007).

II. BACKGROUND

A. Public Accommodation Laws and the First Amendment

Public accommodation laws are rooted in English common law; those who "made profession of a public employment" were prohibited from refusing service to a customer absent a good reason.[9] Public accommodation statutes have been prevalent throughout the country for some time and state legislatures have continuously broadened the scope of the statutes to keep up with changing times.[10] The United States Supreme Court has deemed such statutes to be within the states' power to enact.[11] The Court has also found, despite some claims to the contrary, that such statutes generally do not violate the First or Fourteenth Amendments.[12]

In *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston* the Court attempted to draw the line between constitutional and unconstitutional application of public accommodation statutes.[13] The Court distinguished between commercial and noncommercial speech, arguing that the Free Speech Clause of the First Amendment "has no more certain antithesis" than the restriction of the latter; "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government."[14]

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7. *See id.*
8. *See id.* at 1025-26.
9. Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 551, 571 (1995) (quoting Lane v. Cotton, (1701) 88 Eng. Rep. 1458, 1464-65 (K.B.)).
10. *See id.* at 571-72.
11. *See id.* at 572.
12. *See id.*
13. *See id.*
14. *Id.* at 579.

B. The Unruh Act

The Unruh Civil Rights Act, California Civil Code sections 51 and 52, was enacted in 1959 and provided that "[a]ll persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, disability, or medical condition are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever."[15] Throughout the years, the statute has been amended to include other specified characteristics, including "marital status" and "sexual orientation," which were added in late 2005 and made effective January 1, 2006.[16] However, the legislature, as well as California courts, has consistently insisted that the list of characteristics is only illustrative.[17] In fact, even before the 2006 amendment, the California Supreme Court held that "discrimination against registered domestic partners in favor of married couples is a type of discrimination that falls within the ambit of the [Unruh] Act."[18]

In *Koebke v. Bernardo Heights Country Club*, a lesbian couple who were registered domestic partners sued a country club, alleging that the club's refusal to grant them the same benefits it granted to married couples amounted to marital status discrimination, which they claimed to be forbidden by the Unruh Act.[19] The court considered a California appellate court's decision in *Beaty v. Truck Insurance Exchange* to preclude expansion of the Unruh Act to recognize marital status discrimination because of the "strong public policy favoring marriage."[20] However, the court in *Koebke* concluded that the California Domestic Partner Rights and Responsibilities Act of 2003, which granted legal recognition comparable to marriage to domestic partnerships, was supported by policy considerations commensurate with those that favor marriage.[21] Taking these policy considerations into account, the court found in favor of the couple, ruling that the Unruh Act was applicable to discrimination based on marital status.[22]

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15. CAL. CIV. CODE § 51(b) (2006).
16. *See* Butler v. Adoption Media, LLC, 486 F. Supp. 2d 1022, 1028-36 (N.D. Cal. 2007).
17. *See id.*
18. Koebke v. Bernardo Heights Country Club, 115 P.3d 1212, 1224 (Cal. 2005).
19. *Id.* at 1213.
20. *Id.* at 1222.
21. *See id.* at 1213, 1223.
22. *See id.* at 1224-25.

C. Choice of Law

As California was the forum state, its choice-of-law rules applied.[23] California applies the "governmental interest" test in the absence of a choice of law by the parties.[24] According to the test, the court must first determine whether there is a "true conflict" between the applicable statute or rule of law of each of the implicated jurisdictions.[25] Second, if a conflict is found, the court must then decide which jurisdiction's interests would be more severely compromised if that jurisdiction's law were not applied.[26] Although it might appear to be a matter of simply weighing the interests, the test involves the determination of "the relative commitment of the respective states to the laws involved."[27] In order to make this determination, the court looks to several factors, including "the history and current status of the states' laws; [and] the function and purpose of those laws."[28]

The most recent case in which the California Supreme Court implemented the "governmental interest" test was *Kearney v. Salomon Smith Barney, Inc.*[29] The case was brought by two California clients of Salomon Smith Barney (SSB) who claimed that the brokerage firm had violated California Penal Code section 637.2 when it tape recorded telephone calls the plaintiffs had made to brokers in SSB's Georgia office without their consent.[30] Penal Code section 637.2 provides for a civil cause of action for any violation of California's invasion-of-privacy statutes, section 632 being the one specifically pertaining to the unlawful recording of telephone conversations.[31] The court first analyzed the California statute, looking to the legislatively described purpose of section 632, which is the protection of the privacy of California citizens.[32] The court found that "[t]he privacy interest protected by the statute is no less directly and immediately invaded when a communication *within California* is secretly and contemporaneously recorded from outside the state than when this action occurs within the state."[33]

