



June 16, 2008

To: California County Clerks

From: Robert Tyler, Advocates for Faith and Freedom
Alan Reinach, Seventh-day Adventist Church State Council

Re: **RELIGIOUS ACCOMMODATION AND THE CONSTITUTIONAL RIGHTS OF EMPLOYEES REGARDING SAME-SEX MARRIAGE**

Advocates for Faith and Freedom is a nonprofit public interest law firm dedicated to protecting religious liberty in the courts. We seek to educate public officials regarding the rights of our clients, and when necessary, we bring litigation to protect those rights. We are joined in this letter by the Seventh-day Adventist Church State Council, which is the oldest public policy organization in the western United States devoted to the liberty of conscience. Our co-counsel has developed special expertise concerning religious accommodations required by law. Adventist church members observe the Saturday Sabbath. The Sabbath observance sometimes conflicts with operating hours in the workplace, and the conflict thereby necessitates the assistance of the Seventh-day Adventist Church State Council.

We have already been contacted by an employee of a clerk's office regarding a religious objection to participating in the provision of marriage licenses to same sex couples. Anticipating that similar objections are likely to arise throughout the state, we thought it advisable to write before the problems become acute. Clearly, there is grave potential here for politically explosive legal conflict. With care and compassion for all, perhaps such conflict can be avoided.

The purpose of this letter is to brief you on the applicable law of religious accommodation and relevant constitutional provisions, and to seek a collaborative and problem-solving approach to any conflicts that may arise. We wish to assure you that we are not looking for a "test case," but instead we are seeking to contribute to an orderly implementation of the Supreme Court's decision that will respect the mutual rights both of those seeking same-sex marriage services and of those whose religious conscience leads to their objection to providing them.

To begin with, it is important to affirm that we respect the obligation of government officials to comply with the Supreme Court's decision in the same-sex marriage decision. This includes a clerk's option to perform marriage ceremonies for all couples and, alternatively, the option to perform none at all.

If you choose to perform marriage ceremonies, you must recognize that the population of California is incredibly diverse, and there are literally dozens of different faiths represented in this state. Most religions

teach that homosexual practice is forbidden, a belief that has existed since the beginning of time. Some people of faith will be unwilling to participate in the issuance of marriage licenses to same-sex couples; to serve as witnesses in civil marriage ceremonies for same-sex couples, or to preside over such civil marriage ceremonies. Employees with such religious convictions who serve in clerk's offices have various rights that deserve to be respected just as much as the rights of those who are seeking marriage licenses. This is not a "zero sum game," so to speak, where there must be winners and losers.

Same-sex couples have argued that their personal sexual choices require public acceptance in order for "equal protection" to exist. It would be tragic if the pursuit of "equality" resulted in inequality and discrimination against people of faith seeking to exercise their religious liberty rights. This would certainly send a message of official state hostility toward religion, in violation of the Establishment Clause, while also violating basic equality, speech, and religious rights of the employees.

Title VII And FEHA

Employees have rights to be protected from religious discrimination in their employment under Title VII of the Civil Rights Act of 1964 and under California's Fair Employment and Housing Act. Both statutes require employers to make reasonable accommodations for their employees' religious beliefs that are associated with traditional religions, as well as religious "observances and practices." 42 USC § 2000e(j); Gov.C. § 12940(l). Religion includes all aspects of religious belief, observance, and practice. 42 USC § 2000e(j); Gov.C. § 12926(o). The EEOC Guidelines state that "religious practices" include moral or ethical beliefs about what is right and wrong that are sincerely held with the strength of traditional religious views. 29 CFR § 1605.1.

Legally, an employer must show that it took the initial steps toward accommodation and negotiated with the employee in an attempt to reasonably accommodate the employee's religious beliefs. In one case, the court recognized that an employer may have to reorganize all employees' shifts and allow split shifts in order to accommodate one employee's preference not to work on her Sabbath. *Balint v. Carson City, Nevada*, 180 F3d 1047, 1050 (9th Cir. 1999). Further, an employer cannot deny a religious accommodation and claim undue hardship because it believes or assumes that many more employees may share the same faith or practice. 29 C.F.R. 1605.2(c). Some alternatives for accommodating religious practices might disadvantage the individual with respect to his or her employment opportunities, such as compensation, terms, conditions, or privileges of employment. Therefore, when there is more than one means of accommodation which would not cause undue hardship, the employer or labor organization must offer the alternative which least disadvantages the individual with respect to his or her employment opportunities. 29 C.F.R. 1605.2(c)(2)(ii).

