**S T A T E O F T E N N E S S E E**
**OFFICE OF THE**
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July 12, 2013

Opinion No. 13-55

Public Establishments Denial of Admittance to Persons Wearing Motorcycle Club Insignia

## QUESTIONS

1. Does a public establishment violate the First Amendment or the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution if the establishment does not allow persons wearing motorcycle club insignia to enter its premises?

2. Is a public establishment subject to an action under 42 U.S.C. § 1983 if the establishment does not allow persons wearing motorcycle club insignia to enter its premises?

3. Does a public establishment violate the Tennessee Humans Rights Act or any other provision of Tennessee or federal law if the establishment does not allow persons wearing motorcycle club insignia to enter its premises?

4. If the exclusion of persons wearing motorcycle club insignia is improper, are 18 U.S.C. §§ 241 and 242 implicated in any way?

## OPINIONS

1. No. The constitutional guarantees of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution guard only against abridgment by the government. Absent an indication that a public establishment's denial of admittance of persons wearing motorcycle club insignia is fairly attributable to a governmental entity, the First Amendment and the Equal Protection Clause of the Fourteenth Amendment impose no restraint.

2. No. Private entities whose actions are not attributable to a state governmental entity are not subject to the constraints of the First Amendment or the Equal Protection Clause of the Fourteenth Amendment. To successfully maintain a Section 1983 action, a plaintiff must identify a right secured by the United States Constitution and a deprivation of that right by a person acting under color of state law.

3. No.

4. Based on the information provided, this Office does not find a legal impediment to a public establishment's denying admittance to persons wearing motorcycle club insignia. Therefore, the question concerning the applicability of 18 U.S.C. §§ 241 and 242 is moot.

## ANALYSIS

1. As a threshold consideration, the law is well settled that constitutional guarantees restrain government conduct and generally do not restrain the conduct of private individuals. *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714, 718 (Tenn. 1997); *see Flagg Bros. Inc. v. Brooks*, 436 U.S. 149, 156 (1978) (observing that "most rights secured by the Constitution are protected only against infringement by governments"). Thus, the constitutional guarantee of free speech is a guarantee only against abridgment by government. *Hudgens v Nat'l Labor Relations Bd*., 424 U.S. 507, 513 (1976). The Constitution does not provide redress against a private corporation or person who seeks to abridge the free expression of others. *Id*.; *Cent. Hardware Co. v. Nat'l Labor Relations Bd*., 407 U.S. 539, 547 (1972). Moreover, the United States Supreme Court has made clear that property does not lose its private character merely because the public is invited to use it for a designated purpose. *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551, 569 (1972); *see, e.g*., *Cent. Hardware*, 407 U.S. at 547 (rejecting argument that privately owned hardware store was subject to the constraints of the First Amendment because its parking lot was "open to the public"). Accordingly, the First Amendment is not an impediment to a public establishment, such as an inn, restaurant, or tavern, deciding to deny admittance to persons wearing motorcycle club insignia.[1] *See, e.g*., *Hessians Motorcycle Club v. J.C. Flanagans*, 103 Cal. Rptr. 2d 552, 556 n. 2 (2001) (relying on *Lloyd Corp., Ltd. v. Tanner*, 407 U.S. 551 (1972) in finding that the First Amendment did not reach sports bar that denied admittance to motorcycle club members who refused to remove their "colors").

Similarly, the guarantee of equal protection guards only against encroachment by the government; it "erects no shield against merely private conduct." *Shelley v. Kraemer*, 334 U.S. 1, 13 (1948). The Fourteenth Amendment is not a limitation on the conduct of an owner of private property used for private purposes. *Cent. Hardware*, 407 U.S. at 547. That an establishment is "open to the public" is of no import. In rejecting an argument that a privately owned hardware store was subject to the constraints of the Fourteenth Amendment because its parking lot was "open to the public," the United States Supreme Court reasoned that "[s]uch an argument could be made with respect to almost every retail and service establishment in the country." *Id*.

