UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
AT NEW ALBANY
Electronically Filed

LINDA G. SUMMERS	)	
	)	
Plaintiff	)	
	)	
vs.	)	Case No. 4:15-CV-00093-RLY-DML
	)	
SALLY WHITIS in her official capacity As HARRISON COUNTY CLERK	)	
	)	
and	)	
	)	
HARRISON COUNTY, a political Subdivision of the State of Indiana	)	
	)	
Defendant	)	

DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

This matter arises from an action initiated by Plaintiff, Linda Summers against her former employer Harrison County and supervisor Sally Whitis and (collectively "Defendants") wherein she alleges Defendants violated her religious freedoms under Title VII of the 1964 Civil Rights Act (42 U.S.C.A. § 2000e et seq.). Specifically, she alleges Defendants (1) discriminated her by making a decision to terminate her based upon her religion, and (2) denied her a reasonable accommodation of her religious beliefs.

The undisputed evidence demonstrates Plaintiff is unable to prove she was discriminated against because of her religion as the ministerial duty of performing data entry in relation to the processing of same-sex marriage licenses did not conflict with her religious belief. The basis of Plaintiff's termination was her insubordination, not her religion, which is evident by the

testimony which shows she did not inform Defendants of her religious beliefs or need for an accommodation until after the decision to terminate her had been made.

Further, Defendants had no duty to accommodate Plaintiff because they were unaware of a need for accommodation until the decision to terminate her had been made and even if they had been, Defendants could not accommodate her without undue hardship. As such, Plaintiffs claims fail in their entirety and Defendants are entitled to a grant of summary judgment.

STATEMENT OF MATERIAL FACTS NOT IN DISPUTE

I. THE HARRISON COUNTY CLERK'S OFFICES AND PLAINTIFF'S JOB DUTIES

Harrison County residents intending to marry are required to obtain marriage licenses from the Harrison County Clerk's Office or the county of residence in which their partner resides. I.C. § 31-11-4-3, I.C. § 31-11-4-1. The Clerk's Office is responsible for recording marriage applications, including the licenses and certificate of marriages in a book for public record. I.C. § 31-11-4-4(b). It is also responsible for collecting a $10.00 fee for the issuance of a marriage license and paying that fee to the treasurer of state. I.C. § 33-32-5-1(a).

Sally Whitis ("Whitis") is, and was at all relevant times, the Clerk of Harrison County, Indiana. (February 18, 2016 Deposition of Sally Whitis [hereinafter "Whitis"], attached hereto as **Exhibit A**, p. 5 ll. 4-25; p 10 ll. 1-7.) As Clerk, Whitis ran both the Circuit and Superior Court's Clerks' Offices pursuant to I.C. § 33-32-2-1, as well as the Election Office pursuant to I.C. § 33-32-2-6. (Whitis, p. 14 ll. 19-25, p. 15 ll. 1-13.) In that role, she is responsible for supervising ten (10) employees, including Linda Summers ("Plaintiff"). *Id.* The Superior Court Clerk's Office is located on Gardner Lane in Corydon while the Circuit Court Clerk's Office is located in at the Courthouse in downtown Corydon, Indiana. (Whitis, p. 21 ll. 18-25, p. 22 ll. 1-13; January 27,

2015 Deposition of Linda Summers [hereinafter "Plaintiff"], attached hereto as **Exhibit B**, p. 29 ll. 23-25, p. 30 ll. 1-3.)

Plaintiff, Linda G. Summers ("Plaintiff"), worked in the Superior Court Clerk's Office as a Second Deputy Clerk where Whitis also worked on a daily basis. (Whitis, p. 21 ll. 18-25, p. 22 ll. 1-13.) At all relevant times, only three people worked at the Superior Court Clerk's office—Whitis, Plaintiff and Wanda Kirkham ("Kirkham"). (Whitis, p. 45 ll. 25, p. 46 ll. 1-16; Plaintiff, p. 31 ll. 14-16, p. 32 ll. 1-6, p. 114, ll. 17-25, p. 115, ll. 1-20.) Often at the Superior Court Clerk's Office, there was only one person in the office, as Whitis was routinely required to be out of the office attending to matters in the downtown Circuit Clerk's Office, Election Office and other appointments, and as the other two employees taking vacations, sick days and lunch breaks. (Whitis, p. 40 ll. 14-23.) Plaintiff also testified it was "not uncommon" for her to be left alone. (Plaintiff, p. 36 ll. 17-25, p. 37 ll. 1- 17.) Plaintiff had various duties as a deputy clerk, which during the relevant times included processing marriage licenses.[1] (Whitis, p. 22 ll. 19-25, p. 23 ll. 1-25, p. 24 ll. 1; Plaintiff, p. 148 ll. 3-10.) As deputy clerk, Plaintiff did not perform marriages nor did she sign the marriage license or certificate. (Plaintiff, p. 114 ll. 5-13.) She merely entered the necessary data and handed forms out. *Id.*

