Coates' Canons Blog: Magistrates and Same-sex Marriages

By Michael Crowell

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Last month when the federal courts opened the door to same-sex marriages in North Carolina there was a rush to courthouses, where magistrates are the only state officials authorized to perform marriage ceremonies. Some magistrates, because of their religious beliefs, resigned rather than marry same-sex couples. Are magistrates entitled to be excused from performing assigned duties when those duties conflict with their religious beliefs? It is a complicated and politically charged question. This post is an attempt to explain some of the legal issues involved. It expands on Shea Denning's earlier post on the School of Government's Criminal Law Blog.

There really are two questions. First, does current law entitle a magistrate to refuse to perform a duty of the office based on the magistrate's religious beliefs? The answer seems to be no, at least so far has we know from current case law, as discussed below. Second, should magistrates have such a right? You will have to answer that one yourself, but this blog post will try to point out some of the policy considerations to take into account when thinking about the answer.

The office of magistrate — When North Carolina reformed its courts in the 1960s, it eliminated justices of the peace and established a uniform statewide court system with district and superior courts. Magistrates are judicial officials of the district court and are the closest current equivalent to JPs. They are not required to be lawyers, but some are. Most are full time, some part time.

Unlike judges, who are elected, magistrates are appointed, for an initial term of two years and then subsequent terms, if reappointed, of four years. The county clerk of court nominates candidates to the senior resident superior court judge who then appoints. Once appointed, magistrates are supervised and assigned duties by the chief district court judge. The number of magistrates by county ranges from two to 26. Most magistrates' offices are in the county seats but some are in outlying towns.

Magistrates issue arrest and search warrants and set bail. They also can accept waivers of trial and impose fines for certain minor offenses, pursuant to directions of the chief district judge. When assigned by the chief district judge they may hear civil small claims cases involving up to $10,000. And, of course, they may perform marriages — the only judicial officials, and indeed the only public officials in the state, who may do so.

A magistrate's rights — A magistrate who has a religious objection to same-sex marriage might claim two different rights to refuse to perform the ceremony. The first would be a constitutional right under the First Amendment and the second is a statutory right under Title VII of the federal Civil Rights Act of 1964.

The constitutional right argument would be that the failure to accommodate the magistrate's religiously motivated objection violates the magistrate's right to free exercise of religion. If I am compelled to perform a ceremony that my religion says is wrong, I am being denied the right to freely exercise my religion. In *Employment Division v. Smith*, 494 U.S. 872 (1990), however, the United States Supreme Court held that religious beliefs do not excuse a public official from complying with a valid, uniformly applied, non-discriminatory law. Oregon had denied unemployment benefits to a worker who asserted a religious basis for using peyote. He had ingested the illegal drug, was fired from his job with a rehabilitation clinic, and was denied unemployment benefits because his dismissal was based on misconduct. The Supreme Court upheld Oregon's action, saying that excusing Smith from the valid drug and unemployment laws because of his religious beliefs about peyote would "permit every citizen to become a law unto himself."

The *Smith* reasoning has been applied to law enforcement officers who wanted to be excused from particular assignments for religious reasons. FBI agent John Ryan of Peoria, Illinois, for example, said that his Roman Catholic faith barred him from investigating antiwar activists. Based on *Smith*, the federal Seventh Circuit Court of Appeals rejected his First Amendment exercise of religion argument out of hand in *Ryan v. U.S. Dept. of Justice*, 950 F.2d 458 (7th Cir. 1991). For a

similar result see *Parrott v. District of Columbia*, 1991 WL 126020, 58 Empl. Prac. Dec. P 41,369 (U.S. Dist. Ct., D.C. 1991). There the federal district court denied a District of Columbia police sergeant's claim of a constitutional right to be excused from arresting anti-abortion demonstrators.

The North Carolina Constitution has its own free exercise provision. Article I, Section 13 is worded differently than the First Amendment, but there is no case law to suggest that it offers any greater right. The state supreme court said in *In re Williams*, 269 N.C. 68 (1967), that the state's prohibition on interference with "the rights of conscience" is no broader that the federal right to exercise one's religion. In *Williams* the court found that effective operation of the courts was a compelling state interest to require a minister to testify in a criminal prosecution involving members of his church, despite his assertion that his religious obligations prohibited him from being a witness.

