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COZEN O'CONNOR

Lessons Employers Can Learn from Kentucky Clerk's Same-Sex Marriage License Dispute

Almost every day the news carries an additional story about Kim Davis, the Rowan County, Kentucky clerk who has defied the Supreme Court by refusing to issue marriage licenses to same-sex couples. The Kim Davis story may be grabbing the headlines, but it is not alone. There is an ever-increasing number of public and private sector employees who find that their religious beliefs clash with their work responsibilities. In this Alert, we review some of the lessons every employer may take away from the controversy highlighted by Kim Davis.

The big picture

Some people see this case as what happens when an unstoppable force (the right of same-sex couples to wed) meets an immovable object (Kim Davis, the county clerk in Kentucky who refuses to issue marriage licenses based upon her religious beliefs). These kinds of conflicts can ultimately come to that kind of showdown. But there are safety valves that have been built into our system to promote other ways to resolve the issues.

We start by recognizing that both sides are invoking fundamental rights. The Supreme Court decided this past June that same-sex couples have a fundamental right to marry and that the government cannot block them from enjoying this right on equal terms with others. Previously, the same Court recognized that liberty of conscience is also a fundamental right, and that the free exercise of religious liberty is protected by the First Amendment.

At a constitutional level, the Supreme Court ruled 25 years ago that states have the power to accommodate religious beliefs, but they are not required to provide religious exemptions from laws that are otherwise generally applicable. Therefore, as a constitutional matter, government employees do not have the right, based on their own religious convictions, to deny services to members of the public. Same-sex couples have a constitutional right to wed, and state officials have no legal right to interfere with efforts to exercise that right.

But this does not end the inquiry. In 1993, Congress passed the Religious Freedom Restoration Act (RFRA), which imposes a duty on the federal government not to place substantial burdens on any person's exercise of religion unless the government can meet a two-fold test. First, the burden must be necessary for the furtherance of a compelling government interest. Second, the government must choose the least restrictive way in which to further its interest. These are difficult tests for the government to meet.

State and local governments are not bound by RFRA because the Supreme Court determined that Congress lacked the authority under the Fourteenth Amendment to impose such sweeping restrictions. Congress responded by passing the Religious Land Use and Institutionalized Persons Act in 2000, which grants special privileges in the name of religion to religious land owners and prisoners. More than 20 states have adopted their own versions of RFRA to place limits on the applicability of otherwise neutral state or local laws that are found to place a substantial burden upon a person's exercise of religion.

The federal and state RFRA laws have become much more controversial since the Supreme Court

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issued its 2014 decision in *Burwell v. Hobby Lobby Stores, Inc*. There, the Court held that even for-profit corporations could assert a claim of religious belief and use it as a shield against providing contraceptive health care to their employees. In the wake of *Hobby Lobby*, there have been a number of celebrated cases in which individuals or corporations have sought to invoke their religious beliefs as a basis for denying services to gays and lesbians or to members of other groups with whom they disagreed.

When a public employee denies a marriage license to same-sex couples, does he or she have any freedom of religion job protections?

Yes, but those protections may be very limited.

Besides making claims under federal or state RFRA statutes, public employees may also seek protection under Title VII of the Civil Rights Act of 1964, as amended, or under the analogous state or local antidiscrimination laws. Those laws require public employers to exempt employees from generally applicable job requirements if this can be done without creating an "undue hardship." The undue hardship test is much easier for a government employer to meet than the compelling interest/no less restrictive manner test under RFRA. Under Title VII, an employer's obligation to accommodate ends if the proposed accommodation would impose more than a *de minimis* burden.

Cases of this sort are almost always very fact specific: What is the exact nature of the conflict between the generally applicable work rule and employee's religious belief or practice? What possible accommodations could eliminate this conflict? What hardships would these accommodations cause and on whom would the hardships fall?

Employees do not have a right to insist on their preferred means of accommodation. If the employer proposes an accommodation that reasonably protects the employee's job status, the employee has a duty to make a good faith effort to attempt to satisfy his or her religious needs through the means offered by the employer.

It is not unusual for government employees to seek exemptions from workplace policies that offend their faith. There are reported cases of employees who:

- did not wish to process tax-exempt status applications for groups promoting abortions or LGBT rights;
- did not wish to dispense medication that might induce an abortion;
- wanted to wear religious garb that clashed with uniform or dress requirements;
- did not want to process draft registration forms; or
- did not want to raise or lower the flag.

In some of these cases, the employee won an exemption from the applicable work rule because reasonable accommodations were available. In others, the employee lost because the possible accommodations imposed too great a hardship on the governmental agency or resulted in transferring a hardship to other employees.