[1] Prior to 2014, the Circuit Court Clerk's Office always processed marriage licenses but the Superior Court began processing marriage licenses in early 2014 when the Office gained the ability to process them electronically. (Whitis, p. 23 ll. 6-25, p. 24 ll. 1-25, p. 25 ll. 1-3; Plaintiff, p. 32 ll. 10-25, p. 33 ll. 1-25, p. 34 ll. 1-21.) However, because Harrison County community members were accustomed to marriage licenses being processed at the Circuit Court location, more people went to the Circuit Court. *Id*. Whitis estimated that between the Circuit and Superior Court Clerk's Office, Harrison County processed two to three hundred marriage licenses a year, and that the Superior Court Clerk's Office processed, on average, approximately two – three marriage licenses per month. (Whitis, p. 24 ll. 8-25, p. 25 ll. 1-3, p. 44 ll. 19-25, p. 45 ll. 1.) According to Whitis, as the public becomes increasingly aware that the Superior Court processes marriage licenses, it is likely there will be an increase in individuals coming to the Superior Court Clerk's Office to have their marriage licenses processed. (Whitis, p. 45 ll. 2-17.)

II. THE HARRISON COUNTY CLERK'S OFFICE'S ADJUSTMENT TO INDIANA'S RECOGNITION OF SAME-SEX MARRIAGE.

On June 25, 2014, the United States District Court for the Southern District of Indiana, Indianapolis Division held that Indiana's same-sex legislative marriage ban violated the due process clause and equal protection clause and was, therefore, unconstitutional. *Baskin v. Bogan*, 12 F. Supp. 3d 1144 (S.D. Ind. 2014). After that ruling, the Harrison County Clerk's Offices had meetings regarding the change in the law and everyone in the offices stated they did not condone same-sex marriage. (Whitis, p. 28 ll. 12-25, p. 29 ll. 1-25, p. 30 ll. 1-12.) Plaintiff testified that during that discussion, Whitis stated she did not really want to process same-sex marriage licenses, either. (Plaintiff, p. 54 ll. 22-25, p. 55 ll. 1-25, p. 56 ll. 1-12.) Plaintiff testified she replied, "not me either," which was her only comment. *Id*. Importantly, none of the employees, including Summers, indicated whether their reasons for opposing the processing same-sex marriage licenses were religious or secular or that they held religious beliefs which outright prohibited them from processing same-sex marriage licenses. (Whitis, p. 28 ll. 12-25, p. 29 ll. 1-2; p. 30 ll. 4-12.)

On June 27, 2014, the Court of Appeals for the Seventh Circuit granted an emergency stay of the district court's ruling and on September 4, 2014, affirmed the district court, holding Indiana's law which refused to authorize same-sex marriage or to recognize such marriages made in other states were invalid because they violated equal protection under the Fourteenth Amendment. *Baskin v. Bogan*, 766 F.3d 648 (7th Cir. Ind. 2014). Thereafter, on October 6, 2014, the Supreme Court of the United States denied the petition for writ of certiorari, making the Court of Appeals' ruling final. *Bogan v. Baskin*, 135 S. Ct. 316 (U.S. 2014).

On October 6, 2014, the Office of the Indiana Attorney General issued a memorandum titled "Petition for certiorari denied by U.S. Supreme Court in same sex marriage cases" addressed to "All Circuit Court Clerks" which stated, in relevant part:

> . . . Today the U.S. Supreme Court announced that it had denied the state's request to hear an appeal of the decision made last month by the 7th Circuit Court of Appeals. That denial of the state's request means that the 7th Circuit will issue a "mandate" very soon that will implement the injunction issued by Chief Judge Young in June. As soon as that mandate is issued—and it could be as early as today—county clerks will be prohibited from denying marriage licenses to same sex couples so long as all other marriage license requirements are met. It would be advisable to start making necessary preparations to process marriage license applications and issue licenses accordingly. . .