Accordingly, a private entity can be held to constitutional standards only when its actions so approximate state action that they may be fairly attributed to the state. *See Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 50 (1999); *Lugar v. Edmondson Oil Co., Inc.*, 457 U.S. 922, 937 (1982). There are three tests to determine whether the conduct of a private person is fairly attributable to the state: (1) the public function test; (2) the symbiotic relationship or nexus test; and (3) the state compulsion test. *Chapman v. Higbee Co*., 319 F.3d 825, 833 (6th Cir. 2003); *Collyer v. Darling*, 98 F.3d 211, 232 (6th Cir. 1996). Under the public function test, the court conducts a historical analysis to determine whether the party has engaged in an action

[1] Based on the content of the opinion request, we assume that "public establishment" refers to an inn, restaurant, tavern or similar establishment.

traditionally reserved to the state. *Wittstock v. Mark A. Van Sile, Inc.*, 330 F.3d 899, 902 (6th Cir. 2003). Under the symbiotic relationship or nexus test, "the action of a private party constitutes state action when there is a sufficiently close nexus between the state and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the state itself." *Wolotsky v. Huhn*, 960 F.2d 1331, 1335 (6th Cir. 1992). In order to show state action under this test, the state must be "intimately involved with the challenged conduct." *Id.*; *see Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass'n*, 531 U.S. 288, 295 (2001) (noting that a challenged activity may be state action "when it is entwined with governmental policies or when government is entwined in [its] management or control") (internal quotation omitted). Finally, state action exists under the state compulsion test if the "state exercise[s] such coercive power or provide[s] such significant encouragement, either overt or covert, that in law the choice of the private actor is deemed to be that of the state." *Wolotsky*, 960 F.2d at 1335.

Employing these tests, it does not appear that the public establishments' actions that are the subject of this opinion request are fairly attributable to the government. First, public establishments, such as inns, restaurants, and taverns, are not engaged in action traditionally reserved to the State. Second, with respect to the symbiotic relationship or nexus test, there is no indication that the State is "intimately involved" with the public establishments' conduct. Finally, under the state compulsion test, no evidence exists that the State has coerced or encouraged public establishments to deny admittance to persons wearing motorcycle club insignia.

The only State involvement mentioned in this opinion request is the public establishments' employment of law enforcement officers to prohibit persons wearing motorcycle club insignia from entering public establishments. We assume the "employment" of "law enforcement officers" means the use of such officers as private security guards when these officers are off-duty. *See* Tenn. Code Ann. § 62-35-103(a)(7) (recognizing that a full-time sworn peace officer may at times receive compensation "for services as a guard, patrol or watchperson under a contract with a private business that is properly licensed by the state"). Nonetheless, the Tennessee Supreme Court has recognized that, even while off-duty and acting as a private security guard, the "special status of peace officers in this state permits an off-duty officer to act within the scope of his or her public employment, even while otherwise performing duties for the private employer." *White v. Revco Discount Drug Centers, Inc.*, 33 S.W.3d 713, 718 (Tenn. 2000). Thus, while employed as a security guard off-duty, circumstances could require the officer to render aid in his or her capacity as an officer. Such police aid that may occur while an officer is working as a security guard at a public establishment does not convert the public establishment's conduct into state action. *See Lansing v. City of Memphis*, 202 F.3d 821, 833 (6th Cir. 2000). In *Lansing*, the defendant, a private entity that had leased a public park in the City of Memphis for a festival, directed the plaintiff who was engaged in "street preaching" to leave the festival grounds. After the plaintiff refused, the defendant obtained police assistance in removing the plaintiff from the festival grounds. The plaintiff alleged infringement of his First Amendment right of free speech. The Sixth Circuit Court of Appeals held that the defendant's conduct did not constitute state action simply because the defendant received police assistance in removing the plaintiff from the premises. *Id*. at 833. The court reasoned that "[i]f this [police assistance] were all that was required to find state action, then every private citizen who solicited

the aid of the police in resolving disputes or in ejecting unwanted persons would be transformed into a state actor. *Id.* The "[m]ere request for assistance from an available police officer cannot be sufficient to form a nexus between the state and the private action." *Id.*; *see Federspiel v. Ohio Republican State Cent. Comm.*, 867 F.Supp. 617, 624 (S.D. Ohio 1994) (observing that calling the police or a security force to a function does not make that function "state action"); *Multari v. Cleveland Cmty Hosp.*, No. 1:05-cv-359, 2006 WL 1984376, at *3 (E.D. Tenn. July 14, 2006) (holding that hospital's enlistment of police aid to remove plaintiff from premises did not convert hospital's conduct into "state action"). With no indication that the denial of admittance of persons wearing motorcycle club insignia is fairly attributable to a state governmental entity, the First Amendment and the Equal Protection Clause of the Fourteenth Amendment impose no restraint upon public establishments, such as inns, restaurants, and taverns, from such action.

