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Two Months after Same-Sex Marriages Held Constitutional, Where are the Courts Headed on the Unanswered Questions?

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On June 26, 2015, the United States Supreme Court issued its monumental decision in *Obergefell, et al. v. Hodges, et al.*; Case No. 14-556, holding that state bans of same-sex marriages are unconstitutional. Specifically, the Court found that the Fourteenth Amendment requires every state to issue marriage licenses to same-sex couples and requires each state to give full faith and credit to same-sex marriages performed in another state. The Court, however, noted:

[R]eligions, and those who adhere to religious doctrines, may continue to advocate with utmost, sincere conviction that, by divine precepts, same-sex marriage should not be condoned. The First Amendment ensures that religious organizations and persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths, and to their own deep aspirations to continue the family structure they have long revered. ... The Constitution, however, does not permit the State to bar same-sex couples from marriage on the same terms as accorded to couples of the opposite sex.

While recognizing this religious opposition to same-sex marriage, the Court left open additional questions. For example, may state clerks refuse to issue same-sex marriage licenses? May state court judges refuse to marry same-sex couples? Can business owners refuse to provide services to same-sex couples? Are state bans preventing same-sex couples from adopting now unconstitutional? Is sexual orientation now a protected category in employment decisions? In less than two months, there have been cases filed and guidance issued at both a federal and state level that will address these issues. And, if the tide continues as we have seen this summer, same-sex couples are on their way to having all rights enjoyed by heterosexual couples, and sexual orientation will be (if it is not already) a protected category.

May States Refuse to Marry Same-Sex Couples?

Similar to corporations, a governmental agency may only act through its people. When it comes to issuing marriage licenses, State offices typically operate through clerks. Once the *Obergefell* opinion was handed down, legal scholars surmised that clerks would have to issue same-sex marriage. Unhappy with that prospect, some clerks resigned and others have simply refused to issue the license. For example, in Mississippi on June 30, Grenada County Circuit Clerk Linda Barnette resigned after 24 years, stating "I choose to obey God rather than man." Similarly, two candidates for Circuit Clerk positions, Jay Jernigan of Lamar County, Mississippi, and Mike Lott of Forrest County, Mississippi, withdrew from their respective elections, again citing same-sex marriage as the motivating reason. As of August 13, 2015, Kim Davis, Clerk in Rowan County, Kentucky, has refused to issue all marriage licenses, despite a direct order to do so from Kentucky Governor Steven L. Beshear and Judge David L. Bunning of the United States District Court for the Eastern District of Kentucky.

And there are judges who have also failed in their duty to follow the law of the Supreme Court. In Alabama, State Supreme Court Justice Roy Moore ordered the probate judges of that state to withhold same-sex marriage licenses, in violation of a federal court order.

Moreover, state court judges have refused to perform same-sex marriages, and some have stopped performing any and all weddings. Addressing this issue, on August 7, 2015, the Ohio Supreme Court's Board of Professional Conduct issued an ethics opinion. Per the opinion, judges who refuse to perform same-sex marriages, but continue to perform traditional marriages, are violating their obligations to comply with the law. Moreover:

A judge who takes the position that he or she will discontinue performing all marriages, in order to avoid marrying same-sex couples based on his or her personal, moral, or religious beliefs, may be interpreted as manifesting an improper bias or prejudice toward a particular class. The judge's decision also may raise reasonable questions about his or her impartiality in legal proceedings where sexual orientation is at issue and consequently would require disqualification

Ohio Ethics Op. 2015-1. Time will tell as to whether state clerks and judges will remember their duty to follow the law above personal beliefs.

Can a business refuse services to same-sex couples?

On August 13, 2015, the Colorado Court of Appeals ruled that Colorado's anti-discrimination law prevents a Denver baker who refused to make a cake for a gay couple, citing his religious beliefs, "from picking and choosing customers based on their sexual orientation." That decision may be appealed to the Colorado Supreme Court and beyond. However, it brings an important point of discussion to the table. Will public accommodations laws trump religious freedom laws?

Harking back to the days of the Civil Rights Era, the answer is most likely yes. And while business owners may have strongly held religious beliefs regarding homosexuality, acting on those beliefs in their business – for example, refusing to serve a same-sex couple at the lunch counter – is exposing the business to legal action.

Can same-sex couples adopt children?

Mississippi and multiple other states currently ban same-sex couples from adopting children. Mississippi has allowed a single, homosexual individual to adopt, but that right is not available once the individual weds. A lawsuit was filed in the United States District Court for the Southern District of Mississippi challenging the constitutionality of such a ban. In *Obergefell*, the Supreme Court, in justifying its support of same-sex marriage, stated:

[M]any same-sex couples provide loving and nurturing homes to their children, whether biological or adopted. And hundreds of thousands of children are presently being raised by such couples. ... Most States have allowed gays and lesbians to adopt, either as individuals or as couples, and many adopted and foster children have same-sex parents, see *id.*, at 5. This provides powerful confirmation from the law itself that gays and lesbians can create loving, supportive families.

Based upon this, and other language in the opinion, such adoption bans are likely to be declared unconstitutional.

Is sexual orientation protected in the workplace?

While the *Obergefell* opinion did not address rights in the workplace, the Equal Employment Opportunity Commission has taken the position that sexual orientation is indeed protected. The EEOC published "What You Should Know about EEOC and the Enforcement Protections for LGBT Workers" and "Fact Sheet on

Recent EEOC Litigation-Related Developments Regarding Coverage of LGBT-Related Discrimination under Title VII." Per the EEOC:

The Commission has instructed our investigators and attorneys that discrimination against an individual because that person is transgender is a violation of Title VII's prohibition of sex discrimination in employment. In addition, investigators and attorneys were instructed that lesbian, gay, and bisexual individuals may also bring valid Title VII sex discrimination claims, and the EEOC should accept charges alleging sexual-orientation-related discrimination.

Granted, this is only the opinion of the EEOC. However, courts have started to follow the EEOC's logic, and the EEOC is actively pursuing court action to have its guidance recognized as law. As such, businesses need to be extremely mindful of potential litigation, and owners should consider if they are willing to have their company names in the title of the seminal Supreme Court case that recognizes sexual orientation as a protected category.