DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO 1437 Bannock St., Denver, CO 80202	DATE FILED: March 4, 2021 4:37 PM CASE NUMBER: 2019CV32214
Plaintiff(s), AUTUMN SCARDINA v. **Defendant(s),** MASTERPIECE CAKESHOP INC et al.	▲ COURT USE ONLY ▲ Case Number: 19CV32214 Courtroom: 275

ORDER: Defendants' Motion for Summary Judgment

THIS MATTER comes before the Court on Defendants Masterpiece Cakeshop Inc. and Jack Phillips' motion for summary judgment. The Court, having reviewed the parties' briefs and exhibits (to the extent they are pertinent to the pending claims), the relevant legal authority, and being otherwise fully advised, hereby ORDERS as follows.

Legal Standard

Summary judgment is appropriate if no genuine issue of material fact exists and the movant is entitled to judgment as a matter of law. Rule 56(c). The initial burden is on the movant to show the absence of a factual dispute, after which the burden shifts to the nonmovant to demonstrate such a dispute. *Cont'l Air Lines, Inc. v. Keenan*, 731 P.2d 708, 712-13 (Colo. 1987). Where the movant would not bear the burden of persuasion at trial, its initial burden may be satisfied by showing that there is an absence of evidence in the record to support the nonmovant's case. *Id*. at 712. The Court affords all favorable inferences that can be drawn from the undisputed facts to the nonmovant and resolves all doubts as to the existence of a triable issue of fact against the movant. *Morley v. United Servs. Auto. Assoc.*, 2019 COA 169, ¶ 14.

Plaintiff's CCPA Claim

Plaintiff alleges two, related unfair or deceptive trade practices: (1) that Defendants advertised they would sell birthday cakes to LGBT individuals with intent not to sell such cakes; and (2) that Defendants employed bait and switch advertising to that effect. *See generally* C.R.S. § 6-1-105(1)(i), (n).

For Plaintiff to prevail under the Colorado Consumer Protection Act, she must be able to prove: "(1) that the defendant engaged in an unfair or deceptive trade practice; (2) that the

challenged practice occurred in the course of defendant's business, vocation, or occupation; (3) that it significantly impacts the public as actual or potential consumers of the defendant's goods, services, or property; (4) that the plaintiff suffered injury in fact to a legally protected interest; and (5) that the challenged practice caused the plaintiff's injury." *Rhino Linings USA, Inc. v. Rocky Mtn. Rhino Lining, Inc.*, 62 P.3d 142, 146-47 (Colo. 2003).

Among several arguments, Defendants contend that Plaintiff cannot show an unfair or deceptive trade practice because the most salient materials Plaintiff allegedly relied on are not advertisements. Because the Court agrees with this contention, it need not address Defendants' remaining arguments.

The CCPA defines an "advertisement" as "includ[ing] the attempt by publication, dissemination, solicitation, or circulation, visual, oral, or written, to induce directly or indirectly any person to enter into any obligation or to acquire any title or interest in any property." § 6-1-102(1). While that definition is arguably quite broad, the Court must also interpret it to avoid conflict with the First Amendment. *Hall v. Walter*, 969 P.2d 224, 229 (Colo. 1998) ("Although we must give effect to the statute's plain and ordinary meaning, the intention of the legislature prevails over a literal interpretation of the statute that would lead to an absurd result . . . or that would conflict with the Colorado or United States Constitutions.").

The Court thus interprets the CCPA as proscribing deceptive commercial speech. Such a reading comports with the police power the General Assembly sought to exercise. *See People ex rel. Dunbar v. Gym of America, Inc.*, 493 P.2d 660, 667-68 (Colo. 1972) ("There is a necessary residuum of power which the state possesses to safeguard the interests of its people, and pursuant to this power laws may be passed to protect the public from financial loss . . . and to abate evils which are deemed to arise from the pursuit of business."). Courts have taken a similar approach interpreting the Lanham Act under federal law. *See, e.g., Coastal Abstract Serv., Inc. v. First Am. Title Ins. Co.*, 173 F.3d 725, 734-35 (9th Cir. 1999) (defining "commercial advertising or promotion" as necessarily commercial speech); *L.A. Taxi Coop. Inc. v. Uber Techs., Inc.*, 114 F. Supp. 3d 852, 863 (N.D. Cal. 2015) (same).