Although the gay marriage issue has been percolating for more than a decade now, and magistrates and JPs in other states that preceded North Carolina likewise have declared a conflict with their religious views, there do not appear to be any court decisions saying that a judicial official's First Amendment rights require exemption from performing the duties of the office.

Title VII — Title VII is a part of the federal Civil Rights Act of 1964 that prohibits discrimination in employment based on religion and other specified grounds. In a nutshell an employee protected by Title VII is entitled to a reasonable accommodation of the employee's religious beliefs if such accommodation would not impose an undue hardship on the employer. So, if an employee's faith says not to work on the Sabbath, and the employer has another shift to which to move the employee without causing undue hardship on other employees or on the company's work schedule, the employee is entitled to the accommodation.

The initial question under Title VII is whether magistrates are employees covered by the act. They may not be. The statute defines an employee as "an individual employed by an employer" and excludes only elected officials, their personal staff, immediate legal advisors — or "an appointee on the policy making level." One might not normally think of a judge or magistrate as being on a "policy making level," but that is the holding of several recent federal district court decisions in South Carolina.

In *Spann-Wilder v. City of North Charleston*, 2010 WL 3222235 (US. Dist. Ct., S.C., Aug. 13, 2010), *Nowlin v. Lake City*, 2012 WL 831492 (U.S. Dist. Ct., S.C., Mar. 12, 2012), and *Burgess v. City of Lake City*, 2013 WL 4056315 (U.S. Dist. Ct., S.C., Aug. 12, 2013), three different federal judges held that appointed municipal court judges are not protected by Title VII because they are appointees in policy making positions. Building on the U.S. Supreme Court decision in *Gregory v. Ashcroft*, 501 U.S. 452 (1991), that judges are exempt from federal age discrimination law because they are at a policy making level, and similar holdings about judges in other lower federal courts, the South Carolina courts decided that the policy-making exemption was intended to embrace judges who exercise discretion concerning issues of public policy in a manner similar to policy-making appointees in the other branches of government.

The municipal court judges described in the South Carolina cases sound a good bit like North Carolina's magistrates, though it appears that the South Carolina officials have a somewhat wider jurisdiction to hear and decide lower-level criminal cases. A federal court in North Carolina might well follow the South Carolina lead and conclude that our magistrates are not covered by Title VII.

Even if magistrates are covered by Title VII, the question remains whether their religious beliefs must be accommodated. The most relevant cases on the issue would seem to be those involving law enforcement officers — clearly covered by Title VII — who wish to be exempted from certain duties because of religious objections. Of the few such cases, including a couple already mentioned above for their constitutional claims, the decisions generally have turned on whether the agency offered a reasonable accommodation, but several have questioned whether accommodation should even be discussed for law enforcement officers.

The most prominent statement of this view is the concurring opinion of the respected conservative chief judge of the federal Seventh Circuit Court of Appeals, Richard Posner, in *Rodriquez v. City of Chicago*, 156 F.3d 771 (7th Cir. 1998). A city police officer claimed a Title VII violation in requiring him to stand guard outside an abortion clinic despite his religious objections to abortion. The court decided that the accommodation offered by the city was sufficient, and Posner concurred, but he went on to say that the court should have made a broader decision. Posner wrote that a police department should never have to accommodate an officer who wished to use religion to be excused from protecting someone. To do so

would so undermine public confidence in law enforcement that it always would be an undue hardship on the department to grant an accommodation. For both police and fire fighters, he said, the hardship would be "the loss of public confidence in governmental protective services if the public knows that its protectors are at liberty to pick and choose whom to protect."

The same sentiment is expressed in *Endres v. Indiana State Police*, 349 F.3d 922 (7th Cir. 2003), where an officer did not want to be assigned to duty at a casino. The court compared law enforcement officers to judges:

> Beyond all this is the need to hold law enforcement officers to their promise to enforce the law without favoritism — as judges take an oath to enforce *all* laws, without regard to their (or the litigants') social, political, or religious beliefs. Firefighters must extinguish all fires, even those in places of worship that the firefighter regards as heretical. Just so with police. — 349 F.3d at 927.

