



NORTH CAROLINA  
ADMINISTRATIVE OFFICE  
*of the* COURTS

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November 5, 2014

Senator Phil Berger  
North Carolina Senate  
16 W. Jones St., Room 2008  
Raleigh, NC 27601-2808

Re: Your letter of October 24, 2014

Dear Senator Berger:

Your letter of Friday, October 24, 2014, suggested that I revise the Memorandum on Same-sex Marriages distributed by the North Carolina Administrative Office of the Courts to court officials on the consequences for magistrates of the federal same sex marriage court orders. You asserted that our guidance caused confusion and violated Title VII's protections of religion in the workplace, and that we are required to make reasonable accommodations to judicial officials as employees. In my initial reply I promised to review the legal authorities you cited, but cautioned that this is a complex area of the law.

Unfortunately, within minutes of the electronic transmission to me your letter was picked up by news media. I am concerned that the widespread publicity may have misled magistrates as to their legal rights and remedies and that some may have relied to their detriment on its representations. This letter serves to address the legal authorities you cited in your letter and clarify why the memorandum accurately represented the responsibilities of judicial officials regarding same-sex marriages.

I am concerned that reliance by our magistrates upon Title VII of the Civil Rights Act or any other federal acts with identical definitions of covered employees is misplaced. The question of whether appointed judicial officials were included in the protections of those statutes was addressed in *Gregory v. Ashcroft*, 501 U.S. 452 (1991). That case is a U.S. Supreme Court decision specifically excluding appointed state judicial officials acting in their official capacities from the definition of protected employees as defined in the federal Age Discrimination in Employment Act (ADEA). That act has the same definition of covered employees (29 U.S.C.A § 630(f)) as that appearing in Title VII (42 U.S.C.A. § 2000e(f)). *Ashcroft* reviews the legislative history of Title VII, the federal act that requires "reasonable accommodation" of religious convictions as a protection. By excluding appointed state judicial officials entirely, there is no such federal legislation that provides a sanctuary for our magistrates in the exercise of their official powers. I have found nothing in the legal authorities construing GERA referenced in your footnote that would provide any protections to magistrates acting in their official capacity who refuse to equally administer same-sex marriages based upon their religious beliefs. An attempt to distinguish appointed magistrates from this Title VII exclusion failed recently in *Nowlin v. Lake City*, a 2012 federal district court ruling out

of South Carolina. None of the cases cited in your letter addressed judicial officials. Any magistrate relying on the letter expecting relief from the EEOC under Title VII needs to be aware that none of the cases provide coverage of judicial officials acting in their official capacities.

It is important to note that our guidance must be read in the context of federal court injunctions binding on the courts and all the judicial officials in North Carolina. Two U.S. District Court Judges explicitly ordered that we immediately begin complying with the rulings. The injunctive portion of Judge Osteen's order directed us as follows:

***IT IS FURTHER ORDERED*** that the State of North Carolina, the Attorney General, and all officers, agents, and employees of the State of North Carolina are hereby **ENJOINED** from implementing or enforcing any provisions of North Carolina Cons. Art XIV, § 6, N.C. Gen. Stat. § 51-1, and N.C. Gen. Stat. § 51-2 which prevent same-sex couples from marrying and prohibit the State of North Carolina from recognizing same-sex couples' lawful out-of-state marriages.

All "officers, agents, and employees" includes magistrates acting in their official capacities as well as the Administrative Office of the Courts. If an official cannot rely on the same-sex marriage amendment that the courts declared unconstitutional or the associated statutes as a basis for treating citizens differently who appear before them with a valid marriage license, then they must treat all such citizens equally. Administering this change in the law posed a serious challenge, especially in the forty-nine counties now staffed with only three or four magistrates who are expected to provide service to the public and law enforcement around the clock. All of these counties have only one magistrate on duty for extended periods of time. We recognize that the statutory powers and duties of magistrates are entirely within the province of the legislature. While I agree that it is arguable that a magistrate may not be *required* by statute to officiate over marriages since the statute (G.S. 7A-292) speaks in terms of "*additional powers*" rather than "duties," the law is now clear that any magistrate who does officiate over marriages must comply with the court rulings mandating equal treatment as to same-sex marriages. Since no stays have been issued in either of the federal cases, the federal injunction must be given effect across the state as long as magistrates perform marriages.