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23. *See* Butler v. Adoption Media, LLC, 486 F. Supp. 2d 1022, 1036 (N.D. Cal. 2007).
24. *See id.*
25. *See id.*
26. *See id.*
27. Offshore Rental Co. v. Cont'l Oil Co., 583 P.2d 721, 727 (Cal. 1978).
28. *Id.*
29. 137 P.3d 914 (Cal. 2006).
30. *See id.* at 918-19.
31. *See id.* at 919.
32. *See id.* at 928.
33. *Id.* at 931 (emphasis in original).

The court then turned to analysis of the Georgia law and judicial interpretation.[34] Although the Georgia statute and stated purpose was found to be similar to that of California, the court found that Georgia courts have consistently interpreted the privacy statutes as being inapplicable when conversations are recorded by one of the participants in the exchange.[35] Thus, the court found there to be a true conflict.[36] California had a legitimate interest in having its law applied to the case "because [the] plaintiffs are California residents whose telephone conversations in California were recorded without their knowledge or consent" and Georgia had a legitimate interest in shielding its residents who acted in Georgia in reliance on Georgia law.[37]

Given this conflict, the court proceeded by attempting to discern which state's interest would be more impaired if the other state's law were to be applied.[38] The court reasoned that since California's statute provided *more* privacy protection, rather than less, the application of California law would not violate any privacy interests protected by Georgia law.[39] In addition, since the California law would only apply to calls made to or from California residents to or from Georgia, the burden on businesses in that state to monitor its recordation appropriately would be relatively low.[40] Finally, the court noted that calls between California customers and Georgia businesses could still be made and recorded, but only with prior consent, therefore, posing a very minor impairment of Georgia's interests.[41] The court concluded that California law should be applied to the case because California's interests would be more impaired by the application of Georgia law than would be Georgia's interests if California law were applied.[42]

III. COURT'S DECISION

In the noted case, the court modeled its analysis after the *Kearney* court's interpretation of the "governmental interest" test.[43] First, the court considered whether the laws of Arizona differ from the laws of

34. *See id.* at 932.
35. *See id.*
36. *See id.* at 933.
37. *Id.*
38. *See id.*
39. *See id.* at 936.
40. *See id.*
41. *See id.*
42. *See id.* at 937.
43. *See* Butler v. Adoption Media, LLC, 486 F. Supp. 2d 1022, 1042 (N.D. Cal. 2007).

California.[44] Both plaintiffs and defendants agreed that the laws of the two states differed, but each proffered their own theory as to why this difference was significant.[45] While the defendants found it dispositive that the plaintiffs could not sustain a claim under Arizona law, the plaintiffs focused on the fact that while Arizona does not have a law prohibiting sexual orientation discrimination by businesses, it does not have a law that condones it either.[46] While the Arizona statute was facially similar to earlier versions of the Unruh Act, which did not include marital status and sexual orientation as protected characteristics, Arizona courts have never held, as California courts have, that the list of characteristics is merely illustrative.[47] Therefore, as of 2002, when the cause of action occurred, while Arizona did not prohibit discrimination on the basis of sexual orientation or marital status, California law did prohibit the former and "it was an open question" as to whether the latter was prohibited.[48]

Second, the court considered whether a true conflict existed.[49] Defendants asserted simply that Arizona had an interest in having its law applied, while California did not.[50] Defendants claimed

> an interest in determining which business practices that occur in Arizona will subject Arizona businesses to liability; in ensuring that businesses operating within its borders are not subjected to liability for activities or practices that are legal in Arizona; and in assuring that its citizens are not penalized when they enter into or refuse to enter into contracts in Arizona with persons from the minority of states with substantially different laws.[51]

Defendants also asserted that in 2002, California had not demonstrated a strong commitment to the policies underlying plaintiffs' claims and that the public accommodation at issue occurred in Arizona; therefore, California's public accommodation law was inapplicable.[52] Plaintiffs also contended that a conflict does not exist.[53] They argue that this is because only California has a legitimate interest in applying its law, as the cause

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44. *See id.*
45. *See id.*
46. *See id.* at 1043.
47. *See id.*
48. *Id.* at 1046.
49. *See id.*
50. *See id.*
51. *Id.*
52. *See id.* at 1046-47.
53. *See id.* at 1047.

