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## When Firmly Held Religious Beliefs Conflict With the Right to Wedded Bliss

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CONSIDER the following hypothetical situation:

Mark is an employee at the local county clerk's office. After last month's landmark California Supreme Court decision on same-sex marriage was issued, Mark told his supervisor that he had a religious objection to same-sex marriage and asked his supervisor for an exemption from certain job duties, including issuing marriage licenses and performing marriage ceremonies for same-sex couples. In addition, Mark has been vocal at work about his objection to same-sex marriage. He has asked coworkers about their beliefs and quoted scripture to them. Mark's gay coworker, Cynthia, has complained that Mark's behavior creates a discriminatory environment. Additionally, the county received a complaint from the public after Mark was heard discussing his beliefs in an area of the office open to the public.

Must the county offer Mark an accommodation based on his religious belief? May the county limit Mark's religious speech with regard to his coworkers and in areas open to the public?

## ***Same-Sex Couples' Right to Marry Under In re Marriage Cases***

This hypothetical highlights challenges faced by county clerks' offices across California since the historic ruling by the state Supreme Court in *In re Marriage Cases* on May 15, 2008, when a 4-3 majority decided that state statutes precluding same-sex marriage violate the California Constitution.<sup>1</sup>

The question before the court was whether the California Constitution prohibits a statutory scheme that expressly differentiates between the unions of same-sex and opposite-sex couples. The law afforded all of the significant legal rights and obligations to both types of unions but assigned a different name to

each: “marriage” for heterosexual couples and “domestic partnership” for same-sex couples.<sup>2</sup> In other words, gay and straight couples were “separate but equal.”

Recognizing marriage as a deeply rooted tradition in the state’s history, the court concluded that limiting same-sex couples to domestic partnerships impinged on their right to marry.<sup>3</sup> Specifically, this statutory scheme violated same-sex couples’ privacy and due process rights to marriage, and the guarantee of equal protection under the Constitution. The court determined that the state could neither demonstrate a compelling interest in maintaining this dichotomy, nor show that limiting marriage to heterosexual couples was necessary to preserve the institution of marriage.<sup>4</sup>

The court acknowledged that its decision challenged a predominate understanding of marriage as a union of a man and a woman,<sup>5</sup> but recognized that societal views can evolve. The court noted that for more than a century, California had prohibited marriages between individuals of different racial backgrounds.<sup>6</sup> And, in the “not-so-distant past,” the state maintained rules and practices that segregated minorities from public facilities and excluded women from holding certain occupations or sitting on juries.<sup>7</sup> These examples demonstrate that practices tolerated or even accepted by society “often mask an unfairness and inequality that frequently is not recognized or appreciated by those not directly harmed by those practices or traditions.”<sup>8</sup> Over time, what are accepted practices become intolerable.

And so, California became the second state to acknowledge a constitutional right for same-sex couples to marry.<sup>9</sup>

### ***How the Decision Affects County Employers***

When *In re Marriage Cases* was decided, controversy quickly ensued at counties across the state. The refusal by some employees to perform marriage ceremonies or issue marriage licenses to same-sex couples on religious grounds became fodder for the news media.<sup>10</sup> This article explores

the conflict between the right of employees to seek religious accommodation and the duty of employers to provide a non-discriminatory workplace to its employees and religious-neutral services to the public.

In our hypothetical example, the textbook analysis requires the county to engage in an interactive process to explore whether it can accommodate Mark’s specific request to be relieved of certain duties or provide some other accommodation. To determine whether a county should or

must fulfill an employee’s accommodation request, it is necessary to carefully balance the employee’s right to free exercise and enjoyment of religion with the government’s duties to uphold the constitutional right to marriage and not to entangle itself in religion. Because the county and its employees owe a specific duty to uphold the laws and California Constitution, we believe this traditional balancing tips strongly against accommodating the employee’s specific request to refuse to perform his or her job duties.

The county need not modify the employee’s job duties to allow him to accommodate his religious beliefs. Here, the county may make good-faith efforts to reasonably accommodate Mark in a religious-neutral manner, such as a transfer. While the county should permit the employee to exercise any generally available right to transfer to another available job, there is a strong question whether a county has a right to violate its own rules by permitting an employee to change jobs to avoid the county’s constitutional duty to license same-sex marriages. However, in the interest of avoiding becoming a “test case,” where the ability to accommodate through transfer exists, that may be a wise choice.