As to the case of *Conde-Vidal v. Garcia-Padilla* from Puerto Rico that one of the senators has brought to my attention, if the two U.S. District Court Judges who heard the North Carolina cases had ruled similarly, we would not have this issue. The legal arguments forming the basis for the decision by the judge in Puerto Rico were presented to Judges Cogburn and Osteen, and were rejected. In fact, Judge Osteen explicitly ordered that our courts immediately begin complying with the rulings, holding that a denial by our state officers of the right to marriage by same-sex couples was a denial of their constitutional rights to due process and equal protection.

Our memorandum to magistrates and all court officials who nominate, appoint, and supervise magistrates was in response to a series of specific inquiries from our court officials, including specific questions about potential consequences. While many state officials may desire to provide protection and accommodation to our magistrates who would prefer not to comply with the court order because of religious convictions, our magistrates need to be aware of the potential consequences for failure to comply with the injunction and follow the law. This is especially important in this area since federal constitutional law would be applied in any civil action filed in the federal courts alleging denials of due process and equal protection, and our magistrates may risk personal liability in such a case.

I want to assure you and all of the people of our state that I respect our magistrates who hold sincere and deep religious beliefs that have placed them in conflict with the duties of their appointed judicial office. Those who have resigned demonstrated their thoughtful choices in resolving their moral dilemmas. At the same time, other magistrates with equally sincere and deep religious beliefs recognize a quite clear distinction between marriage as a civil ceremony conferring legal status, and marriage as a religious institution quite apart from temporal concerns. One chief magistrate who is also an ordained minister wrote to me the following message immediately after the publication of the federal court decisions and the NCAOC memorandum and has urged me to communicate his analysis in the hope that it might be helpful to those facing the issue:

*Hon. Judge Smith, Director:*

*As an ordained minister and chief magistrate, I have given much consideration to the question of same-sex marriage long before it became the law in North Carolina. I think I have reached a reasonable conclusion that should satisfy the concerns of most concerned parties. I offer the following for your consideration and use as you see fit.*

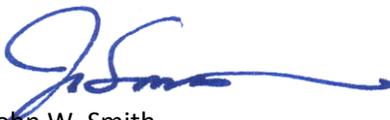
*Should magistrates be required to either quit their jobs or violate their conscience in being forced to marry people of the same gender? It is a matter of Church vs. State, and in this area the Scriptures give us guidance. Jesus said, "Render unto Caesar that which is Caesar's and unto God that which is Gods" (Matthew 22:21). Civil marriage is an act of the State. Same-sex marriage, like the coins that were struck with the graven image of Caesar – a violation of the 2nd Commandment but necessary for the Jews of that day to use to engage in commerce and survive in their secular culture – belongs to the State. Holy matrimony still belongs to the Church. Magistrates are not ministers, so let's not confuse the two. Same-sex marriage is a function of the courts performed by a judicial magistrate who has sworn an oath of office to uphold the laws of the State. Holy marriage, the sacred union of a man and a woman, remains a sacrament of the Church performed by an ordained minister who has pledged a vow of holiness unto the Lord. Civil marriage and Holy matrimony are not the same even though semantically they use the same word.*

*While moralistic, I hope this does not come across as too judgmental. Hope this helps!*

*Chief Magistrate of District Court  
21st Judicial District/Forsyth Co.*

Many others have seen clearly the dilemma that this recent and sudden change in our law creates, and have made hard decisions as they resolve the inherent conflict that confronts them. Our magistrates swear that they will “support the Constitution of the United States” before they are allowed to take their office. Whether we agree or disagree with the holdings, the courts have defined the scope of due process and equal protection under the Constitution of the United States on this issue. Unless and until those holdings are stayed, modified, or reversed, our magistrates are affirmatively bound by those rulings in exercising their official powers. We will continue to monitor this area of the law and remain prepared to administer any legislative changes in the duties and powers of our magistrates.

Very truly yours,



John W. Smith