of action "directly implicates the primary purpose of the Unruh Act—to guarantee access to public accommodations for all Californians."[54]

The court found the unlikelihood that the plaintiffs could have sustained a similar discrimination claim under Arizona law to be indicative of a true conflict.[55] The court noted that while it was clear that California had an interest in enforcing its antidiscrimination laws, "[i]t is less clear what interest Arizona might have in allowing discrimination in public accommodations on the basis of sexual orientation or marital status, or in applying its own law to California residents."[56]

Third, the court considered which state's interest would be more impaired if its law were not applied.[57] Defendants alleged that the Unruh Act could not be applied because to do so would amount to impermissible regulation of the "internal affairs of another state."[58] Plaintiffs argue that "defendants' combined physical and virtual presence in California" necessitates the application of California law and the court agreed.[59] The court found California law to be applicable where an extraterritorial business "intentionally solicits California customers and intentionally harms California residents in California, in violation of California law."[60] In fact, the failure to apply California law would directly undermine the purposes of the Act.[61] The court noted that the Unruh Act provides more protection for consumers than Arizona's statute; therefore, its application "would not violate any right protected by Arizona law," but would actually provide more protection.[62] The court also rejected the defendants' claim that the application of California law in this case would constitute regulation of interstate commerce, citing the lack of evidence that such an application "would pose an undue and excessive burden on interstate commerce by making it impossible or infeasible for defendants to comply with the requirements of the Unruh Act without altering their conduct with regard to ParentProfiles.com's non-California clients."[63]

Having determined that the Unruh Act was applicable in the case, the court then considered the defendant's claim that its Web site was not a

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54. *Id.*
55. *See id.* at 1048.
56. *Id.*
57. *See id.*
58. *Id.* at 1050.
59. *Id.* at 1051.
60. *Id.*
61. *See id.* at 1052.
62. *Id.* at 1053.
63. *Id.*

business, but a conduit for its "editorial policy" to promote adoption by heterosexual married couples.[64] According to the defendants, their policy constituted "expressive speech" and, as such, was protected by the First Amendment.[65] The court disagreed, finding that the Web site was a "business establishment" and that the policy was not supported by legitimate business reasons, as the defendants did not arrange adoptions, but merely sold a service to those interested in adoption.[66] Thus, the defendants were engaging in discriminatory conduct, to which discriminatory speech was merely incidental, and conduct that is not inherently expressive *can* be regulated.[67]

IV. ANALYSIS

The noted case signifies the new frontier in the movement to eradicate discrimination based on sexual orientation. Although other cases have come before that dealt with discrimination against homosexual individuals by private businesses, none before have dealt with such discrimination by private Internet businesses. Recent polls show that nearly eighty percent of American adults not only access the Internet, but spend an average of eleven hours a week in cyberspace.[68] With so many Americans not only accessing the Internet, but also doing business over the Internet, it has become "'an emerging issue across the country whether Internet businesses have to comply with state anti-discrimination and consumer protection laws.'"[69]

The court's decision has already inspired others to attack the legality of discrimination on the Internet. In the same vein as the noted case, a woman in San Mateo County, California has filed suit against the popular online dating Web site, eHarmony, for refusing its services to those who are seeking to be matched with someone of the same sex.[70] The Web site defends the legality of its actions by claiming to have a "legitimate business purpose" for its policy of exclusion, the fact that its research database is comprised of one clinical psychiatrist's observations

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64. *See id.* at 1056.
65. *Id.* at 1058.
66. *See id.* at 1056-67.
67. Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 66 (2006).
68. *See* Solarina Ho, *Polls Find Nearly 80 Percent of U.S. Adults Go Online*, REUTERS, Nov. 5, 2007, www.reuters.com/article/internet News/idUSN0559828420071106.
69. Heather Cassell, *Gay Couple Can Sue Adoption Site*, BAY AREA REPORTER, Apr. 12, 2007, at 31 (quoting Shannon Minter).
70. *See* Bob Egelko, *EHarmony Accused of Discrimination: Service Sued for Not Offering Same-Sex Dating Opportunities*, SAN FRANCISCO CHRONICLE, June 2, 2007, at B2.

of successful and unsuccessful heterosexual marriages.[71] According to Todd Schneider, the lawyer for the plaintiff, "[t]he case is about moving gay rights into this century."[72] The court in the noted case, in deeming online businesses to be "public accommodations," subject to regulation as such, has taken the first step towards this movement.

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71. *See id.*
72. *Id.*

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