### ***Religious Accommodation in the Workplace — A Brief Overview***

Both the California and federal Constitutions protect freedom of religious expression.<sup>11</sup> In the context of employment, this freedom is also protected by Title VII of

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the Civil Rights Act of 1964, and by the California Fair Employment and Housing Act.<sup>12</sup> Both statutes make it unlawful for an employer to discriminate against an employee on the basis of religion. If an employee requests an accommodation based on religious beliefs, an employer must make good-faith efforts to reasonably accommodate that employee's religious beliefs and practices unless doing so would create an undue hardship.<sup>13</sup> Under Title VII, the Supreme Court has held that an undue hardship is one that presents more than a de minimis cost to the employer.<sup>14</sup> The FEHA, however, requires an employer to demonstrate that an accommodation would require "significant difficulty or expense" to prevent an undue hardship.<sup>15</sup> In California, under the FEHA, county employees may be held to a higher standard.

If the county declines to accommodate Mark, or offers an alternative he finds unacceptable, he may make a religious discrimination claim under the FEHA by alleging: (1) he holds a sincere religious belief; (2) the employer was aware of that belief; and (3) the belief conflicts with an employment requirement.<sup>16</sup>

For our hypothetical, we will assume that Mark met his initial burden<sup>17</sup> and the burden has shifted to the employer to establish either that (1) it made good faith efforts to accommodate Mark, or (2) it could not do so without suffering an undue hardship.<sup>18</sup> Some counties have declined to entertain requests like Mark's because they view such requests as discriminatory or possibly even unlawful, thereby constituting an undue hardship.<sup>19</sup> Other counties are willing to accommodate employees and have begun to determine what type of accommodation is appropriate.<sup>20</sup>

### ***County Likely Would Not Be Required to Exempt Employee From Certain Job Duties***

Mark asked to be excused from issuing marriage licenses and performing marriage ceremonies for same-sex couples

— essentially carving out those established responsibilities from his job. A court likely would conclude that Mark's requested accommodation is not required by law. Instead, an offer to transfer Mark out of the department that handles marriage may be sufficient. Moreover, agreeing to Mark's request would likely prevent the county from providing services in a religious-neutral manner, creating an undue burden on the employer.

In *Bruff v. North Mississippi Health Services*,<sup>21</sup> an employment counselor refused to discuss a client's homosexual relationship because it conflicted with the counselor's religious beliefs. Management met several times to consider whether an accommodation was feasible, but ultimately concluded that the counselor could not determine which patient issues to counsel in advance of an appointment and that accommodating the request would create an uneven distribution of work for other counselors.<sup>22</sup> Instead, the employer gave Bruff 30 days notice to find another position at the hospital.<sup>23</sup>

In *Shelton v. University of Medicine and Dentistry of New Jersey*,<sup>24</sup> the Third Circuit Court of Appeals confronted a deliveryroom nurse who refused to take part in emergency abortions, risking patients' health and safety. The employer determined that staffing shortages prevented it from accommodating assignment trades.<sup>25</sup> Instead, the hospital offered the nurse a lateral transfer to the newborn intensive care unit and invited her to contact the human resources department to identify other open nursing positions. Shelton did not accept the transfer and instead sued when she was terminated.<sup>26</sup>

Both courts held that the employers offered a sufficient reasonable accommodation and were not required to carve out job duties to suit the employees since doing so would create an undue hardship on the employer.<sup>27</sup>

The Seventh Circuit also has held that a city offered a reasonable accommodation to a police officer by giving him the opportunity to transfer to another unit rather than carving

### ***Agreeing to excuse the employee from issuing licenses could prevent the county from providing services in a religious-neutral manner.***

out certain duties. In *Rodriguez v. City of Chicago*,<sup>28</sup> a police officer requested to be relieved from guarding an abortion clinic. When the city offered a transfer instead of carving out those duties, the officer turned it down and brought suit. The majority opinion held that the city's attempt at accommodation was sufficient.<sup>29</sup>

Judge Richard Posner's concurring opinion in the *Rodriguez* case is notable. Although Posner agreed with the result, he asserted that the court should have decided the city was not required to offer the officer an accommodation because to offer an accommodation was itself an undue hardship. He wrote that safety officers should not be allowed "to recuse themselves from having to protect persons of whose activities they disapprove for religious (or any other) reasons."<sup>30</sup> Judge Posner emphasized the "importance of public confidence in the neutrality of its protectors," and reasoned that the need for public confidence should allow a public safety agency to claim undue hardship and "escape any duty of accommodation."<sup>31</sup>

Although a county clerk does not perform a public safety function, the importance of religious neutrality by government agencies that provide services to the public cannot be overlooked. Indeed, the county has an obligation to perform services in a religious-neutral manner and a right to "protect its own legitimate interests in performing its mission."<sup>32</sup> At a minimum, as in *Bruff* and *Shelton*, it would likely be unduly burdensome for our county to carve out Mark's duties, since there would be no way to determine in advance which members of the public he would be unable to serve. And under *Rodriguez*, our county may claim that to even entertain Mark's request for accommodation is unduly burdensome because, as discussed below, it would undermine public confidence that the county is meeting its Establishment Clause obligation to perform marriage services in a religious-neutral manner.