When an employee objects to performing one aspect of the job based on religious objections, the case often turns on whether there are other employees who can be assigned the duty without meaningfully burdening them or delaying service to others. For example, can tax exempt application forms for groups seeking to provide abortion services be routed to another employee in the office? Will doing so add an undue burden to that employee's workload? Will doing so delay the ability of the organization to have its application processed in a timely manner?

Courts sometimes struggle with the issue: What if every employee asked for the same accommodation? This kind of inquiry seems to be inconsistent with the concept of determining undue hardship because making up hypothetical arguments that everyone will seek the same accommodation can turn into just another reason why no one can be accommodated. What if every bus driver asked to have Sunday off to attend church services? Then there would be nobody to drive the busses. But in fact, rarely will everyone ask for the same accommodation. So each request is evaluated on its own. If a tipping point of hardship is reached, the court can deal with it at that time. But until that occurs, each employee is entitled to have a religious accommodation claim evaluated under the undue hardship standards.

When the employee works for a governmental body subject to the RFRA standards, the government's burden of justification becomes much greater. The work requirement must be supported by a compelling interest and there must be no less burdensome way to achieve that interest. That burden of proof is clearly high above the *de minimis* hardship threshold.

How should an employer deal with an employee who denies a marriage license because of his or her religious beliefs?

This question calls for a typical lawyer's answer: It depends.

There is no doubt that the couple is entitled to the marriage license and cannot be subjected to any second class status merely because the clerk disagrees on religious grounds with the couple's desire to marry. So this means that it will never be an adequate accommodation to say that the couple should go to the next county over to get a license there. Not only does this transfer hardship to an innocent party, but in the case of the Kentucky clerk, it denies the couple the right to have the license issued in the jurisdiction where the marriage is to take place, which is a requirement of state law. Nor will it ever be acceptable to reassign the duty of issuing the license to someone else in the clerk's office if that will impose an undue delay on the couple seeking the license.

Recognizing that the right of the same-sex couple to equal services is paramount, the government employer must look to see how it can meet that obligation in a manner that does not force the objecting clerk to violate what he or she views to be a religious obligation. That means we must first understand what the religious obligation is asserted to be and what conflict it creates.

- If the clerk is the only one who may, by law, issue the license, then the unstoppable force will prevail: There will be no way to provide and accommodation and no less restrictive way to satisfy the compelling governmental interest. The clerk will be forced into resigning from office, being jailed for contempt, or in fulfilling her oath of office by issuing the license.
- If someone else can issue the license, and the clerk finds that her faith will be violated if any of her subordinates issues the license, there may be no way to provide a full accommodation. A partial accommodation could be made by allowing her not to issue the licenses personally, provided others in the office did so in a timely manner. The clerk's choice may be to resign from office or at least obey an injunction prohibiting her from interfering with the issuance of marriage licenses by others.
- Similarly, if the clerk's religious objection is that she cannot directly issue the license, then it will be possible to accommodate her as long as there are others in the office who can perform this task. Things may get complicated if others in the office seek a similar exemption, but until they do there is no need to force the clerk to issue the license, hold her in contempt, or impose any other punishment on her.
- If the clerk objects to having her name on any license issued to a same-sex couple because it violates her religious obligation "not to cooperate with evil," there would seem to be an easy answer: Accommodate the clerk by removing her name from the license. Will this be an undue hardship? The financial cost could be an undue hardship under the *de minimis* test. But in a RFRA jurisdiction, it is hard to imagine that the government could articulate a compelling interest that would prevent a license from being issued under the name of an assistant county clerk.

Other alternatives may also be available depending on the circumstances. If the clerk job is an appointed one, perhaps the clerk could be transferred to a different office. Could the job of issuing marriage licenses be reassigned to another office? That is likely going to impose an undue hardship on the government or members of the public, but it may be a viable alternative when the standards of RFRA are applied. In short, how the government deals with this problem depends on a variety of facts and circumstances.

It is important to remember that this issue is not limited to cases involving same-sex marriage. Consider the clerk who refuses to issue hunting or fishing licenses because she has become a vegan. What about the pacifist who no longer grants gun permits? In each such case, a searching inquiry will be needed to determine if the clerk's actions stem from a sincerely held religious belief and a careful weighing of the alternative ways of accommodating that belief.

Of course, in a state without a RFRA law, the resolution will be much easier from the standpoint of the employer. The clerk will have to perform the duty, resign, or face removal from office because there is no countervailing religious right at issue. The clerk's official position obligates her to follow the state law even if she disagrees with it on moral or religious grounds.

