

**BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF NEW MEXICO**

VANESSA WILLOCK
Complainant,

v.

HRD No. 06-12-20-0685

ELANE PHOTOGRAPHY, LLC,
Respondent.

DECISION AND FINAL ORDER

THIS MATTER came before the New Mexico Human Rights Commission for determination of a discrimination claim based on sexual orientation, brought by the Complainant, Vanessa Willock, against the Respondent, Elane Photography, LLC. The designated hearing officer, Lois Dogliani, heard the above-captioned matter in Albuquerque, New Mexico, on January 28, 2008. The Complainant appeared, gave witness testimony and was represented at the hearing by her attorney, Julie Sakura. The Respondent appeared through its representative and co-owner, Elaine Huguenin, and was represented at the hearing by its attorney, Jordan Lorence. Both Elaine Huguenin and Jonathan Huguenin, the co-owners of Elane Photography, LLC, gave witness testimony at the hearing. The hearing record in this matter closed on April 2, 2008.

After considering the record established, the Commission issues the following decision, which includes the findings of fact, the conclusions of law and the final order.

FINDINGS OF FACT

1. Vanessa Willock (Willock), a woman of homosexual orientation, made an email inquiry to Elane Photography, LLC (Elane Photography), about obtaining the photographic services of Elane Photography to provide her with photographs of her upcoming, same-sex commitment ceremony. [Testimony of Willock]
2. Elane Photography was a commercial business which sold its photographic services of

providing photographs to document other people's expressions and events, such as weddings, engagements and various other events. Elane Photography offered its photographic services to customers and sought to assist its customers in commemorating significant life events.

[Testimony of Elaine Huguenin and Jonathan Huguenin; Exhibit 4 at 3, ¶ 3.]

3. Jonathan Huguenin and Elaine Huguenin, husband and wife, were the co-owners of Elane Photography. Jonathan Huguenin was the business manager of Elane Photography, and Elaine Huguenin was the principal photographer for Elane Photography. Sometimes, Elane Photography temporarily hired other photographers, as independent contractors, to assist Elaine Huguenin in providing photographic services to its customers. [Testimony of Elaine Huguenin and Jonathan Huguenin; Exhibit 4 at 4, ¶ 7.]

4. Elane Photography was created and organized as a limited liability company in April 2006. [Testimony of Elaine Huguenin and Jonathan Huguenin]

5. The company was registered with the New Mexico Public Regulation Commission and was organized to do business in New Mexico, pursuant to the New Mexico Limited Liability Act. [Testimony of Elaine Huguenin and Jonathan Huguenin; Exhibit F.]

6. Under its Articles of Organization, Elane Photography set out that the address of its company's principal place of business, as well as its initial registered office, was: 2912 Cuervo Dr. NE, Albuquerque, NM 87110. The company's registered agent at the same address was listed as Jonathan Huguenin. [Exhibit F at 2]

7. Elane Photography generally advertised its business and solicited customers through the internet, on its website and, at times, in the Yellow Pages. A potential customer could find and access the company's website by utilizing a computer search vehicle, such as "google."

[Testimony of Elaine Huguenin and Jonathan Huguenin]

8. Elane Photography's website advertising was available to anyone who wished to access it.

[Testimony of Elaine Huguenin]

9. As wedding photography was the primary business of Elane Photography, the company's website contained samples of photographs which Elaine Huguenin previously took at weddings.

The sample photographs on the website were similar to the wedding photographs taken by Elaine Huguenin and offered as Exhibits I, J and K. The company's website also contained a "BIO" of Elaine Huguenin, which included her autobiography, her philosophy and her artistic approach to photography. [Testimony of Elaine Huguenin; Exhibits I, J & K; Exhibit B at 1-2.]

10. Elane Photography used samples of Elaine Huguenin's photographs on its website as a promotional tool to showcase the artistic skills of Elaine Huguenin and to solicit customers.