### ***The County Likely Must Explore Whether Other Reasonable Accommodations Can Be Offered***

Counties would be on solid ground if they refuse to carve out specific duties as an accommodation, and may have a reasonably strong argument that *any* accommodation would be unduly burdensome. However, our hypothetical county has decided it does not want to be the test case and opts to consider whether there are other reasonable accommodations it can offer.<sup>33</sup>

Under Title VII, an employer is not obligated to offer one reasonable accommodation over another, even if the employee has a preference. The Supreme Court held that Title VII directs that "*any* reasonable accommodation by the employer is sufficient to meet its accommodation obligation...."<sup>34</sup> The employer may consider the burden on other employees and the impact on the terms of a collective bargaining agreement if the accommodation were granted.<sup>35</sup> Under the FEHA, an employer must "explore" any reasonable available alternative.<sup>36</sup>

Whether a hardship exists will vary depending on "overall financial resources of the covered entity" and "type of operations, including the composition, structure, and functions of the workforce of the entity."<sup>37</sup> The two most common types of undue hardship are additional costs to accommodate the employee and the need for coworkers to shoulder part of the accommodated employee's workload.<sup>38</sup> Assuming that the county could carve out certain duties for Mark, it has determined that, as in *Bruff*, doing so would unduly burden other coworkers and the public. In addition, because our county is very small, there are no transfer opportunities for Mark at this time. The county plans to offer Mark 90 days to seek a transfer opportunity, consistent with its civil service rules.

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### ***Employer May Prohibit Workplace Expressions of Religious Opposition to Same-Sex Marriage***

During the time our county explored possible accommodations, it received two complaints about Mark's workplace conduct: one from a gay coworker and one from a member of the public. Both are offended by Mark's vocal religious objections to same-sex marriage. Mark has requested a further accommodation that he be allowed to express his religious objections to same-sex marriage, both to his coworkers and to members of the public.

The county has an obligation to provide a workplace free from discrimination in a religious-neutral manner.<sup>39</sup> The county also has a First Amendment Establishment Clause obligation to provide services in a religious-neutral manner and a right to "protect its own legitimate interests in performing its mission."<sup>40</sup> Now, in addition to Mark's right to freedom of religious expression, the county must address its competing constitutional rights to protect public employee speech and governmental neutrality.<sup>41</sup>

When the public employee's rights conflict with the public employer's rights and duties, a court will balance them pursuant to the *Pickering* test established by the United States Supreme Court.<sup>42</sup> When balancing Mark's right to freedom of speech as a public employee, the United States Supreme Court ruled in *Garcetti v. Ceballos* that the First Amendment only protects public employees' speech when they speak "as citizens" on "matters of public concern" and not when they speak "as employees" as part of their official job duties.<sup>43</sup> If a court concluded that Mark is speaking as an employee, his speech is not protected, and he has no competing right to balance against the rights of the county. But if a court concluded that Mark is speaking as a citizen, he would be afforded First Amendment protection. But the county can still refuse to accommodate Mark's speech, if it can demonstrate: (1) Mark's speech was expressed

pursuant to his official job duties; (2) on balance, under the *Pickering* test, the speech was unduly disruptive; or (3) the alleged adverse employer action was taken for a legitimate non-retaliatory reason not in response to the employee speech.<sup>44</sup>

Thirty days before the Supreme Court decided *Garcetti*, the Ninth Circuit Court of Appeals decided *Berry v. Department of Social Services*.<sup>45</sup> In *Berry*, the court applied the

*Pickering* balancing test and found in favor of the employer because of the risk of violating the Establishment Clause. In *Berry*, a Tehama County employee was prohibited from discussing religion with clients, prohibited from holding prayer meetings in a county conference room, and asked to remove visible religious items in his workspace.<sup>46</sup> *Berry* alleged that this violated his First Amendment right to free speech and expression. The court found in favor of the employer because the risk of an Establishment Clause violation based on the county's entanglement with religion outweighed *Berry's* free exercise claim. It also found, "it would be an undue hardship to require the Department to accept, or have to rebut, the inherent suggestion

of Department sponsorship that would arise..." by allowing this type of speech and expression.<sup>47</sup>

If Mark could demonstrate that his speech is not "as an employee" related to his official job duties, then the *Berry* analysis under the *Pickering* test is more appropriate.