Justice Scalia discussed this issue in the context of the death penalty in his 2002 essay "God's Justice and Ours," where he wrote:

> [W]hile my views on the morality of the death penalty have nothing to do with how I vote as a judge, they have a lot to do with whether I can or should be a judge at all. To put the point in the blunt terms employed by Justice Harold Blackmun …, when I sit on a Court that reviews and affirms capital convictions, I am part of "the machinery of death." My vote, when joined with at least four others, is, in most cases, the last step that permits an execution to proceed. I could not take part in that process if I believed what was being done to be immoral….
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> [I]n my view the choice for the judge who believes the death penalty to be immoral is resignation, rather than simply ignoring duly enacted, constitutional laws and sabotaging death penalty cases. He has, after all, taken an oath to apply the laws and has been given no power to supplant them with rules of his own. Of course if he feels strongly enough he can go beyond mere resignation and lead a political campaign to abolish the death penalty and if that fails, lead a revolution. But rewrite the laws he cannot do.

What about private-sector employees? Are employers free to discipline up to and including terminating them if they deny services to same-sex couples?

Here again, the answer depends on a number of factors. Generally, RFRA laws do not apply to the relations between private sector employers and employees. So we have to look to Title VII and the various state and local antidiscrimination laws. Usually, those laws have thresholds. To be covered by Title VII, and employer must have 15 or more employees in 20 or more calendar weeks of the current or preceding calendar year. So very small employers are out. State and local laws vary in their coverage requirements. If there is no coverage requiring the employer to accommodate to the religious beliefs of an employee, the employer will generally be able to terminate the employee for not providing services to anyone the employer wishes to serve. A few states may have back door protections for employees under the privacy or free exercise of religion clauses of their state constitutions, but generally these provisions are not binding on private sector employers.

Where Title VII applies, the employer will have to go through the same undue hardship type of analysis described above. There are many cases involving private sector employees who sought exemptions from otherwise applicable job service requirements that can be used as examples. Consider the nurse who does not wish to participate in performing abortion services, the pharmacist who does not wish to dispense contraceptives, or the Muslim taxi driver who does not wish to transport passengers carrying liquor. In these kinds of cases, the existence of undue hardship often turns on the availability of some other employee to perform the requested service.

If a covered employer can accommodate a religious objection without undue hardship, then the employer must do so. The need to serve the customer will remain a paramount consideration in evaluating whether such a hardship exists, but a careful evaluation of the hardships that will be encountered will determine whether the employee can be disciplined or terminated for refusing to provide service to the customer. In every case, the employer should undertake an interactive dialogue with the employee to identify the nature of the conflict, the range of potential accommodations, and the hardship each of them would impose. This should all be carefully documented before a decision is made to terminate the employee. A failure to engage in such an interactive dialogue will be treated as a failure to attempt accommodation and will result in liability in every case in which it is later found that an accommodation was possible without creating undue hardship.

What if a business is run by individuals who want to deny services to same-sex couples because of the individuals' religious beliefs? Do any Religious Freedom Restoration Acts "protect" these individuals and allow these laws to be used as tools of discrimination?

We are seeing an increasing number of cases where small businesses or individual proprietors claim that it would violate their religion to provide services to same-sex couples. There is the florist who does not wish to provide wedding flowers, the musician who does not want to perform at the reception or the baker who does not want to provide a wedding cake.

Resolution of these cases almost always depends on the applicable local law because there is no federal law mandating that services or public accommodations be provided without discrimination on the basis of sexual orientation or gender identity. Several state and local governments have adopted such laws and have enforced them against those small business owners who attempted to deny services to same-sex couples. Some of these cases are working their way to the appellate courts, but most legal observers believe that the nondiscrimination laws will trump the religious exemption claims.

Most state RFRA laws do not provide businesses with the ability to deny services to same-sex couple based on the business owner's religion. Arizona passed such a law, but it was vetoed in 2014. Indiana passed such a law but quickly amended it to remove fears it would allow business to discriminate against gays and lesbians after an intense weeklong storm of public protest.

State RFRA laws normally do not offer any defense to claims relating to the denial of services. This is because those claims are usually brought by individual plaintiffs against the person or entity that denied them service. By their nature, RFRA laws do not apply to those proceedings because the government is not a party. There is also a reasonable legal argument that state RFRA laws may not be used to shift burdens to innocent third parties who do not share the same religious beliefs.

So long as both religious beliefs and individual rights remain closely held, these two societal pillars will sometimes conflict. The challenge for employers will be to determine the extent to which the pillars may sway to accommodate the pressure. Through careful analysis — and often a bit of creativity — it will often be possible for employers to restore the equilibrium and maintain a strong foundation.

Cozen O'Connor's Labor & Employment attorneys are available to provide counsel and guidance on the issues discussed in this Alert.