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Federal Court Rules that Virginia's Laws Barring Same-Sex Marriage are Unconstitutional

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On February 13, 2014, in *Bostic v. Rainey*, Judge Arenda L. Wright Allen of the U.S. District Court for the Eastern District of Virginia ruled that any Virginia laws banning same-sex marriage or prohibiting recognition of same-sex marriages—including Article I, Section 15-A of the Virginia Constitution and Sections 20-45.2 and 20-45.3 of the Virginia Code—are unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment. If upheld, the ruling, in conjunction with the Supreme Court's decision in *Windsor v. United States*, means that Virginia employees who choose to marry a person of the same sex would now have the benefit of spousal status under both state and federal law for the purposes of medical plan coverage, 401(k) and retirement plans, and entitlement to leave under the Family and Medical Leave Act (FMLA).

Background to the Decision

In 1997, the Virginia legislature amended the Virginia Code to provide that "a marriage between persons of the same sex is prohibited" and that same-sex marriages from other states and jurisdictions "shall be void in all respects in Virginia," as well as "any contractual rights created by such marriage[s] . . ."

In 2004, in response to successful challenges to similar prohibitions against same-sex marriages in other states, Virginia's General Assembly proposed an amendment to the Virginia Constitution defining marriage as between one man and one woman, which was ratified by a majority of Virginia voters in 2006 and implemented as Article I, Section 15-A of the Virginia Constitution. The Virginia Legislature also adopted the Affirmation of Marriage Act in 2004, which provided that "A civil union, partnership contract or other arrangement between persons of the same sex purporting to bestow the privileges or obligations of marriage is prohibited."

In July 2013, two men who had been in a relationship for over 20 years, but were unable to obtain a marriage license, filed a complaint against, among others, the then Virginia governor and attorney general, pursuant to 42 U.S.C. § 1983. The complaint was later amended to add two women, also a couple of over 20 years, who were recently legally married in California. The women claimed they were aggrieved by an inability to have their California marriage recognized in Virginia, and therefore could not, among other things, obtain insurance coverage for each other under their respective employer-provided health insurance plans, or receive FMLA protections.

The plaintiffs filed their lawsuit less than a month after the Supreme Court issued the *Windsor* decision, ruling unconstitutional the section of the Defense of Marriage Act (DOMA) requiring federal laws to ignore same-sex marriages legally entered into under applicable state law. Notably, the *Windsor* decision struck down a section of DOMA that denied federal legal recognition of the marital status *granted* to same-sex couples in 12 states and the District of Columbia, but left open the question presented in *Bostic* of whether state laws banning same-sex marriages were unconstitutional. Just three weeks ago, Virginia's Attorney General and the State Registrar of Vital Records, who was also a named defendant, submitted a formal change in position in *Bostic*, abandoning their defense of Virginia's laws.[1]

What the Court Held

The court first addressed two preliminary challenges to the plaintiffs' case: that they lacked standing; and that there had not been sufficient doctrinal development to overcome the Supreme Court's dismissing of a constitutional challenge to a state's same-sex marriage laws in 1972.[2]

On the issue of standing, the court found that both couples had standing, having suffered the injuries of being denied a marriage license and the "stigmatic injury" of humiliation caused by Virginia law. Moreover, the court held that the state officials prohibiting one of the couples from obtaining a marriage license and refusing to recognize the other couple's California-issued marriage license were proper defendants. With regard to doctrinal developments, the issue before the court was the precedential value of the Supreme Court's dismissal of a similar suit for "want of a substantial federal question" over 40 years ago. The court held that a 1972 summary dismissal was no longer binding, citing *Windsor* as well as the recent decision of a sister federal district court addressing whether Utah law prohibiting same-sex marriages was constitutional.

The court then considered whether Virginia's marriage laws denied the plaintiffs their rights to due process and equal protection, answering affirmatively to both questions.