2. Whether a public establishment is subject to action under 42 U.S.C. § 1983 if the establishment does not allow persons wearing motorcycle club insignia to enter its premises depends upon whether a plaintiff can identify a right secured by the Constitution and laws of the United States and a deprivation of that right by a person acting under color of state law. *Russo v. City of Cincinnati*, 953 F.2d 1036, 1042 (6th Cir. 1992). As explained above, private entities whose actions are not attributable to the state are not subject to the constraints of the First Amendment or the Equal Protection Clause of the Fourteenth Amendment and, because they are not acting under the color of state law, would not be subject to Section 1983 liability. *See, e.g.*, *Wittstock*, 330 F.3d at 902 (concluding that because tax sale purchaser of property did not function as state actor, purchaser was not subject to § 1983 claim for denial of due process resulting from purchaser's failure to provide owner notice and opportunity to be heard in quiet title action); *Lansing*, 202 F.3d at 833 (holding that § 1983 action for deprivation of First Amendment rights could not be lodged against private festival organizer because organizer did not act as state actor in ejecting street preacher).

3. The Tennessee Human Rights Act prohibits discrimination in places of public accommodation and provides in pertinent part:

> Except as otherwise provided in this chapter, it is a discriminatory practice for a person to deny an individual the full and equal enjoyment of the goods, services, facilities, privileges, advantages and accommodations of a place of accommodation, resort or amusement, as defined in this chapter, on the grounds of race, creed, color, religion, sex, age or national origin.

Tenn. Code Ann. § 4-21-501. The Act defines "public accommodation" to include "any place, store or other establishment, either licensed or unlicensed, which supplies goods or services to the general public or which solicits or accepts the patronage or trade of the general public. " Tenn. Code Ann. § 4-21-102(15).

While public establishments, such as inns, restaurants, and taverns are "public accommodations," the discrimination prohibited by the Act is limited to the enumerated grounds of "race, creed, color, religion, sex, age or national origin." The Act does not enumerate a class of persons that could be construed to include persons wearing motorcycle club insignia, and thus

the Act would not be implicated unless such a ban was adopted by an establishment as a pretext to discriminating on the basis of "race, color, religion, sex, age or national origin."

Further, the relevant portions of Tennessee's public accommodation statute are virtually identical to the federal version codified at 42 U.S.C. § 2000a. Although the language differs slightly, the General Assembly intended the Tennessee Human Rights Act to be coextensive with federal law. *Phillips v. Interstate Hotels Corp*., 974 S.W.2d 680, 683-84 (Tenn. 1998) (citing *Bennett v. Steiner-Liff Iron and Metal Co*., 826 S.W.2d 119, 121 (Tenn. 1992)). Under federal law, "[a]ll 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. . . . without discrimination or segregation on the ground of race, color, religion, or natural origin." In similar fashion as Tenn. Code Ann. § 4-21-501, this provision limits discrimination only on the enumerated grounds of "race, color, religion, or natural origin." To receive protection under this law, a person must show that he is a member of a protected class. *See, e.g*., *Burnett v. Bredesen*, 566 F.Supp.2d 738, 745 (E.D. Tenn. 2008) (concluding that 42 U.S.C. § 2000a provided no protection for discrimination against smoker). Again, the term "protected class" would not include persons wearing motorcycle insignia absent evidence that any such ban was adopted as a pretext to engage in unlawful discrimination.

4. In sum, this Office finds no legal impediment to a public establishment's non-discriminatory denial of admittance to persons wearing motorcycle club insignia, based on the information provided. Therefore, the question concerning the applicability of 18 U.S.C. §§ 241 and 242, which impose criminal penalties for the deprivation of federal rights under color of state law or for a conspiracy against the free exercise of such rights, is moot.

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