Most employment lawyers are familiar with the provisions of Title VII, 42 U.S.C. 2000e(j), but overlook the much more stringent requirements of the California Government Code, Sections 12940 and 12926, as they pertain to religious accommodation. Under Federal law, Title VII, the employer must provide a "reasonable accommodation" short of an "undue hardship," but the threshold of what constitutes such a hardship is fairly low and is referred to as "de minimus." California law is quite different and imposes a much tougher standard on employers. Under California law, an employer must provide reasonable accommodation unless the undue hardship resulting causes a "significant difficulty or expense." Gov. Code Section 12926(s). This is a phrase more familiar to those practicing in the disability discrimination arena, where it is well known that substantial costs may be required of the employer in order to facilitate the accommodation of an employee with a disability. Likewise, this standard applies for a religious accommodation.

There is a frequent misconception about what constitutes an undue hardship. It is common to regard even minor added burdens imposed on other employees as an undue hardship. However, careful examination of both the statutory definition of undue hardship and the California regulations fails to reveal a single citation wherein “undue hardship” refers to the impact on other employees. Instead, every reference pertains to the impact on the operations of the employer. It appears that clerks’ offices throughout the state are anticipating a flood of applications for marriage licenses in the coming weeks. This may itself impose a burden on employees. The fact that there are special challenges involved in meeting this need does not justify discriminating against those whose faith precludes them from participating in same-sex marriage.

Religious Liberty And Free Speech Under The Federal And State Constitutions

In addition to the statutory obligation to provide reasonable accommodation for the religious beliefs and practices of workers, the California Constitution also requires public employers to respect the right of employees to “the free exercise and enjoyment of religion.” Cal. Const., Article 1, Section 4. The only exceptions to this rule in the text are for actions that are “licentious or inconsistent with the peace or safety of the State.” As a result of the significant respect and protection provided to religious liberty under the state constitution, although the state may be required to provide marriage licenses to same-sex couples, the county clerk’s offices have a clear obligation to protect and accommodate the religious consciences of their employees.

The state constitutional provision provides greater protection on its face than is provided under the traditional strict scrutiny analysis. However, the California Supreme Court has yet to interpret the provision. *Catholic Charities of Sacramento, Inc. v. Superior Court*, 32 Cal.4th 527, 562 (Cal. Sup Ct. 2004) (applying strict scrutiny), citing *Thomas v. Review Bd., Ind. Empl. Sec. Div.*, 450 U.S. 707, 718 (1981) and *Sherbert v. Verner*, 374 U.S. 398, 403, 406, 407-408 (1963). Even so, if the California Supreme Court were to apply the lesser standard of strict scrutiny, the analysis remains consistent because strict scrutiny will likewise require county clerks to protect the religious liberty of their employees. *Id.* Under that standard, the commencement of same-sex marriages can not be implemented in such a manner that the implementation substantially burdens an employee’s religious belief or practice unless the county government can show that forcing an objecting employee to participate in same-sex marriages represents the least restrictive means of achieving a compelling interest. *Id.*

Additionally, requiring an employee either to find another job or be transferred will generally be considered a substantial burden and will force the applicable clerk’s office to prove that there was no less restrictive manner in which to commence same-sex marriages other than to remove the employee. Notwithstanding the strict scrutiny analysis, transferring an objecting employee is troublesome because it sends a clear signal of hostility against the religious belief at issue. Such a course of conduct is not “equality” but is favoritism for the morality and ideology of same-sex couples, as against the morality and religious beliefs of those who object. There is another word for such favoritism: discrimination. Transferring out employees who object to participating in the issuance of same-sex marriage licenses is just that: discrimination.

There seems to be a clear and direct solution to the problem: providing adequate staffing of those with no religious objections to issuing same-sex marriage licenses, without compelling anyone to transfer. While there may be some added cost in such a solution, state law clearly contemplates that the employer may be required to bear a “significant difficulty or expense” in providing a “reasonable accommodation.” Thus, the public employer is unlikely to prevail by complaining that the cost of such an accommodation is too high.

Finally, under both the California and United States Constitutions, public employees retain free speech rights, which, when combined with their religious freedom, means they cannot be compelled to endorse same-sex marriages through officiating such marriages or serving as a witness. Under the U.S. Supreme Court's free exercise jurisprudence, the combination of free exercise of religion and free speech rights yields a "hybrid rights" situation, resulting in "strict scrutiny" and the same "compelling interest/least restrictive means" test discussed above.

Conclusion

There is no reason why people of faith must suffer discrimination in order to provide same-sex couples with the marriage licenses. This challenge will be the first test of whether the Supreme Court's decision is about respecting the rights of all Californians, as is claimed, or whether it will mean that the rights of some will be advanced at someone else's expense.

Of course, such a challenge can only arise where a conflict has not been successfully resolved at the local level. We stand ready to assist county clerks and county attorneys in navigating this hazardous terrain, in order to ensure that such conflicts have the best prospects for mutually satisfactory resolution. At the same time, you should know that our organizations are publicizing our availability to represent employees who feel they have suffered religious discrimination as a result of their refusal, on religious conscience grounds, to participate in various marriage services to same-sex couples.

Thank you for your consideration of the legal analysis provided above. Please do not hesitate to contact us if we can be of service to you in regard to these issues.