First, the court acknowledged that marriage is a fundamental right under the Due Process Clause of the Fourteenth Amendment, inseparable from rights to privacy and intimate association. It is therefore protected by strict scrutiny which only permits infringements that serve a compelling state interest. The court rejected the defendants' argument that the couples were in fact attempting to create a new right, stating that they "ask for nothing more than to exercise a right that is enjoyed by the vast majority of Virginia's adult citizens" and noting that fears of a "dilution of the sanctity of marriage" echoed past defenses of anti-miscegenation laws.

The court further rejected the defendants' primary justifications of its marriage laws, which appealed to tradition, federalism, and "responsible procreation." In rejecting the defendants' federalism argument, the court acknowledged that generally powers regarding domestic relations properly rest with state and local government, but federal courts have intervened when state regulations have infringed on the right to marry.

The court then addressed whether the marriage laws passed constitutional muster under the Equal Protection Clause. The court noted that it was undisputed that same-sex couples may be similarly-situated to opposite-sex couples with respect to their love and commitment to one another, but that the proponents of the state's laws advanced the argument that the laws' primary purpose was procreation and child-rearing. This, however, was inconsistent with the state's previous rationalizations, and failed to recognize that same-sex couples were already successfully raising children, but were denied the benefits and protections of marriage. Although the court declined to decide whether laws effecting same-sex couples warranted heightened scrutiny, it found that the laws did not even meet rational basis scrutiny.

What Does This Mean For Employers?

The court stayed the execution of its injunction enjoining the Commonwealth from enforcing laws prohibiting same-sex marriage. So, for the time being, this decision will have no effect on employers. But, if the U.S. Court of Appeals for the Fourth Circuit upholds the district court's decision, it could significantly impact Virginia employers.

First, with gay and lesbian couples no longer prohibited from obtaining marriage licenses in Virginia, they will be able to avail themselves of spousal benefits under employer-administered medical and retirement plans without having to pay state taxes for imputed income. Along with

1 As a result, the clerk for Virginia's Prince William County Circuit Court stepped in as an Intervenor-Defendant to replace the State Registrar.

2 *Baker v. Nelson*, 191 N.W.2d 185, 187 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972).

the *Windsor* holding, this decision will mean that Virginia same-sex marriages are recognized not only for purposes of plans subject to the Employee Retirement Income Security Act (ERISA), but also for purposes of plans subject only to state law, such as public (that is, governmental) plans and plans of church-affiliated institutions.

Second, the decision means that same-sex married couples residing in Virginia will be entitled to the same right to medical leave to attend to sick spouses or parents, as well as leave for childbirth or adoption (at the present time, federal law recognizes marital status based on state of residency for FMLA purposes, but state of celebration for ERISA purposes). Under the FMLA, an employee can take up to 12 weeks of such unpaid, job-protected leave. If both spouses work for the same employer, however, they will have only 12 weeks between the two of them for FMLA leave.

Recommendations for Employers

Many employers have already updated their employee handbooks and company policies to acknowledge and accommodate same-sex couples recognized under federal law, but employers in states that have not recognized same-sex marriage may have deferred action. Nevertheless, because ERISA and the Internal Revenue Code recognize same-sex marriages entered into in states or other countries, regardless of place of residence, employers in any state may be confronted with the necessity of recognizing a same-sex marriage for benefit plan purposes.

For employers with employees located in states that do not recognize same-sex marriage (including, for now, Virginia and Utah), the status of federally recognized same-sex marriages may require separate tax withholding and reporting unless and until these cases work their way through the appellate process. Since *Windsor*, the federal district courts that have encountered similar constitutional challenges to state laws prohibiting same-sex marriages have unanimously found them to be unconstitutional. But the courts of appeals will have to wrestle with the broad affirmation of the constitutional rights of same-sex couples contained in *Windsor*'s majority opinion in contrast to that same opinion's carefully-limited language affirming the rights of states to establish their own standards for marriage.

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