[Testimony of Jonathan Huguenin]

11. The majority of potential customers contacted Elane Photography by email. [Testimony of Jonathan Huguenin and Elaine Huguenin]

12. Once a potential customer contacted Elane Photography by email, Elane Photography followed its customary procedures in providing photographic services. Elaine Huguenin responded to the customer's email inquiry and attached copies of Elane Photography's pricing system and its online system of proofing credits. If a customer was interested, Elaine Huguenin met with the customer to discuss arrangements for providing photographic services. [Testimony of Elaine Huguenin and Jonathan Huguenin]

13. Elane Photography executed a written contract with a customer that stated the terms under which the company would provide its photographic services to the customer. One such

term was set out, as follows, in the contract:

1. This agreement constitutes an order for wedding photography services, as agreed to by both parties: The Studio [Elane Photography] and Contracting Party (Client). Unless otherwise specified, it is understood that rights to proofs, final or sample prints, thereof shall remain the property of [t]he Studio and may be used for advertising, display or any other purpose thought proper by [t]he Studio. The images supplied may not be used for another company in any capacity without the consent of The Studio.

[Testimony of Elaine Huguenin and Jonathan Huguenin; Exhibit A.]

14. Elane Photography assumed ownership by contractual agreement and by copyright to the photographic images which it took. Under its contract with a customer, the company retained the rights to proofs and prints and retained the right to use them for its advertising or other purposes.

[Testimony of Jonathan Huguenin]

15. Elane Photography also had an unwritten company policy, which was shared between its co-owners, Elaine Huguenin and Jonathan Huguenin, that Elane Photography would not photograph any image or event which was contrary to the religious beliefs of its co-owners.

[Testimony of Elaine Huguenin and Jonathan Huguenin]

16. In or around September 2006, Ms. Willock and her partner, Misti Collinsworth (Collinsworth), who was formerly known as Misti Pascottini, were planning a same-sex commitment ceremony. As part of their arrangements, they were trying to find a photographer to provide them with photographs of their ceremony. [Testimony of Willock and Collinsworth]

17. On September 21, 2006, Ms. Willock contacted the website of Elane Photography to obtain information about its photographic services and pricing. Ms. Willock sent Elane Photography the following email inquiry:

We are researching potential photographers for our commitment ceremony on

September 15, 2007 in Taos, NM.

This is a same-gender ceremony. If you are open to helping us celebrate our day we'd like to receive pricing information.

Thanks

[Testimony of Willock; Exhibit E at 1-2.]

18. Later on the same day, Ms. Elaine Huguenin gave the following response to Ms. Willock:

Hello Vanessa,

As a company, we photograph traditional weddings, engagements, seniors, and several other things such as political photographs and singer's portfolios.

-Elaine-

[Testimony of Willock and Elaine Huguenin; Exhibit 1; Exhibit E at 1, 3 & 4.]

19. Ms. Willock was not sure whether Ms. Elaine Huguenin's response meant that Elane Photography did or did not offer its services to same-gender couples and sought clarification on November 28, 2006, as follows:

Hi Elaine,

Thanks for your response below of September 21, 2006. I'm a bit confused, however, by the wording of your response. Are you saying that your company does not offer your photography services to same-sex couples?

Thanks,

Vanessa

[Testimony of Willock; Exhibit 1; Exhibit E at 4.]

20. On November 28, Ms. Elaine Huguenin clarified her previous response to Ms. Willock in the following way:

Hello Vanessa,

Sorry if our last response was a confusing one. Yes, you are correct in saying we do not photograph same-sex weddings, but again, thanks for checking out our site!

Have a great day.

-Elaine

[Testimony of Willock and Elaine Huguenin; Exhibit 2; Exhibit E at 5.]

21. Ms. Willock was shocked, angered and saddened to receive Ms. Elaine Huguenin's response. Ms. Willock was also fearful, because she considered the opposition to same-sex to be so blatant. Ms. Willock thought that Ms. Elaine Huguenin's response was an expression of hatred at what Ms. Willock had hoped to be a happy occasion. [Testimony of Willock]

22. Ms. Elaine Huguenin refused to provide Ms. Willock with photographic services for a same-sex commitment ceremony, because the photographing of a such a ceremony was contrary to the her religious beliefs. Ms. Elaine Huguenin held the religious belief that marriage is only between one woman and one man and that, thus, a wedding is only between one woman and one man. Ms. Elaine Huguenin declined to provide photographic services to Ms. Willock for this ceremony, because the same-sex ceremony would be between one woman and another woman. [Testimony of Elaine Huguenin]

23. Ms. Elaine Huguenin believed that, as an artist, she became a part of the events which she photographed and an owner of the images or messages conveyed in her photographs. Based on her religious and artistic freedom of expression, she declined to photograph events or promote views which were contrary to her belief system. [Testimony of Elaine Huguenin]

