



LEGAL MEMORANDUM

TO: Virginia Clerks Responsible for Issuing Marriage Licenses

FROM: Alliance Defending Freedom

DATE: October 10, 2014

RE: Rights of Conscience Pertaining to the Issuance of Marriage Licenses

On October 6, 2014, the U.S. Supreme Court declined to review the Fourth Circuit Court of Appeals' decision that declared unconstitutional Virginia's laws defining marriage as the union of one man and one woman since 1607. The full legal impact of this decision, and whether it undermines other traditional restrictions on marriage, like bigamy or consanguinity, is not yet known. In the meantime, Attorney General Mark Herring has instructed Clerks of Circuit Courts ("clerks") in the Commonwealth of Virginia to begin issuing marriage licenses to same-sex couples.¹ Some clerks might believe that they face a serious dilemma: either resign their positions or violate their sincerely held religious or moral beliefs about marriage by being forced to issue marriage licenses to relationships inconsistent with those beliefs. But clerks, as explained herein, can resolve this potential conflict.

Clerks are responsible for issuing marriage licenses. *See* VA. CODE ANN. § 20-14 (2014). But clerks whose sincere religious or moral beliefs prevent them from issuing marriage licenses to same-sex couples have the ability to appoint a deputy to perform that task. *See* VA. CODE ANN. § 20-14 (2014); VA. CODE ANN. § 15.2-1603 (2014). Furthermore, state law also provides that "[i]f from any cause neither the clerk nor his deputy is able to issue the license, it may be issued by the judge of the circuit court of such county, or city." VA. CODE ANN. § 20-14 (2014).

A clerk thus should appoint a deputy clerk with full authority to perform all acts necessary to issue, administer, or process the marriage licenses of same-sex couples should a conflict of conscience arise. And if no deputy clerk is available, the clerk should ask a judge of the circuit court. This should resolve the situation and facilitate the interests of all parties.

Should a clerk encounter resistance to their efforts to resolve a conflict, the First Amendment to the United States Constitution ensures that neither state nor county officials may impede clerks' free exercise of religion. The First Amendment prohibits any government officials from "penaliz[ing] or discriminat[ing] against individuals . . . because they hold [particular] religious views." *Sherbert v. Verner*, 374 U.S. 398, 402 (1963); *accord Employment Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 877 (1990) (the First Amendment

¹ *See* <http://www.oag.state.va.us/index.php/component/content/article?id=341> (last visited Oct. 7, 2014).



prohibits the government from “impos[ing] special disabilities on the basis of religious views”). Additionally, Virginia law provides that “no government entity shall substantially burden a person’s free exercise of religion even if the burden results from a rule of general applicability . . .” VA. CODE ANN. § 57-2.02 (2014). And given that state law already prescribes other means for clerks to ensure that parties seeking marriage licenses receive them, government officials may not prevent a clerk’s reasonable and legitimate effort to resolve his or her limited conflict. Indeed, a refusal by the Commonwealth of Virginia and its government subdivisions to protect a clerk who refuses to issue a marriage license in violation of his or her conscience suggests an unconstitutional discriminatory intent.²

In addition, ensuring that clerks are not forced to issue licenses contrary to their conscience is consistent with Title VII’s requirements that employers, including governmental employers, must reasonably accommodate the religious beliefs or practices of their employees.³ In other words, an employer must make reasonable adjustments to the work environment, or to the employee’s job requirements, to ensure that the employee’s ability to maintain his or her religious conscience remains unimpeded. Clerks are certainly no exception to this rule.

If clerks face legal difficulties regarding their duties as they pertain to issuing marriage licenses, and would like legal advice in resolving their conflict, please contact Alliance Defending Freedom at 1-800-835-5233. All such calls are strictly confidential and protected by the attorney/client privilege even if Alliance Defending Freedom is not hired to represent the caller.

² See *Fraternal Order of Police v. City of Newark*, 170 F.3d 359 (3d Cir. 1999).

³ See Civil Rights Act of 1964, 42 U.S.C. § 2000e(j) (2012). See also *E.E.O.C. v. Ithaca Indus., Inc.*, 849 F.2d 116 (4th Cir. 1988) (Court found that employer's failure to attempt to accommodate employee was a violation of Title VII.); *Chalmers v. Tulon Co. of Richmond*, 101 F.3d 1012, 1018 (4th Cir. 1996) (“[A]n employer must, to an extent, actively attempt to accommodate an employee’s religious expression or conduct even if, absent the religious motivation, the employee’s conduct would supply a legitimate ground for discharge.”); and *E.E.O.C. v. Firestone Fibers & Textiles, Co.*, 515 F.3d 307, 312 (4th Cir. 2008) (Court stated that employer has a “statutory obligation to make reasonable accommodation for the religious observances of its employees.” (quoting *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 75 (1977))).