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A NOTE ON OUR IMLA COLLEAGUE IN UKRAINE:

In our current issue of *Municipal Lawyer*, we describe some of the activities of IMLA's International Committee, including the trip last year by Chuck Thompson and Ben Griffith to Ukraine. On that trip, they were escorted around the country by Taras Mazyar, a young Ukrainian lawyer who had spent several months at IMLA in Bethesda in 2012 and attended our Annual Conference in Austin.

At the time the current issue of *Municipal Lawyer* went to print, we reported that the situation in Ukraine was relatively stable. Obviously, that has changed dramatically in the past week with renewed conflict and bloodshed on the streets of Kiev and elsewhere.

We express our support and concern for Taras and his fellow Ukrainians.

Domestic Relations: Virginia Court Strikes Down State's Marriage Laws Banning Same-Sex Marriage as Unconstitutional

Bostic v. Rainey, No. 2:13cv395 (E.D.Va. Feb. 13, 2014).

Two same-sex couples (Plaintiffs) residing in Virginia challenged the constitutionality of Virginia's ban on same-sex marriage. Virginia law limits the institution of marriage to a union between a man and a woman and in 1997 the legislature specifically amended the law to provide that "a marriage between persons of the same sex is prohibited." Va. Code § 20-45.2. In November 2006, the Virginia Constitution was amended after a majority of Virginia voters ratified an amendment stating that "only a union between one

man and one woman may be a marriage valid in or recognized by this Commonwealth and its political subdivisions." Va. Const, art. I, § 15-A.

One couple, who had enjoyed a committed relationship for over twenty years, tried unsuccessfully to obtain a Virginia marriage license. The other couple, who were similarly committed to each other, was legally married in California and sought to have their marriage recognized in Virginia, but failed. After the Plaintiffs were denied marriage licenses in Virginia, they brought suit in district court, claiming that Virginia's marriage laws denied them rights to due process and equal protection and therefore violated the Fourteenth Amendment of the United States Constitution. The Plaintiffs sought summary judgment on their constitutional claims and a preliminary injunction seeking the court to enjoin the Commonwealth from enforcing its marriage laws banning same-sex marriage.

HELD: The district court held that the Virginia marriage laws violated the Due Process Clause and Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. It also held that the Defendants had violated Section 1983 by enforcing unconstitutional laws. The court granted the Plaintiffs' motion for summary judgment and their motion for a preliminary injunction, but stayed its decision pending appeal to the Fourth Circuit.

DISCUSSION: The Defendants' preliminary arguments regarding standing and summary disposition were both examined, but ultimately disregarded by the court. With regard to their summary disposition argument, the Defendants relied on a 1972 Supreme Court case, which dismissed a challenge to similar laws in Minnesota as, in the Court's views, the case did not present a substantial federal question. While the district court agreed that summary dispositions by the Supreme Court are considered precedential and binding on lower courts, the district court concluded that the particular summary disposition relied upon by the Defendants was no longer binding due to significant doctrinal developments since that time.

Turning to the substantive claims, the district court reviewed the Plaintiffs' due process claims first. The Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const, amend. XIV, § 1. The district court began its analysis by concluding that there can be "no serious doubt that in America the right to marry is a rigorously protected fundamental right." Because the Virginia marriage laws imposed a condition on the exercise of a fundamental right – the right to marry – the court concluded that strict scrutiny of the law was warranted. Under strict scrutiny, the marriage laws will be upheld only if they are "narrowly tailored to serve a compelling state interest."

The Defendants sought to uphold the marriage laws by claiming three state interests: (1) tradition; (2) issues of state sovereignty/federalism; and (3) arguments relating to benefits to children. After an analysis of each of the three interests proffered by the

state, the district court concluded that none of the interests were compelling enough to survive constitutional muster. With regard to its "tradition" argument, the court noted that the Supreme Court has rejected the assertion that a "prevailing moral conviction can, alone, justify upholding a constitutionally infirm law." The district court also noted that the Commonwealth had unsuccessfully presented nearly identical arguments regarding the traditional definition of marriage in the *Loving* case, which was resolved by the Supreme Court decades ago.