24. The policy of the company's co-owners was that the photographs taken by Elane Photography must reflect the belief system of its co-owners. [Testimony of Elaine Huguenin and Jonathan Huguenin]

25. On November 29, 2006, Ms. Willock's partner, Ms. Collinsworth, formerly known as Ms. Pascottini, sought to verify Ms. Elaine Huguenin's refusal to photograph a same-sex ceremony by making a similar email inquiry about packages and rates to photograph a wedding,

without any mention of same-sex. Ms. Collinsworth sent the following email to Elaine

Photography:

Hi Elaine,

I really like your photographs. I was wondering if you would be willing to travel to Ruidoso for my wedding? Can you send me a list of your packages and rates?

Thanks!!

[Testimony of Collinsworth; Exhibit E at 6.]

26. On November 29, 2006, Ms. Elaine Huguenin responded affirmatively by email to Ms. Collinsworth's inquiry and, at the same time, forwarded Ms. Collinsworth information about the company's photography pricing (base package, \$1,450; deluxe package, \$1,850; and royal package, \$2,250), as well as information about the company's procedure for online proofing credits. The text of Ms. Elaine Huguenin's response to Ms. Collinsworth's inquiry was as follows:

Hello Misty,

Thanks so much for contacting us. I would definately [sic] be willing to travel to Ruidoso for your wedding. I have attached some information that should be helpful as far as prices and packages. There is also another attachment concerning "print credits" – it explains what online proofing is, because it's something that is a bit newer and not everyone may know what it is yet. Hopefully these items will help you sort some things out. Also, I would love to meet up with you sometime, if you are interested, to show you more of my recent book, along with an example of the "coffee table book" that included in all of our packages. My place of choice is Satellite...

Good luck with your planning, and I hope to talk with you soon!

-Elaine

[Testimony of Collinsworth and Elaine Huguenin; Exhibit E at 7; Exhibit C & Exhibit E at 9; Exhibit D & Exhibit E at 10.]

27. On December 19, 2006, having not heard again from Ms. Collinsworth (then known as Misty Pascottini), Ms. Elaine Huguenin sent the following email to Ms. Collinsworth:

Hello Misty,
I just wanted to check and see if you had any questions about the prices or packages that I could help answer. I hope that planning is going well for you.
Have a great day!
-Elaine

[Testimony of Elaine Huguenin; Exhibit E at 8.]

28. After receiving Ms. Elaine Huguenin's response to her inquiry on November 28, 2006 and learning of Ms. Elaine Huguenin's different response to a similar inquiry by Ms. Collinsworth, without the mention of same-sex, Ms. Willock remained fearful and anxious about seeking other photographers to photograph their same-sex commitment ceremony. [Testimony of Willock]

29. Subsequently, she received a recommendation from a friend for a photographer. She engaged the photographic services of the photographer, who photographed their September 2007 ceremony for a fee of \$1,200.00. For that fee, Ms. Willock and Ms. Collinsworth received a CD of about 300 photographic images. [Testimony of Willock]

30. On December 20, 2006, Ms. Willock filed a charge of discrimination against Elane Photography with the Human Rights Division (now known as the Human Rights Bureau) of the New Mexico Department of Labor (now known as the New Mexico Department of Workforce Solutions). Ms. Willock alleged that Elane Photography discriminated against her because of her sexual orientation, in refusing to provide its photographic services to her. [Testimony of Willock; Commission Complaint.]

31. On September 15, 2007, the Reverend Pintki Murray performed a same-sex commitment ceremony between Ms. Willock and Ms. Collinsworth, in which vows were exchanged and a prayer and a blessing were given. The Reverend Pintki Murray, currently retired, performed

healing services and was a nondenominational minister at the Unity Church of Taos.

[Testimony of Pintki Murray and Willock; Exhibit G; Exhibit H.]