In *Peterson v. Hewlett-Packard Co.*,<sup>48</sup> the Ninth Circuit Court of Appeals similarly held that a private employer did not need to accommodate Peterson's religious beliefs, which included posting biblical messages meant to discourage homosexuality. These messages were exhibited next to posters promoting tolerance of sexual orientation as part of the company's workplace diversity program. Analyzing this case under a failure-to-accommodate claim (without Establishment Clause implications), the court held that Title VII does not require the employer "to accommodate an

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employee's desire to impose his religious beliefs upon his co-workers."<sup>49</sup> While the court determined that the accommodation requested placed an undue hardship on the employer, it explained that the employer "must tolerate some degree of employee discomfort in the process of taking steps required by Title VII to correct the wrongs of discrimination."<sup>50</sup> But the employer need not tolerate behavior that will "demean or degrade" members of its workforce.<sup>51</sup>

Under these cases, the county likely has an obligation not to consider an accommodation that would unlawfully entangle the county in the promotion of a religious message, cause undue disruption, or create a high level of workplace discomfort amongst employees.

### **Conclusion**

The cases strongly suggest there is no need to accommodate by carving out marriage duties from Mark's current position. Employers who offer alternative accommodation to employees like Mark have flexibility to determine an appropriate religious accommodation and may consider a compromise that "eliminates the conflict between employment requirements and religious practices."<sup>52</sup> Accommodation likely will lead to different action in different counties. The California Fair Employment and Housing Commission has acknowledged the need for flexibility, and will consider the size of the employer facility, the number of employees, and the size of the budget. In the meantime, counties are within their rights to ensure a workplace free of discrimination and to ensure that services are provided to the public in a religious-neutral manner.

As California embarks on a new path that recognizes a same-sex couple's right to marry, the outcome for individuals seeking religious accommodations in the public workplace is just now being explored. Counties are on the frontline of this ruling, and will face challenges in balancing its duties under the Establishment Clause and Constitution with employees' religious freedom. County employers may place themselves at risk for accommodating an employee if that accommodation endorses unlawful discrimination against individuals or couples based on sexual orientation. Or

counties may face the risk of a religious discrimination suit by an employee alleging the county failed to consider his or her request for accommodation. Accordingly, counties should carefully consider how an accommodation request might affect both its internal and external operations. If a county makes a claim of undue hardship, it should be prepared to articulate what the hardship is and how it will specifically affect the county's ability to provide public services in a religious-neutral and lawful manner. \*

1 (2008) 43 Cal.4th 757.

2 *Id.* at 779-780.

3 *Id.* at 737, 783.

4 *Id.* at 784-785.

5 *Id.* at 853.

6 The Supreme Court of California outlawed the prohibition on interracial marriage in *Perez v. Sharp* (1948) 32 Cal.2d 711.

7 *In Re Marriage Cases*, *supra*, 43 Cal.4th at 854.

8 *Id.*

9 Massachusetts was the first state to find that its constitution prohibited limiting marriage to a union between a man and a woman in *Goodridge v. Dept. of Public Health* (2003) 440 Mass. 309.

10 Renaud, John-Paul, "California's county clerks' policies vary on same-sex marriages," *Los Angeles Times*, June 16, 2008; Tony Perry, Craig Gustafson, "14 County workers objected to services," *San Diego Union-Tribune*, June 19, 2008; "Clerk reassigns workers who object to gay marriage," *Los Angeles Times*, June 20, 2008.

11 The California Constitution provides, "Free exercise and enjoyment of religion without discrimination or preference are guaranteed." Cal. Const., Art. 1, Sec. 4. The U.S. Constitution precludes the passage of any law that prohibits the free exercise of religion. U.S. Const., Amendment 1.

12 Gov. Code Sec. 12940(a); 42 USC Sec. 2000e-e(a)(1).

13 Gov. Code Sec. 12940(a); 42 USC Sec. 2000e.

14 *Trans World Airlines, Inc. v. Hardison* (1977) 432 U.S. 63, 84.