Commercial speech proposes a commercial transaction. *Joe Dickerson & Assocs., LLC v. Dittmar*, 34 P.3d 995, 1004 (Colo. 2001) (citing *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422-23 (1993)). Such speech may be regulated if it concerns an unlawful activity or is misleading. *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 563-64 (1980). Whether speech is commercial is a question of law, determined from the content of the speech rather than the motivation of the speaker. *Dittmar*, 34 P.3d at 1003-04. And while most advertising also seeks to entertain or inform, the Court must determine which type of speech predominates—commercial or noncommercial. *Id*.

Plaintiff claims to have relied on several, purported advertisements before deciding to order a cake. However, most of the materials presented to the Court are news articles or op-eds predominantly concerning Phillips' refusal to make a wedding cake for a same-sex couple, which resulted in a case that ultimately went to the Supreme Court. *See generally Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018) ("*Masterpiece I*"). That case garnered substantial press coverage. In various publications, Phillips says, or is quoted as

saying, that he is happy to sell birthday cakes and other bakery items to same-sex couples and other LGBT customers, just not wedding cakes. Plaintiff claims this statement was misleading and deceptive. Perhaps so, but that alone does not make it actionable under the CCPA.

For instance, in a Denver Post op-ed, Phillips recounts what he said to the same-sex couple in *Masterpiece I*, explaining his convictions and why he is appealing the case. He does the same in a Fox Business interview with Neil Cavuto, accompanied by his then-attorney. An NPR article quotes Phillips for what he said to the same-sex couple, in the midst of discussing generally the intersection of religious liberty with businesses in the wedding industry. And a Westword article similarly quotes Phillips and recounts the early days immediately following his refusal to make the wedding cake.

Far more than proposing commercial transactions with members of the LGBT community, Phillips was speaking on a matter of public concern: his legal case. Moreover, most of the materials recount what he said to the same-sex couple at the time, rather than making representations to other LGBT customers prospectively. These materials are not commercial speech, and thus cannot be classified as advertisements under the CCPA.

Plaintiff argues in essence that, in response to the controversy, Phillips and his bakery attempted to exploit the news coverage by stating they would sell birthday cakes to LGBT customers. The materials provided to the Court do not raise a disputed issue of fact to support that argument. If Defendants were engaged in such a stealth advertising campaign, they successfully disguised it within their speech on a matter of public concern.

Plaintiff also claims to have relied on photographs of birthday cakes displayed on the Masterpiece Cakeshop website, arguing that the news articles and op-eds just discussed provided context for the photographs. The photographs themselves qualify as advertisements, but they are not deceptive standing alone. Indeed, the only representation the Court gleans from the photographs is that Defendants make birthday cakes in a variety of colors and designs. Plaintiff's reliance on one photograph of a cake featuring two mice garbed in pink and blue is insufficient, as that photograph is far too vague to support the weighty representation Plaintiff ascribes to it, *i.e.*, that Defendants will custom-make gender-specific birthday cakes. Further, the Court sees no meaningful distinction between punishing Defendants for their noncommercial speech and punishing them for advertisements as contextualized by Plaintiff via reference to separate noncommercial speech. The First Amendment would not tolerate either circumstance.

Plaintiff has failed to establish an actionable unfair or deceptive trade practice. Accordingly, summary judgment enters in Defendants' favor on Plaintiff's CCPA claim.

Plaintiff's CADA Claim

To prevail under the Colorado Anti-Discrimination Act, Plaintiff must prove that "but for" her sexual orientation as a transgender woman, she would not have been denied the full privileges of a place of public accommodation—more specifically, her requested cake from Masterpiece Cakeshop. *See Craig v. Masterpiece Cakeshop, Inc.*, 2015 COA 115, ¶¶ 28-29, *rev'd on other grounds*, 138 S. Ct. 1719 (2018). Plaintiff need not establish that her transgender

status was the "sole" cause of the denial of services. *Id*. Rather, she need only show that the discriminatory action was based, in whole or in part, on her protected status. *Id*.

Defendants again raise several arguments for why they are entitled to summary judgment on Plaintiff's CADA claim. The Court stands by its previous rulings regarding jurisdiction. Defendants briefly argue, for the first time, that Plaintiff did not exhaust administrative remedies against Phillips individually. However, Plaintiff's administrative charge included sufficient information for Phillips to defend himself, as evidenced by the written response to that charge. *See Colo. Civil Rights Comm'n v. Adolph Coors Corp.*, 486 P.2d 43, 45 (Colo. App. 1971). Defendants' other arguments are addressed in turn.