32. If Ms. Willock is successful in proving her discrimination claim based on sexual orientation against Elane Photography, she requested that: (a) Elane Photography should be prevented from continuing to engage in an unlawful discriminatory practice, or injunctive relief should be granted, and (b) there should be an award of attorneys fees and costs, in the amount of \$6,637.94. Ms. Willock asserted at the hearing that she was not seeking a monetary award for actual damages, and, when given a specific opportunity at the hearing to offer proof in support of a monetary award for actual damages, she declined to do so. [Testimony of Willock; Complainant's Request for Attorney's Fees and Attorney's Fees Affidavit]

33. Elane Photography answered that Ms. Willock has not established the elements of her claim or proven her claim, brought under Section 28-1-7(F) of the New Mexico Human Rights Act. Thus, Ms. Willock has not prevailed and is not entitled to the relief which she requested. [Respondent's Response to Complainant's Request for Attorneys' Fees]

CONCLUSIONS OF LAW

Jurisdiction

1. The New Mexico Human Rights Commission has jurisdiction over the parties and the subject matter herein, pursuant to the New Mexico Human Rights Act (NMHRA). NMSA 1978, §§ 28-1-1 to 28-1-7, 28-1-9 to 28-1-15.
2. The venue in Bernalillo County was proper. NMSA 1978, § 28-1-10(F).

Claim of Public Accommodation Discrimination Based on Sexual Orientation

3. Ms. Willock brought a claim of public accommodation discrimination based on sexual

orientation against Elane Photography, LLC, alleging that Elane Photography refused to offer its photographic services to her because of her sexual orientation, in violation of Section 28-1-7(F) of the NMHRA.

4. Section 28-1-7(F) of the NMHRA provides, in applicable part, that it is an unlawful discriminatory practice for: “any person in any public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services, facilities, accommodations or goods to any person because of ... sexual orientation....” NMSA 1978, § 28-1-7(F).

5. Section 28-1-2(P) of the NMHRA defines “sexual orientation” to mean: “heterosexuality, homosexuality or bisexuality, whether actual or perceived....” NMSA 1978, § 28-1-2(P).

6. Section 28-1-2(H) of the NMHRA defines “public accommodation” to mean: “any establishment that provides or offers its services, facilities, accommodations or goods to the public, but does not include a bona fide private club or other place or establishment that is by its nature and use distinctly private....” NMSA 1978, § 28-1-2(H).

7. A similar prohibition against the discrimination of members of protected classes in public accommodations is contained in Title II of the federal Civil Rights Act of 1964, 42 U.S.C. § 2000a (1994 ed). Section 2000a (a) provides the following: “All persons shall be entitled to the full and equal enjoyment of the goods, services, facilities, privileges, advantages, and accommodations of any place of public accommodation, as defined in this section, without discrimination or segregation on the ground of race, color, religion, or national origin.” 42 U.S.C. § 2000a (a).

8. Federal adjudication may be relied on for guidance in analyzing a claim brought under the NMHRA. See Ocana v. American Furniture Co., 2004-NMSC-018, ¶ 23, 135 N.M. 539, 91 P.3d

58. The complainant in a discrimination case has the initial burden of establishing a prima facie case of discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The plaintiff may establish a prima facie case of discrimination with direct or indirect proof. See Martinez v. Yellow Freight System, Inc., 113 N.M. 366, 369, 826 P.2d 962, 965 (1992).

9. In this case, Ms. Willock established a prima facie case of discrimination with both direct proof and indirect proof.

10. As direct proof of a distinction made by Elane Photography because of sexual orientation, Ms. Willock offered the following email exchanges between Ms. Willock and Ms. Elaine Huguenin of Elane Photography.

Ms. Willock's Inquiry:

We are researching potential photographers for our commitment ceremony on September 15, 2007 in Taos, NM.

This is a same-gender ceremony. If you are open to helping us celebrate our day we'd like to receive pricing information.

Thanks

Ms. Elaine Huguenin's Response:

Hello Vanessa,

As a company, we photograph traditional weddings, engagements, seniors, and several other things such as political photographs and singer's portfolios.

-Elaine-

Ms. Willock's Follow-on Question:

Hi Elaine,

....I'm a bit confused, however, by the wording of your response. Are you saying that your company does not offer your photography services to same-sex couples?

....Vanessa

Ms. Elaine Huguenin's Follow-on Response:

Hello Vanessa,

.... Yes, you are correct in saying we do not photograph same-sex weddings, but again, thanks for checking out our site!

....Elaine

11. As an additional showing of a distinction made by Elane Photography because of sexual orientation, Ms. Willock pointed to the affirmative responses given by Ms. Elaine Huguenin in offering photographic services to Ms. Collinsworth (formerly known as Ms. Pascottini), when Ms. Collinsworth made a similar inquiry to obtain information about Elane Photography's photographic services for her upcoming wedding, but did not mention same-sex or same-gender.