15 Gov. Code Sec. 12926(s).

16 *California Fair Employment and Housing Comm. v. Gemini Aluminum Corp.* (2004) 122 Cal.App.4th 1004, 1011, 169 CPER 54; see also, *Opoku-Boateng v. State of California* (9th Cir. 1996) 95 F.3d 1461, 120 CPER 79 (third prong satisfied where employer threatened adverse action or subjected employee to discriminatory treatment). Under Title VII, a plaintiff is required to show: (1) he

had a bona fide religious belief; (2) the practice associated with the religious belief actually conflicted with the job requirements; (3) he informed the employer of the conflict; and (4) that, as a result of the conflict, the employer either failed to hire or terminated the employee or the employee felt forced to resign. *Balint v. Carson City, Nevada* (9th Cir. 1999) 180 F.3d 1047, 1050 (en banc), 137 CPER 62. The FEHA, unlike Title VII, does not require an adverse employment action; it merely requires that the employee's religious belief conflict with an employment requirement.

17 Courts in California have taken an expansive view of what constitutes a religion or a religious practice. The FEHA defines "religion" to include "all aspects of religious belief, observance and practice." Gov. Code Sec. 12926(o).

18 "Once the employee establishes a prima facie case with sufficient evidence of the three elements, the burden shifts to the employer to establish that 'it initiated good faith efforts to accommodate or no accommodation was possible without producing undue hardship. [Citations.]'" (*Soldinger v. Northwest Airlines, Inc.* (1996) 51 Cal.App.4th 345, 370, 58 Cal.Rptr.2d 747.) *FEHC v. Gemini Aluminum Corp., supra*, 122 Cal.App.4th 1004, 1011, 169 CPER 54.

19 Renaud, John-Paul, "California's county clerks' policies vary on same-sex marriages," *Los Angeles Times*, June 16, 2008.

20 *Id.*

21 *Bruff v. North Mississippi Health Services* (5th Cir. 2001) 244 F.3d 495, 498.

22 *Id.* at 497.

23 *Id.* at 502.

24 *Shelton v. University of Medicine and Dentistry of New Jersey* (D.N.J. 2000) 223 F.3d 220.

25 *Id.* at 223.

26 *Id.* at 224.

27 *Bruff, supra*, 244 F.3d at 502; *Shelton, supra*, 223 F.3d at 227-228.

28 *Rodriguez v. City of Chicago* (7th Cir. 1998) 156 F.3d 771.

29 *Id.*

30 *Id.* at 779.

31 *Id.*

32 *Berry v. Department of Social Services* (9th Cir. 2006) 447 F.3d 642, 648, 178 CPER 65, quoting *City of San Diego v. Roe* (2004)

543 U.S. 77, 170 CPER 48.

33 Under Title VII or the FEHA, a decision to flatly refuse any consideration of an accommodation could be problematic given that employers can refuse to accommodate "[o]nly if the employer can show that no accommodation would be possible without undue hardship."

34 *Ansonia Board of Education v. Philbrook* (1986) 479 U.S. 60, 107 S. Ct. 367 (emphasis added).

35 *Trans World Airlines, Inc. v. Hardison, supra*, 432 U.S. 63, 79-81; *Chalmers v. Tulon Co. of Richmond* (4th Cir.1996) 101 F.3d 1012, 1017-18; *Opuku-Boateng, supra*, 95 F.3d 1461, 1468, 130 CPER 29.

36 Gov. Code Sec. 12940 (j). To date, no California court has ruled on whether the duty to explore reasonable accommodations is greater under the FEHA than the de minimis standard under Title VII.

37 Gov. Code Sec. 12926(s.1-5).

38 Sakai, Charles, Erich Shiners and Genevieve Ng, "Religion in the Workplace: A Public Employer's Guide to Reasonably Accommodating Employee's Religious Practices," *2008 Bender's Calif. Lab. & Empl. Bull.* 224 (June 2008).

39 See Gov. Code Sec. 12940(a); 42 USC Sec. 2000e-e(a)(1).

40 *Berry v. Department of Social Services, supra*, 447 F.3d 642, 648, 178 CPER 65 (quoting *City of San Diego v. Roe, supra*, 543 U.S. 77, 170 CPER 48).

41 *Pickering v. Board of Education* (1968) 391 U.S. 563.

42 *Id.*

43 *Garcetti v. Ceballos* (2006) 547 U.S. 410, 180 CPER 13.

44 *Id.* at 424.

45 *Berry v. Department of Social Services, supra*, 447 F.3d at 648, 178 CPER 65.

46 *Id.* at 648-651.

47 *Id.* at 655.

48 *Peterson v. Hewlett-Packard Co.* (9th Cir. 2004) 358 F.3d 599, 164 CPER 77.

49 *Id.* at 607 (citing *Chalmers v. Tulon Co. of Richmond, supra*, 101 F.3d 1012, 1021).

50 *Id.*

51 *Id.* at 608.

52 *Ansonia Board of Education, supra*, 479 U.S. at 70.