(Plaintiff, p. 56 ll. 17-25, p. 57 ll. 1-25, p. 58 ll. 1-21; October 6, 2014 Attorney General Memorandum, attached hereto as **Exhibit C**.) On October 22, 2014, Whitis sent an e-mail to Clerk's Office employees, including Plaintiff, titled "Gay Marriage License," which said:

> While I was on vacation, the Supreme Court has ordered Indiana to proceed with gay marriages.
>
> Therefore, it is our duty in the Clerk's office to process those applications. The process in Incite[2] has been modified to accommodate these filings. Even though it may be against your personal beliefs, we are required by state law to process their applications. We are only doing the paperwork and not performing their ceremony.
>
> I expect everyone to please comply. Thanks.

(Whitis, p. 25 ll. 4-23, Plaintiff, p. 51 ll. 5-25, p. 52 ll. 1-25, p. 53 ll. 1-15; October 22, 2014 E-mail, attached here to as **Exhibit D**.) Plaintiff received this e-mail but did not talk to Whitis about it or express any concern with her ability to do this requirement. (Plaintiff, p. 53 ll. 16-25.) Prior December 8, 2014, Plaintiff did not communicate to Whitis that she was unable or unwilling to process same-sex marriage licenses or follow the instructions set forth in Whitis' e-

[2] Incite is the computer system used to process marriage licenses. (Whitis, p. 27 ll. 23-25, p. 28 ll. 1-11.) The entries on Incite were changed from "male, woman" to "Applicant 1, Applicant 2" to allow for the processing of same-sex marriage licenses. *Id*.

mail. (Plaintiff, p. 54 ll. 15-25, p. 55 ll. 1-5, p. 42 ll. 23-25, p. 43 ll. 1-16.) She also did not express a religious belief preventing her from doing so. *Id*.

III. PLAINTIFF'S DECEMBER 8, 2014 REFUSAL TO PROCESS A MARRIAGE LICENSE FOR A SAME-SEX COUPLE.

On December 8, 2014, a couple came to the counter at the Superior Court Clerk's Office and requested a marriage license from Plaintiff. (Whitis, p. 33 ll. 7-25; Plaintiff, p 59 ll. 24-25, p. 60 ll. 1-25, p. 61 ll. 1-25, p. 62 ll. 1-25, p. 63 ll. 1-25, p. 64 ll. 1-25, p. 65 1-25, p. 66 ll. 1-25, p. 67 ll. 1-17.) Plaintiff went to her computer and opened the marriage processing program to begin processing the license. *Id*. However, when Plaintiff pulled up the couple's initial application online, she realized the individuals requesting the marriage license were of the same sex. *Id*. When asked what she did next, Plaintiff stated, "I sat there for a moment, and I didn't know what I would actually do when this time occurred. I'd hoped I would be strong enough to do something that I felt that God would want me to do. And I thought and I thought, and I thought there's no way I can do this. So I stepped aside back to [Whitis'] side of the desk back away from view of the two people and motioned for her to come over there." *Id*.

Plaintiff then told Whitis the couple was seeking a same-sex marriage license and that she could not process it. *Id*. According to Plaintiff, Whitis replied, "[y]ou are not marrying them. You're just providing them with the license." *Id*. Plaintiff allegedly replied that she did not feel that way and refused to process the license. *Id*. Whitis told Plaintiff she was required to process the marriage license and Plaintiff again refused. *Id*. Whitis then brought the couple back to her desk behind the counter and processed the marriage license herself. *Id*. Once the couple left the Office, Whitis told Plaintiff such a refusal would not happen again. *Id*. At no point during this exchange or on December 8, 2014 did Plaintiff indicate the reason she was refusing to process

the marriage license for the same-sex couple was due to her religious beliefs nor did she request a religious accommodation, informally or otherwise. (Whitis, p. 42 ll. 23-25, p. 43 ll. 1-6, Summers, p. 68 ll. 20-23.)

