



Summer 2019

## [Q&A with Ohio Attorney General Dave Yost](#)

Ohio Attorney General Dave Yost sat down earlier this week to discuss his thoughts on civil rights in Ohio.

### **Q. What are the significant civil rights issues in Ohio?**

A. There's a lot of debate about whether racism is dead and to my direct observation, racism is not dead. Now, certainly a lot of barriers have been torn down. It has become socially unacceptable to hold racist views but that doesn't mean that it's not out there. In a lot of ways the story of America has been wrapped up and wrapped around the story of the races learning to live together in the same society, and that story isn't finished yet.

### **Q. What role should the Attorney General's Office play in the resolution of civil rights issues?**

A. It's important to recognize that the Civil Rights Commission is the primary authority on civil rights in Ohio. We serve as a support function to the Civil Rights Commission. But it's also important to recognize that the attorney general is in a position to provide moral leadership from time to time – to raise questions, to hold up a standard for justice – and I've tried to do that in the first six months in office.

### **Q. How can we be an advocate to the General Assembly about creating change in civil rights laws?**

A. We need to recognize that the General Assembly is charged with actually enacting policy and law for the state of Ohio, not the attorney general. But the General Assembly listens to many voices as it weighs competing demands and competing virtues to make those policy choices. The attorney general should be a strong voice in that discussion.

### **Q. What role do civil rights play in a healthy economy?**

A. The economy hums best in a place of trust and respect. Companies are more efficient, more profitable when workers operate as teams. All economic relations are first human relationships, a desire to want to work together, to do business, to enter into a contract, to trade. All of those functions are smoothed, improved and amplified in an environment in which civil rights are respected – and on the other hand, they are slowed down and fragmented and diminished when civil rights are ignored.

**Q. Your office offered some educational sessions to employees at General Motors earlier this year in Toledo. How important is this type of education?**

A. Someone once said, “To understand all is to forgive all.” That may be an overstatement but certainly knowledge and understanding decrease the potential for friction points in any situation, including the workplace. We saw an opportunity to bring greater understanding to one workplace for GM, and we’re very pleased that they accepted our offer to come in at no cost in a very fraught environment.

**In the Trenches – Recent Decisions of the Civil Rights Section**

The Civil Rights Section is on the front lines of civil rights litigation in courts and administrative forums throughout the state. In *Cox v. Dayton Pub. Schools Bd. Of Edn.*, 2019-Ohio-2591, the Second District Court of Appeals reaffirmed the Ohio Civil Rights Commission’s discretion not to issue a complaint when it is not in the State’s best interests. In *Newman v. Ohio Civil Rights Commission*, 2018 U.S. Dist. LEXIS 183935, the section found itself in federal court successfully defending the Commission’s employees and the Attorney General’s Office who represents them from a 42 U.S.C. 1983 action. In the Commission’s *Grigsby v. Ratliff*, (June 13, 2018) Report and Recommendation, the section was in the administrative forum defending the rights of a child who was suffering from PTSD to live with his emotional support animal.

In *Cox*, a teacher was fired for assaulting a functionally-impaired student in 2013. In 2017 the school district argued in its brief that the issue of her reinstatement was moot because her teaching license had been permanently revoked, therefore they could not rehire her. The teacher filed a charge with the Commission alleging that her employer’s legal argument was discriminatorily motivated.

The Commission determined that it lacked jurisdiction because no adverse employment action had occurred within six months of the filing of her charge, a jurisdictional prerequisite. See [Ohio Revised Code Section 4112.05\(B\)\(1\)](#). *Cox* appealed and the Second District affirmed the Commission’s determination that she was not subject to a new harm that occurred within six months from the date of her charge. The court also affirmed that the appropriate standard of judicial review of a decision by the Commission not to issue a complaint is whether the decision is unlawful, irrational, and/or arbitrary and capricious.

In *Newman*, an adjunct business and law professor’s contract was not renewed by the University of Dayton, and he was barred from the University’s law library. The Commission issued a no probable cause determination, and the professor filed a complaint pursuant to 42 U.S.C. 1983 against 11 Commission employees and 1 assistant attorney general.

The court dismissed the complaint after determining that it lacked subject matter jurisdiction and held that, pursuant to statute, the court of common pleas has exclusive jurisdiction to review the Commission’s investigation and determination. See [Ohio Revised Code Section 4112.06](#). The court also held that all the defendants were entitled to absolute immunity as administrative officers acting in quasi-judicial or quasi-prosecutorial roles in deciding whether to issue a complaint. This case has been appealed.

In *Grigsby*, a landlord had a no pet policy and refused to allow a family to rent a home because the son suffered from PTSD and needed an animal assistant. The son's disability and need for the assistance animal were supported by medical documentation.