The notion that the nature of the work of law enforcement agencies and judges requires these officials to perform their duties without regard to their individual beliefs is also expressed in the *Parrott v. District of Columbia* case mentioned above and in *Brady v. Dean*, 173 Vt. 542 (2001) (when town clerks expressed religious objections to issuing same-sex civil union licenses).

As with the constitutional claims of public officials who object to performing their duties related to same-sex marriages, there do not appear to be any court decisions clearly recognizing a Title VII right for magistrates. It is not certain that magistrates are even covered by Title VII and, if they are, the need to accommodate them, as the public face of the court system, may not be the same as for other employees.

Judicial ethics — An additional consideration for magistrates is the ethics of their office. Magistrates take the same oath as judges — including the duty to "faithfully and impartially discharge all the duties" of the office — and are subject to the same Code of Judicial Conduct.

The code requires judges to avoid bias and the appearance of bias and to act at all times in a manner that promotes public confidence in their independence, integrity and impartiality. The Commission on Judicial Conduct for Washington applied comparable provisions in that state's code and admonished a judge for saying he would be uncomfortable performing same-sex marriages and asking his colleagues to take his place for such marriages. Counsel for the Pennsylvania Judicial Conduct Board has advised judges that decisions to refuse to perform same-sex marriages could result in claims of judicial misconduct, and that a decision to not perform any marriages at all because of the objection to same-sex marriages could be interpreted as bias against homosexuals as a class, prompting recusal issues. The New York Advisory Committee on Judicial Ethics in 2011 said, in essence, it was not ready to answer such questions.

Should magistrates be allowed to refuse to perform same-sex marriages? — As already discussed, it does not appear that current law gives magistrates a constitutional or statutory right to refuse to perform their duty of officiating marriages based on their religious objections. It may also be that refusal violates the Code of Judicial Conduct to which they are subject. That leaves the question of whether the law ought to say that magistrates may refuse that duty if it conflicts with a sincerely held religious belief.

Freedom of religion is a fundamental right. We start with the premise that all citizens should be able to exercise their own religious beliefs, and that the state ought not interfere with such exercise. These are important principles. Deciding how to apply them in this particular context is unusually difficult, however.

First, there is the nature of the judicial system and its dependence on public confidence in its fairness and lack of bias. As expressed by Judge Posner and the Code of Judicial Conduct, it is important that the officers of some public institutions appear to always put their personal beliefs aside. As the only public officials in North Carolina empowered to perform marriage ceremonies, magistrates are the public face of the court system in this instance. Along the same lines, accommodating a magistrate in this circumstance might be seen as something different than the usual religious accommodation. Usually, accommodation simply allows individuals to satisfy their only beliefs without affecting the rights of others. Here, though, it might be said that the accommodation of magistrates would result in discrimination against others. And it might be said that allowing a public official to opt out of performing a duty because the affected citizens' sexual orientation appears to be governmental endorsement of discrimination. Weighing these considerations against a magistrate's right to exercise his religious beliefs raises difficult public policy questions.

Finally, there is a practical consideration. It would seem to be a considerable challenge to draft legislation that excuses

magistrates in this one circumstance but does not open the door to other questions. Would magistrates also be entitled to not issue warrants in domestic violence cases involving same-sex couples? What if the religious objection is to something other than same-sex marriages? Perhaps the magistrate's beliefs are based on the citizen being Muslim or Jewish or atheist. And what about other officials and other matters involving same-sex couples, like the clerks of court who deal with adoptions? It may be that a very good legislative drafter can craft something that keeps the issue under control, but it appears to be a daunting task.

Links

- nccriminallaw.sog.unc.edu/goin-to-the-courthouse-and-were-gonna-get-married/
- www.cjc.state.wa.us/Case%20Material/2013/7251%20Tabor%20Stip%20FINAL.pdf
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