12. In the presence of direct proof, as in this case, a plaintiff need not establish a prima facie case of discrimination with an indirect method of proof, such as the McDonnell Douglas methodology. See Smith v. FDC Corp., 109 N.M. 514, 518, 787 P.2d 433, 437 (1990). The McDonnell Douglas indirect method of proof is only a tool to focus the issues and reach the ultimate issue of showing impermissible discrimination. See id. The ultimate burden of proving, by a preponderance of the evidence, that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff. See Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 1093 (1981).

13. Section 28-1-7(F) of the NMHRA provides that it is an unlawful discriminatory practice for "any person in a public accommodation to make a distinction, directly or indirectly, in offering or refusing to offer its services ...to any person *because of...sexual orientation....*" NMSA 1978, § 28-1-7(F) (emphasis added). To prevail in a discrimination claim brought under Section 28-1-7 of the NMHRA, the plaintiff must demonstrate that the defendant intentionally discriminated against the plaintiff because of his or her protected class membership. See Sonntag v. Shaw, 2001-NMSC-015, ¶ 11, 130 N.M. 238, 22 P.3d 1188; Smith v. FDC, 109 N.M. at 517, 787 P.2d at 436.

14. Elane Photography contended that Ms. Willock could not show that Elane Photography had the intent or motive to discriminate based on sexual orientation, because Elaine Huguenin

asserted a different reason for her action of refusing to provide photographic services to Ms. Willock. The reason stated by Ms. Elaine Huguenin of Elane Photography for her action of refusing to provide photographic services to Ms. Willock at her same-sex commitment ceremony was that a same-sex ceremony was contrary to the religious beliefs of Elane Photography's co-owners, Elaine Huguenin and Jonathan Huguenin. Elane Photography's co-owners held the religious belief that a marriage or a wedding is only between one woman and one man. Ms. Elaine Huguenin asserted that, consistent with its co-owners' beliefs, Elane Photography would only provide photographic services for traditional weddings between one woman and one man. She declined to provide photographic services to Ms. Willock, because the photographic services which Ms. Willock sought would be for a same-sex wedding between one woman and another woman.

15. Ms. Willock answered that the acknowledged action of Ms. Elaine Huguenin, in refusing to provide the photographic services to Ms. Willock for her same-sex ceremony, between one woman and another woman, was the action or conduct expressly prohibited by Section 28-1-7(F) of the NMHRA and, thus, constituted intentional discrimination because of sexual orientation.

16. Section 28-1-7(F) provides that it is an unlawful discriminatory for "any person in a public accommodation *to make a distinction*, directly or indirectly, *in offering or refusing to offer its services ...to any person because of...sexual orientation....*" NMSA 1978, § 28-1-7(F) (emphasis added). Section 28-1-2(P) of the NMHRA defines "sexual orientation" to mean: "heterosexuality, homosexuality or bisexuality, whether actual or perceived...." NMSA 1978, § 28-1-2(P).

17. The evidence presented in this case indicated that Elane Photography made a distinction

because of sexual orientation, prohibited under Section 28-1-7(F), by refusing to offer its photographic services to Ms. Willock at her same-sex ceremony, which was perceived by Ms. Elaine Huguenin to be a same-sex ceremony, between one woman and another woman of a same-sex or homosexual orientation. The facts of this case provided a sufficient basis for inferring an intent or motive to discriminate against Ms. Willock because of her homosexual orientation.

18. Elane Photography argued that, even if a violation of the NMHRA was shown, Elane Photography was exempt from the application of Section 28-1-7(F) of the NMHRA to it. Elane Photography contended that it was exempt from provisions of the NMHRA because: (1) Elane Photography, as a business entity, did not meet the criteria or definition of a “public accommodation” covered under the NMHRA; and (2) the provisions of federal law, and similar provisions of state law, took precedence over and governed the conduct of Elane Photography’s co-owner and her right to refuse to provide its photographic services. Specifically, Elane Photography contended that the right to free exercise of religion and speech, as provided under the First Amendment of the United States Constitution, prevented the application of the NMHRA to it, because its co-owner was exercising that right in refusing to provide photographic services to Ms. Willock. The particular facts of this case failed to offer sufficient support for these contentions.