Defendants argue that Plaintiff cannot prove she was denied service because of her transgender status. Rather, Defendants assert they would not have made a blue and pink cake celebrating a gender transition for anyone. Defendants made a near identical argument in *Craig*, contending that they would not have made a cake celebrating a same-sex marriage for anyone. *Id*. at ¶ 30. As did the Court of Appeals in *Craig*, this Court rejects Defendants' reasoning.

Defendants' call for greater specificity regarding the denied privileges seeks to allow discrimination on the basis of intended messages rather than with respect to the people denied those privileges. But *Craig* reasoned that distinctions between discrimination based on a status, and discrimination based on closely correlated conduct, is generally inappropriate. *Id*. at ¶ ¶ 32-33 (citing cases). Nor is the result necessarily different by virtue of Plaintiff specifying the message she sought to convey with her cake. As the New Mexico Supreme Court aptly stated in another free speech/wedding services case, public accommodation laws do not apply "only to the extent that [same-gender couples] do not openly display their same-gender sexual orientation." *Elane Photography, LLC v. Willock*, 309 P.3d 53, 62 (N.M. 2013). So too here, CADA does not protect Plaintiff only to the extent she keeps her thoughts to herself. Defendants have not shown that, as a matter of law, Plaintiff cannot prove discrimination because of her transgender status.

Defendants next argue that forcing them to make Plaintiff's cake violates the First Amendment and Article II, Sections 4 and 10 of the Colorado Constitution. Specifically, Defendants contend that punishing them for their refusal both compels them to speak and abridges the free exercise of religion. Again, these same arguments were rejected in *Craig*, and they are rejected for the same reasons here.

Making a pink cake with blue frosting, the design Plaintiff requested, would at most be symbolic speech. As such, the relevant inquiry is whether making Plaintiff's cake would have been inherently expressive conduct. *Craig*, 2015 COA 115, ¶ 52. Perhaps the analysis would be different if the cake design had been more intricate, artistically involved, or overtly stated a message. *See, e.g.*, *Brush & Nib Studio, LC v. City of Phoenix*, 448 P.3d 890, 905-08 (Ariz. 2019) (custom wedding invitations featuring calligraphy and original artwork were pure speech); *Masterpiece I*, 138 S. Ct. at 1723 ("If a baker refused to design a special cake with words or images celebrating the marriage—for instance, a cake showing words with religious meaning—that might be different from a refusal to sell any cake at all. In defining whether a baker's creation can be protected, these details might make a difference.").

Whether making Plaintiff's requested cake is inherently expressive, and thus protected speech, depends on whether Defendants would thereby convey their own particularized message, and whether the likelihood is great that a reasonable observer would both understand the message and attribute that message to Defendants. *See Craig*, 2015 COA 115, ¶ 61 (citing *Spence v. Washington*, 418 U.S. 405, 410-11 (1974)). The Court cannot conclude, based on the current record, that the act of making a pink cake with blue frosting, at Plaintiff's request, would convey a celebratory message about gender transitions likely to be understood by reasonable observers. Further, to the extent the public infers such a message, that message is far more likely to be attributed to Plaintiff, who requested the cake's simple design. Therefore, if Defendants violated CADA here, they have not shown that their freedom of speech would be violated by holding them liable.

Defendants also argue that punishing them under CADA abridges their free exercise of religion. To the contrary, CADA is a neutral law of general applicability that does not offend the Free Exercise Clause. *Id*. at ¶ ¶ 81-91. The result is the same under Article II, Section 4 of the Colorado Constitution. *Id*. at ¶ ¶ 96-100. As such, CADA easily satisfies rational basis review. *Id*. at ¶ ¶ 101-103.

Further, this case is now before this Court, not the Colorado Civil Rights Commission. The Court takes no position on the so-called "offensiveness" rule, or how CADA applies in other cases that were before the Commission. And Defendants could not plausibly allege (nor have they) that the Court has been anything other than a neutral arbiter of the parties' dispute.

Defendants' motion for summary judgment is GRANTED IN PART as to Plaintiff's CCPA claim and DENIED IN PART regarding her CADA claim.

DATED AND ORDERED: March 4, 2021.

BY THE COURT:

Judge A. Bruce Jones
Denver District Court Judge