The Commission held that the landlord's actions violated [O.R.C. 4112.02\(H\)\(1\) and \(19\)](#). Ohio Revised Code makes it illegal to refuse to rent because of a disability and makes it illegal to refuse to modify a policy when a disabled person needs it to rent an apartment. The Commission ordered the landlord to stop discriminating, pay the family damages, and attend training.

Stay tuned for the next issue of the Civil Rights Reporter for more news from the Civil Rights Front Lines.

## **Disabilities and Medical Marijuana**

The first of the medical marijuana dispensaries has opened in Ohio. How can this affect your daily operations as a housing provider or employer? You may be a landlord with a strict no smoking policy. One tenant complains that there is a distinct aroma emanating from the apartment across the hall. You confront the smoker and she tells you her physician has prescribed medical marijuana to relieve her anxiety. You are aware of "reasonable accommodations." Must you allow her to smoke medical marijuana in her unit to alleviate her anxiety?

Or you may be an employer who finds that an employee has tested positive for cannabis during a random drug screen. The employee tells you it is medical marijuana. Because his job does not involve moving large equipment or other potentially hazardous activities, he asks you to excuse the positive test as a reasonable accommodation for his multiple sclerosis.

When the Ohio legislature considered decriminalizing medical marijuana in this State, it set guidelines. And neither your smoking tenant nor THC-positive employee will likely be happy with the answers the lawmakers have provided.

First, medical marijuana cannot be smoked or vaped. Oils, edibles and patches are some of the acceptable forms of medical marijuana. There is also a specific list of conditions for which a certified doctor may recommend – not prescribe – medical marijuana. Anxiety is not on the approved list. Furthermore, no employer is required to waive a zero-tolerance drug policy because of a person's use of medical marijuana – even if he has an authorized condition and has acquired the appropriate formulation of medical marijuana in the State-approved manner.

These were straight forward examples. But as with most things in the law, a small change can lead to a different result. What if it were a tenant taking the proper form of medical marijuana for an authorized condition? Or, what if the employer does not have a zero-tolerance policy but discharges a person taking medical marijuana to alleviate cancer pain? The State Medical Board is empowered to authorize medical conditions for which medical marijuana may be

recommended beyond those identified by the legislature. Additionally, the Medical Board is currently studying whether conditions like anxiety or autism should be added to the approved list.

As stated above, the method of consuming medical marijuana and the basis for recommending it are the two current foundational blocks. This issue continues to evolve. For more information, you may consult Revised Code Chapter 3796 and the State Medical Board at <https://med.ohio.gov>. As usual, we urge you to consult with an attorney before making a decision which may have costly legal ramifications.

### **When is a Cake Not Just a Cake?**

In 2012 a same-sex couple attempted to place an order for a wedding cake with Masterpiece Cakeshop. The shop's owner, Mr. Phillips, refused to create a custom cake for their wedding because of his opposition to same-sex marriage. The couple filed a charge with the Colorado Civil Rights Commission, which ruled in the couple's favor. This decision was upheld on appeal, and ultimately reached the U.S. Supreme Court, which vacated the Commission's decision.

The Court explained that great weight and respect must be given both to preventing people from being discriminated against based on sexual orientation and to the religious and philosophical objections many people hold to same-sex marriage. While the general rule is that such objections do not allow business owners to deny equal access to goods and services based on sexual orientation, there are important exceptions to this rule. The Court noted that if a member of the clergy whose religious beliefs were opposed to same-sex marriage objected to performing such a marriage, his constitutional right to free exercise of religion would prohibit the State from requiring that he do so. On the other hand, a baker who refused to provide any goods for a same-sex wedding would likely lose. Balancing the interests involved in such claims requires a neutral and respectful consideration of both sides.

The Court then held that the Commission denied Mr. Phillips this neutral and respectful consideration. This was demonstrated by (1) a series of statements made by Commissioners that indicated hostility to Mr. Phillips' beliefs, particularly a statement that religion has been used to justify events such as slavery and the holocaust, and calling his actions a despicable piece of rhetoric in using religion to hurt others; and (2) the Commission's failure to explain why it ruled against Mr. Phillips, but in favor of bakeries that refused to make cakes with messages disapproving of same-sex marriage. Because the Commission's treatment of this case violated its duty under the free exercise clause to consider Mr. Phillips' religious objections with neutrality, its order was set aside.

In concurring with this decision, Justices Kagan and Breyer stated that the Commission's failure to differentiate the claims against bakers who refused to bake cakes with messages disapproving of same-sex marriage was particularly disquieting because a valid basis to distinguish those claims was obvious. The other bakers refused to bake a cake that had a specific message on it, and would have done so regardless of the identity of the person asking for the cake. On the other hand, Mr. Phillips would have baked the requested wedding cake for

an opposite-sex couple, which constituted different treatment based on sexual orientation.