19. Elane Photography argued generally that it was exempt from application of the NMHRA to it. The various express exemptions to the NMHRA are contained in Section 28-1-9 of the NMHRA. NMSA 1978, § 28-1-9. Elane Photography did not assert any express exemption under Section 28-1-9 of NMHRA, and, no express exemption under the NMHRA, which would apply to the facts of this case, was found.

20. Elane Photography also argued that, as a business entity of an expressive or artistic nature, it was exempt from the application of Section 28-1-7(F) of the NMHRA to it, because it did not meet the statutory definition of a “public accommodation” under the NMHRA. A “public accommodation” is defined in Section 28-1-2(H) of the NMHRA to mean: “any establishment that provides or offers its services, facilities, accommodations or goods to the public, but does not include a bona fide private club or other place or establishment that is by its nature and use distinctly private....” NMSA 1978, § 28-1-2(H).

21. The evidence in this case indicated that Elane Photography was a business publically organized as a limited liability company and registered with the New Mexico Public Regulation Commission to do business in New Mexico, pursuant to the New Mexico Limited Liability Act. The company’s principal place of business and its registered agent were set out in its Articles of Organization. Elane Photography offered its photographic services to the public through openly accessible means. Elane Photography generally advertised its photographic services to the public and solicited customers through the internet, on its website and in the Yellow Pages. Elane Photography’s website advertising was available to anyone who wished to access it.

22. Although the statutory definition excludes an “establishment that is by its nature and use distinctly private,” the facts presented in this case failed to show that Elane Photography was, by its nature and use, an establishment that was distinctly private. The express provisions of the statutory definition do not exclude a business entity which is by its nature expressive and artistic. The fact that the services offered to the public by an entity are not provided in a fixed place does not exclude the entity from meeting the statutory definition of a place or establishment of public accommodation. See National Organization for Women, Essex County Chapter v. Little League

Baseball, Inc., 318 A.2d 33, 37 (1974). The hallmark of a place of public accommodation has been found to be that “the public at large is invited.” Id.

23. Under the facts of this case, Elane Photography met the statutory definition of a “public accommodation” by being “any establishment that provides or offers its services... to the public....” Elane Photography did so by: (1) inviting the public at large to use its services through its advertisements and solicitation of business on the internet, on its website and in the Yellow Pages; (2) selling its photographic services to solicited customers, in exchange for providing those customers with photographs and related services; (3) publicly organizing and registering itself as a limited liability company to do business in New Mexico, pursuant to the New Mexico Limited Liability Act; and (4) openly conducting its business activities at various sites within the State of New Mexico.

24. Elane Photography additionally argued that it was exempt from the application of Section 28-1-7(F) of the NMHRA to it, because the provisions of First Amendment of the United States Constitution relating to the right to free exercise of religion and speech, as well as similar provisions of the New Mexico Constitution and the New Mexico Religious Freedom Restoration Act, NMSA 1978 (Repl. Pamp. 2000), Sections 28-22-1 to 28-22-5, took precedence over the NMHRA in this instance. Elane Photography asserted that, in refusing to provide photographic services to Ms. Willock, Elane Photography’s co-owner, Ms. Elaine Huguenin, was acting in a way which was consistent with her religious beliefs and was exercising her right to free exercise of religion and expression under the First Amendment of the United States Constitution (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech....”), and, thus, Elane Photography was

exempt from the application of Section 28-1-7(F) of the NMHRA to it.

25. The United States Supreme Court has considered the provisions of state anti-discrimination laws similar to the provisions of NMHRA and concluded that: “Provisions like these are well within the States usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments.” Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, 115 S.Ct. 2338, 2346 (1995). The Court has explained that “acts of invidious discrimination in the distribution of publicly available goods, services, and other advantages cause unique evils that government has a compelling interest to prevent.” Roberts v. United States Jaycees, 468 U.S. 609, 104 S.Ct. 3244, 3255 (1984).

26. In addressing the constitutional protection for free exercise of religion, the United States Supreme Court determined that its “cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.” Church of the Lukumi Babalu Aye v. Hialeah, 508 U.S. 520, 113 S.Ct. 2217, 2226 (1993). Cf. Axson-Flynn v. Johnson, 356 F.1277, 1294 (10th Cir. 2004) (“Neutral rules of general applicability ordinarily do not raise free exercise concerns even if they incidentally burden a particular religious practice or belief.”). The United States Supreme Court has consistently held that “the right to free exercise does not relieve an individual of the obligation to comply with a ‘valid and neutral law of general applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes).” Employment Division, Department of Human Resources of Oregon v. Smith, 494 U.S. 872, 879 (1990).

