# Coates' Canons Blog: What Effect Do the North Carolina Marriage Case Orders Have on Local Government Employers?

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As a result of rulings by two federal district court judges that North Carolina's ban on same-sex marriage is unconstitutional, North Carolina local government employers may now recognize same-sex marriages performed within North Carolina or outside of North Carolina for employee benefits purposes.

**Background**

Following the passage of Amendment One, which constitutionalized North Carolina's statutory prohibition of same-sex marriage, three cases challenging the North Carolina same-sex marriage ban were brought in federal court in North Carolina, one in the Western District of North Carolina and two in the Middle District (North Carolina has three federal judicial districts – the third is the Eastern District).

***Judge Cogburn's Order***

On Friday, October 10th, U.S. District Court Judge Max Cogburn issued a ruling in the Western District case, General Synod of The United Church of Christ v. Reisinger. Judge Cogburn found that Article IV, Section 6 of the North Carolina Constitution (Amendment One), North Carolina General Statutes § 51-1, which defines marriage as being between a man and a woman, § 51-1.2, which prohibits recognition of same-sex marriage in other states, and all sources of state law that prohibit same-sex marriage or its recognition are unconstitutional under the Due Process and Equal Protection Clauses of the 14th Amendment to the U.S. Constitution. Judge Cogburn expressly relied on the federal Fourth Circuit Court of Appeal's decision in Bostic v. Shaefer, which found Virginia's substantially similar constitutional and statutory provisions unconstitutional. (The U.S. Supreme Court declined to hear Virginia's appeal of the Bostic decision last Monday).

***Judge Osteen's Orders***

On Tuesday, October 14th, U.S. District Court Judge William Osteen issued two rulings in the two Middle District cases, Fisher-Borne v. Smith and Gerber v. Cooper. In the first ruling, which applied to both cases, Judge Osteen granted motions to intervene filed by Thom Tillis and Phil Berger, Speaker of the North Carolina House and President Pro Tem of the North Carolina Senate. The order allows them to intervene in these cases for the purpose of appealing a finding that the Bostic decision applies to North Carolina.

Judge Osteen's second ruling held, like Judge Cogburn's ruling, that in light of the Bostic decision, Article IV, Section 6 of the North Carolina Constitution (Amendment One), and North Carolina General Statutes §§ 51-1 and 51-2 are unconstitutional under the Due Process and Equal Protection Clauses of the U.S. Constitution. Judge Osteen found "no substantive distinction" between the constitutional and statutory provisions of the North Carolina same-sex marriage ban and the Virginia constitutional and statutory provisions at issue in Bostic. As Judge Osteen explained on page 9 of his decision on the Tillis and Berger motion to intervene, "The Court of Appeals for the Fourth Circuit can overrule Bostic, but absent "special justification," which is not present here, this court cannot." Judge Osteen enjoined "the State of North Carolina, the Attorney General, and all officers, agents, and employees of the State of North Carolina" from enforcing any constitutional or statutory provision prohibiting same-sex marriage in North Carolina or prohibiting recognition of a lawful out-of-state same-sex marriage.

**Where does all of this leave North Carolina local government employers?**

In my opinion, the effect of Judge Cogburn's and Judge Osteen's decisions is to require cities, counties and other local government entities to offer the same-sex spouses of their employees the same benefits that they offer opposite-sex spouses of employees. Unless and until the Fourth Circuit issues a stay temporarily enjoining enforcement of Judge Osteen's order, or the Fourth Circuit or the U.S. Supreme Court hold that North Carolina's ban on same-sex marriage is constitutional (all of which are theoretically possible if Mr. Tillis and Mr. Berger appeal Judge Osteen's order, as they have indicated they will do), Judge Cogburn's and Judge Osteen's orders represent the law with respect to same-sex marriage in North Carolina. Employers who fail to extend the same benefits to same-sex spouses as they do opposite-sex spouses risk being sued by their employees.

Lawyers do occasionally disagree, however. Some city and county attorneys may not think that local government employers should take any action until either the deadline for appealing Judge Cogburn's and Judge Osteen's decisions has passed or, if an appeal is filed, until the Fourth Circuit or U.S. Supreme Court rules on whether the Bostic decision applies to North Carolina. *No North Carolina government employer should add the same-sex spouses of its employees into its benefit programs without first consulting with its own lawyers.*

**How Particular Employee Benefits Will Be Affected by the Marriage Rulings**

***Health Insurance Benefits***

Local government employers must now offer employees' same-sex spouses coverage in their organization's group health plans, if the health plan provides for coverage of spouses, and in any other insurance benefit plan. The Affordable Care Act requires employers who offer health insurance coverage to include the dependent children (up to age 26) of its employees in its offer of coverage, but does *not* require employers to offer spousal coverage. *An employer who offers spousal coverage, however, may no longer discriminate between opposite-sex and same-sex spouses. For a local government employer to discriminate on that basis would itself be a violation of the Equal Protection Clause and would be open to challenge under the provisions of Title VII that prohibit discrimination on the basis of sex in the terms and conditions of employment, including benefits. This is true notwithstanding the terms of the local government employer's contract with its health insurer.* Local governments that offer spousal coverage will either need to amend the terms of their insurance contracts to include same-sex spouses, if they are not included under the contract's current terms, or risk being sued.

***Federal Tax-Favored Benefits***

Local government employers should already be allowing their employees to include same-sex spouses wed in other states in flexible spending plans, premium conversion plans, health savings accounts and health reimbursement accounts. After the U.S. Supreme Court's 2013 decision in U.S. v. Windsor, which struck down the federal Defense of Marriage Act as unconstitutional, the Internal Revenue Service changed its definition of the terms "spouse," "husband," "wife" and "marriage" by looking to the law of the state of celebration (the state where the employee entered into a legally-recognized marriage), rather than to the law of the state of domicile (the state where the employee lives) for determining whether or not the spouse in a same-sex marriage qualifies for treatment as a spouse for federal tax purposes. This change also applied to the treatment of same-sex spouses in tax-qualified retirement plans like the Local Governmental Employee Retirement System (LGERS) and the North Carolina 401(k) plan. As a result of the court orders invalidating North Carolina's prohibition on same-sex marriage, employees must now also be allowed to include same-sex spouses that they have married here in North Carolina in their federally tax-favored health spending and retirement accounts.

***Family and Medical Leave Act***

The marriage case rulings will also have an important effect on local government employees' entitlement to FMLA leave. The federal Family and Medical Leave Act defines the term "spouse" as meaning "a husband or wife, as the case may be." The U.S. Department of Labor's FMLA regulations define the term "spouse" as meaning "a husband or wife as defined or recognized under State law for purposes of marriage in the State where the employee resides, including common law marriage in States where it is recognized." This means that effective immediately, North Carolina local government employees are entitled to FMLA leave to care for the serious health condition of a same-sex spouse as same-sex

marriage may now be recognized in North Carolina. The U.S. Department of Labor is in the process of amending its regulations to define the term “spouse” by reference to the state of celebration rather than the state of domicile, but same-sex spouses in North Carolina local government employment no longer need wait for DOL’s final rule to be issued.

## Links

- docs.justia.com/cases/federal/district-courts/north-carolina/ncwdce/3:2014cv00213/74940/121
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- www.scribd.com/doc/242996690/1-12-cv-00589-134
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