In a mirror-image concurrence, Justices Gorsuch and Alito asserted that there is no valid basis for distinguishing the bakers who wouldn't bake cakes with the anti-same-sex marriage messages and Mr. Phillips because, just as cakes celebrating same-sex weddings are usually going to be requested by persons of a particular sexual orientation, so too will cakes expressing religious opposition to same-sex weddings usually be requested by persons of a particular faith. Therefore, both refusals are related to a protected class. They then asserted that it is unavailing to try and distinguish those cases by arguing that a cake for a same-sex wedding does not convey a message. Instead, such a cake inherently conveys a message of support for same-sex marriage.

Following up on the theme of a wedding cake inherently conveying a message, Justices Gorsuch and Thomas issued an opinion addressing Mr. Phillips' claim regarding freedom of expression. Their opinion states that the government cannot compel speech without running afoul of the First Amendment. Because providing a cake for a same-sex wedding inherently communicates support for same-sex marriage, no one can be forced to bake such a cake.

Finally, Justices Ginsburg and Sotomayor dissented. They would have found that a same-sex couple requesting a wedding cake is asking for a cake celebrating *their* wedding, not a cake celebrating same-sex weddings in general. They also felt that the comments cited by the majority did not undo Mr. Phillips' unlawful conduct, and should not allow that conduct to stand.

Following this decision, the Court remanded similar cases in which violations of law were found in the denial of services in support of same-sex weddings back to the lower courts for consideration in light of the *Masterpiece Cakeshop* decision. One of the first of those cases has now been decided.

The Washington Supreme Court had held that a florist could not refuse to provide flowers for a same-sex wedding. After the U.S. Supreme Court remanded the case for consideration of the *Masterpiece Cakeshop* decision, the Washington Supreme Court re-affirmed its ruling against the florist. The court found that there was no evidence that its decision, or that of the lower court, was tainted with unlawful animus. Neither court had disparaged the florist's religion, nor had either court treated similarly situated parties differently. Furthermore, when the florist tried to argue that the Plaintiff had shown improper animus towards the florist's religion, the court held that any such animus was irrelevant, as the issue was whether the decision-makers acted improperly.

It is likely that most, if not all, of the courts whose decisions were remanded in light of *Masterpiece Cakeshop*, will render similar findings. Given the strong beliefs of both sides in this fight, it is likely that such lawsuits will continue to be brought forward.

## Animal Assistants

Animals are great! If you don't love a dog, a cat, or some other furry creature, you are missing out on one of life's great pleasures. Pets provide many, many people with comfort, cheer, and companionship – and those are just the benefits that start with the letter “C”!

But animals can also provide much more – they can deliver very real physical and therapeutic assistance to people with disabilities. Such animals are not “pets” in the traditional sense; instead – in the *legal* sense – they are called “animal assistants.” And they are protected under Ohio law.

Ohio's laws protect everyone from unlawful discrimination (such as sexual harassment, racial discrimination, age discrimination, etc.). The laws also provide additional protection for people with disabilities – “reasonable accommodations” that assist the person with living, working, and going places on an equal footing with other people. In short, housing providers, employers, and businesses are required to provide people with disabilities “something extra” – a “reasonable accommodation” – if needed to allow the person to live, work, and attend public places.

One form of accommodation is allowing the person with a disability to use an animal, even if the housing provider, employer, or business has a general policy prohibiting animals or pets. Here, the “reasonable accommodation” is to modify that general policy to allow the person with a disability to use their animal for their physical or therapeutic needs.

“Animal assistant” is the phrase used in [Ohio law](#) for this type of animal that aids the disabled. Specific examples include a dog which alerts a hearing impaired person to sounds, a dog which guides a visually impaired person, and a monkey which collects or retrieves items for a person whose mobility is impaired.

These are examples of animal assistants that perform *tasks*, and so they are commonly called “service animals.” Another type of animal assistant is the “emotional support animal.” This type of animal does not perform a task, but nevertheless provides a therapeutic benefit to the person with a disability by simply being with the person. Thus, “animal assistant” is an umbrella term encompassing both “service animals” and “emotional support animals.”

In contrast with pets, animal assistants are often prescribed by a medical provider or some service or support agency. As a result, they should not be confused with (or considered) “pets.” A common mistake made by housing providers, employers, and businesses is to automatically assume that an animal is a pet, when it is really an animal assistant. How can you tell the difference?

To begin with, sometimes the disability and the need for an animal assistant are obvious. An example of this is a dog which guides a visually impaired person. Of course, not all disabilities are obvious; even so, disabilities which are not readily apparent are still entitled to accommodations under the law. For example, just as a blind person can be assisted by a “seeing eye” dog, a person with Post Traumatic Stress Disorder can be assisted by an animal

that alerts the person to an impending panic attack, or by an animal that provides a needed calming effect for the person. With this example, neither the disability nor the need for an animal is obvious.