27. To the extent that Elane Photography's arguments in this proceeding sought to raise questions as to the constitutionality of the NMHRA or questions as to an automatic preemption of the NMHRA by the United States Constitution, the New Mexico Constitution or the New Mexico Religious Freedom Restoration Act, those questions are not before the New Mexico Human Rights Commission for determination in this proceeding and, accordingly, are not addressed here.

28. With the facts presented in this case, Ms. Willock met her burden of proving, by a preponderance of the evidence, that Elane Photography discriminated against her in a public accommodation because of her sexual orientation. The evidence provided a sufficient basis for inferring intentional discrimination and an unlawful discriminatory practice based on sexual orientation, in violation of Section 28-1-7(F) of the NMHRA.

Damages

29. Ms. Willock prevailed in her discrimination claim based on sexual orientation against Elane Photography and was represented by private counsel in pursuing her discrimination claim.

30. Section 28-1-11(E) of the NMHRA provides that, if the complainant prevails, "the commission may require the respondent to pay actual damages to the complainant and to pay reasonable attorneys' fees, if the complainant was represented by private counsel...." NMSA 1978, § 28-1-11(E). The term "actual damages" is synonymous with compensatory damages. Gandy v. Wal-Mart Stores, Inc., 117 N.M. 441, 443, 872 P.2d 859 (1994); Behrmann v. Phototron Corp., 110 N.M. 323, 328, 795 P.2d 1015 (1990). The complainant seeking an award of damages has the burden of proving injury and resulting damages. See Jacobs v. Meister, 108 N.M. 488, 495, 775 P.2d 254 (Ct. App. 1989).

31. In this case, Ms. Willock did not seek a monetary award for actual damages, but did seek

an award for attorney's fees and costs. At the hearing, Ms. Willock asserted that she was not seeking a monetary award for actual damages. When Ms. Willock was given a specific opportunity at the hearing to offer proof in support of a monetary award for actual damages, she declined to do so. Having prevailed and being represented by private counsel, Ms. Willock may recover reasonable attorney's fees, pursuant to Section 28-1-11(E). See NMSA 1978, § 28-1-11(E).

FINAL ORDER

The New Mexico Human Rights Commission determines that the Complainant, Vanessa Willock, proved her discrimination claim based on sexual orientation. The Complainant proved by a preponderance of the evidence that the Respondent, Elane Photography, LLC, discriminated against her because of sexual orientation, in violation of Section 28-1-7(F) of the New Mexico Human Rights Act. Having prevailed, the Complainant is entitled to recover reasonable attorney's fees, pursuant to Section 28-1-11(E) of the New Mexico Human Rights Act.

IT IS THEREFORE ORDERED that the Respondent, Elane Photography, LLC, shall pay an award of attorney's fees and costs, for the attorney's representation of the Complainant, Vanessa Willock, in the amount of **\$6,637.94**.

NEW MEXICO HUMAN RIGHTS COMMISSION

By: _____
Commissioner

Date: _____

BEFORE THE HUMAN RIGHTS COMMISSION
OF THE STATE OF NEW MEXICO

VANESSA WILLOCK
Complainant,

v.

HRD No. 06-12-20-0685

ELANE PHOTOGRAPHY, LLC,
Respondent.

FINAL ORDER

THIS MATTER came before the New Mexico Human Rights Commission for determination of a discrimination claim based on sexual orientation, brought by the Complainant, Vanessa Willock, against the Respondent, Elane Photography, LLC. The New Mexico Human Rights Commission determines that the Complainant, Vanessa Willock, proved her discrimination claim based on sexual orientation. The Complainant proved by a preponderance of the evidence that the Respondent, Elane Photography, LLC, discriminated against her because of sexual orientation, in violation of Section 28-1-7(F) of the New Mexico Human Rights Act. Having prevailed, the Complainant is entitled to recover reasonable attorney's fees, pursuant to Section 28-1-11(E) of the New Mexico Human Rights Act.

IT IS THEREFORE ORDERED that the Respondent, Elane Photography, LLC, shall pay to the Complainant, Vanessa Willock, an award for attorney's fees and costs, in the amount of \$6,637.94.

NEW MEXICO HUMAN RIGHTS COMMISSION

By: 
Commissioner

Date: 4/9/08