As to the federalism issue, the district court noted that the federal government pays deference to state-law policy decisions regarding domestic relations and that any federal intervention in this area should be exercised "rarely." However, the district court concluded that federal courts have properly intervened in this arena where state regulations have infringed upon the right to marry and that under the present circumstances, intervention was not only warranted but compelled.

The district court also rejected the Defendants' arguments that its marriage laws protected Virginia's children and "responsible procreation." The court concluded that such an argument not only fails under the strict scrutiny test, but also the rational basis review test. Limiting marriage to opposite sex couples does not advance the welfare of children, instead, the court reasoned, it simply stigmatizes and humiliates children who are being raised by loving same-sex couples. Because none of the rationales advanced by the Commonwealth were narrowly tailored to serve a compelling state interest, the court concluded that the marriage laws were unconstitutional under the Due Process Clause.

The district court also found that the marriage laws violated the Equal Protection Clause for the same reasons that they violate the Due Process Clause. The Equal Protection Clause of the Fourteenth Amendment provides that no state shall "deny to any person within its jurisdiction the equal protection of its laws." U.S. Const, amend. XIV, § 1. The court noted that even a fundamental right was not implicated, the laws would still violate the Equal Protection Clause. The court also noted that although it was inclined to believe that strict scrutiny would apply to the marriage laws, it need not decide that issue because the laws fail to "display a rational relationship to a legitimate purpose, and so must be viewed as constitutionally infirm under even the least onerous level of scrutiny." The district court concluded that the goal and result of the marriage laws was to deprive gay and lesbian couples of the opportunity to choose to marry a partner of their choice and that result occurred without furthering any legitimate state purpose.

Finally, the court also concluded that because the laws violated the Constitution, the Plaintiffs were entitled to relief under §1983. They had demonstrated that they were deprived of a right secured by the Constitution and that the deprivation was committed under the color of state law.

The court therefore granted the Plaintiffs' motion for summary judgment and its motion for a preliminary injunction, but stayed its decision pending appeal to the Fourth Circuit.

http://legaltimes.typepad.com/files/edva-ssm-opinion.pdf (last accessed Feb. 20, 2014).

Employment: Employer's Vague Verbal Statements About Future Job Security Do Not Convert At-Will Employment or Create Promissory Estoppel

Gill-Mulson v. Eagle River Fire Protection District, NO. 11-CV-01896 (D. Colo. Feb. 4, 2014).

A recent Colorado Federal District Court decision rebuffed the efforts by two senior at-will firefighters to challenge their terminations based on promissory estoppel. The case depicts the mischief which can result from an employer's imprecise or un-vetted verbal statements about employment.

Carol Gill-Mulson and John Willson (Plaintiffs) each began employment with Eagle River Fire Protection District (Eagle River) in the 1980's, rising through the ranks to senior positions. Neither Plaintiff was hired pursuant to any written contract and each was an at-will employee. Each signed an "Acknowledgment of Receipt" of Eagle River's employee handbook, affirming that he or she understood the following provisions:

> [N]either the employer nor myself is committed to an employment relationship for a fixed period of time. Employment with the Eagle River Fire Protection District is at-will. Both Management and I have right to terminate this employment at any time for any reason. The language used in this handbook and any verbal statement of Management are not intended to constitute a contract of employment, either express or implied, nor are they a guarantee of employment for any specific duration... [N]o representative of the Eagle River Fire Protection District, other than the Chief of the District, has the authority to enter into an agreement of employment for any specific period and such agreement must be in writing, signed by the Board of Directors and myself. We have not entered into such an agreement.

On January 21, 2010, Plaintiffs attended an all-employee meeting where the tenuous financial condition of the region, including Eagle River was discussed. At that meeting the Chairman of Eagle River's Board of Directors allegedly told all employees words to the effect that "all jobs were secured until the 2012 period."

Plaintiffs were subsequently terminated during 2010. They sued Eagle River, alleging promissory estoppel and deprivation of property interests without due process. More specifically, Plaintiffs alleged that the Eagle River was estopped to deny a promise which converted their at-will employment to a more secure status, and that the secure status gave rise to a property interest which supports a claim under 42 U.S.C. § 1983.