As a housing provider, an employer, or a business, how can you tell when an animal assistant is needed for a disability that is not obvious? The answer depends on whether you are a housing provider, an employer, or a business, and stems from the amount of time spent in each area.

Just as you generally spend more time at home than at work, you similarly spend more time at work than you spend at, say, a restaurant. These differences in time dictate the length and number of interactions possible between persons, and thus the amount of information that can reasonably be exchanged concerning an animal assistant.

The law takes these differences into account. For example, the federal Americans with Disabilities Act requires places of public accommodations, such as restaurants, to allow service animals. Under federal law, “service animal” is defined as “any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability.” As noted above, Ohio law is broader, defining a different term, “animal assistant,” as “any animal that aids the disabled.” Thus, the Ohio Civil Rights Commission – the state agency responsible for enforcing Ohio’s discrimination laws – has adopted the federal approach of access for service animals (i.e., task-performing animals) in places of public accommodations, while not limiting such access to dogs alone.

Where the need for a service animal is not obvious, the Department of Justice has issued helpful guidance on the types of questions that can be asked of a person who wants to bring a service dog into a place of public accommodation. Specifically, the person can be asked: 1) whether the dog is a service animal for a disability, and, if so, 2) what task(s) the dog has been trained to perform. The Ohio Civil Rights Commission has adopted this two-question approach but, again, it is not limited to just dogs. Importantly, the person cannot be questioned about the nature or extent of his or her disability, or be charged a fee for allowing access for the animal. However, as long as the business charges customers in general for damages caused by the customer, the business can charge a customer for damage caused by his or her service animal.

Special identification (such as papers or an identifying “vest”) for the animal is not required; indeed, there is no recognized “certificate” or “license” for animal assistants available, despite the proliferation of on-line websites eager to sell you such “certification.” These documents do not convey any rights or establish any proof that the animal is a service animal.

One question often raised is whether these laws require public places to allow unruly animals. Simply put, the answer is no. Just as people are not permitted to cause disturbances, service animals likewise are not permitted to cause disturbances. On balance, by combining these elements – being identified as a service animal upon admittance (“Question 1”), being identified as trained to perform a specific task (“Question 2”), and not causing a disturbance – the risk of possible abuse is significantly reduced.

These issues involving animal assistants in public places are generally carried over to employment and housing. Nevertheless, employers and housing providers should keep in mind the greater time available for interaction concerning the animal assistant.

In the employment context, there is much more opportunity for interaction between the employer and the employee, so more interactive communication is encouraged than simply the two questions allowed in places of public accommodations. When the need for the animal assistant is not obvious, the employer may require documentation (such as from a medical provider) of the need for the animal as an accommodation. The law encourages this “interactive process” of discussion to determine the needs of the employee and the ability of the employer to provide the accommodation. The accommodation need not be provided if it would impose an “undue hardship” on the employer (such as excessive financial cost, necessities of the business, etc.). As in places of public accommodations, the Ohio Civil Rights Commission currently takes the position that, in employment, the animal must be trained to perform a task.

As you might predict, housing provides the greatest area of protection for animal assistants. Again, when the need for the animal assistant is not obvious, the housing provider may request reliable medical documentation of a disability and the related need for an assistant animal. This does not mean that the housing provider can demand the tenant’s complete medical history and diagnosis. Rather, the housing provider can ask for information from the medical provider establishing that the tenant has a *disability*, not the tenant’s specific medical condition. As in other situations, actual damage caused by an animal assistant can be addressed just as it is with any actual damage caused by a tenant.

The home is typically considered a refuge from the pressures of the outside world. As a result, and due to the differences in available interactions, housing providers are required to be more accommodating of animal assistants than either employers or places of public accommodations. Likewise, employers and places of public accommodations must also be mindful of the need to accommodate service assistants.

Of course, this brief article is not intended to be an exhaustive treatise on reasonable accommodations (or animal assistants), nor is it intended to be legal advice. As each situation is unique, you should seek legal counsel for any specific situation that may arise.

## **Spring Training**

Now that we caught the attention of all you baseball fans; bet you didn’t know that the Civil Rights Section does free trainings that cover many topics ranging from public accommodations, animal assistants, employment discrimination and fair housing. In the past six months, the Section conducted 21 presentations for over 2,000 individuals. The groups we presented to range from 1 person to 800 people. Anyone interested in receiving free training or wanting to learn about Ohio’s discrimination laws can contact our office by e-mailing us at [CivilRightsTraining@OhioAttorneyGeneral.gov](mailto:CivilRightsTraining@OhioAttorneyGeneral.gov) or calling (614) 466-7900 for more information.