IV. WHITIS' DECEMBER 8, 2014 DECISION TO TERMINATE PLAINTIFF

Later that afternoon, following Plaintiff's refusal to process the marriage license, Whitis reviewed the Handbook of the Harrison County Clerk Employee Policies, made the decision to terminate Plaintiff for insubordination, and consulted with the County Attorney and the County Auditor on how to proceed with the termination process. (Whitis, p. 37 ll. 17-19, p. 43 ll. 15-25, p. 44 ll. 1-25; and Harrison County Personnel Policies Handbook Excerpts, attached hereto as **Exhibit E**.) Specifically, Whitis conferred with these individuals to ensure she was following the policy of Harrison County in terminating Plaintiff and that her termination letter was handled properly. (Whitis, p. 46 ll. 23-25, p. 47 ll. 1-17.) Plaintiff's religious beliefs—of which Whitis was unaware at the time the decision to terminate Plaintiff was made— did not play a role in Whitis' decision to terminate her, nor did Whitis treat Plaintiff any differently because of her religious beliefs. (Whitis, p. 28 ll. 23-25, p. 29 ll. 1-25, p. 30 ll. 1-20, p. 35 ll. 20-25, p. 36 ll. 1-25, p. 38 ll. 1-2, p. 39 ll. 8-25, p. 40 ll. 1-13, p. 42 ll. 23-25, p. 43 ll. 1-15, p. 44 ll. 1-9, p. 48 ll. 23-25, p. 49 ll. 1-7; Plaintiff, p. 59 ll. 24-25, p. 60 ll. 1-25, p. 61 ll. 1-25, p. 62 ll. 1-25, p. 63 ll. 1-25, p. 64 ll. 1-25, p. 65 ll. 1-25, p. 66 ll. 1-25, p. 67 ll. 1-7, p. 70 ll. 11-15, p. 133 ll. 7-15, p. 162 ll. 1-25, p. 163 ll. 1-25, p. 164 ll. 1-25, p. 165 ll. 1.) Whitis' decision to terminate Plaintiff was based solely on Plaintiff's insubordination in her refusal to assist citizens and process a marriage license. (Whitis, p. 46 ll. 23-25, p. 47 ll. 1-17.)

At no point in time prior to Plaintiff's refusal to process a same-sex couple's marriage license did Summers advise Whitis that she was requesting a religious accommodation to be

exempt from processing same-sex marriage licenses. (Whitis, p. 43 ll. 7-14.) Significantly, Whitis was not even aware of Plaintiff's religious denomination or beliefs on December 8, 2014 at the time she made the decision to terminate Whitis for her insubordination. (Whitis, p. 28 ll. 23-25, p. 29 ll. 1-25, p. 30 ll. 1-20, p. 35 ll. 20-25, p. 36 ll. 1-25, p. 38 ll. 1-2, p. 39 ll. 8-25, p. 40 ll. 1-13, p. 42 ll. 23-25, p. 43 ll. 1-15, p. 44 ll. 1-9, p. 48 ll. 23-25, p. 49 ll. 1-7; Plaintiff, p. 59 ll. 24-25, p. 60 ll. 1-25, p. 61 ll. 1-25, p. 62 ll. 1-25, p. 63 ll. 1-25, p. 64 ll. 1-25, p. 65 ll. 1-25, p. 66 ll. 1-25, p. 67 ll. 1-7, p. 70 ll. 11-15, p. 133 ll. 7-15, p. 162 ll. 1-25, p. 163 ll. 1-25, p. 164 ll. 1-25, p. 165 ll. 1.)

V. EVENING OF DECEMBER 8, 2014 AND PLAINTIFF'S DECEMBER 9, 2014 TERMINATION FOR INSUBORDINATION.

Plaintiff testified that on the night of December 8, 2014, she went home and handwrote her religious accommodation letter with assistance from a religious organization's pamphlet Yvonne Beanblossom—an employee in the Circuit Court Clerk's Office—had given her about a month prior to December 8, 2014. (Plaintiff, p. 69 ll. 1-25, p. 70 ll. 1-25, p. 71 ll. 1-25, p. 72 ll. 1-25, p. 73, ll. 1-25, p. 74 ll. 1-25, p. 75 ll. 25, p. 76 ll. 1-25, p. 77 ll. 1-13.) The pamphlet explained religious accommodation requests and what should be included in them. *Id.* Despite Plaintiff's knowledge for at least a month that she could request a religious accommodation, she did not do so until after refusing to process a same-sex couple's marriage license. *Id.*

Early on December 9, 2014, Plaintiff came in to the Clerk's office and typed her letter. (Plaintiff, p. 80 ll. 9-25, p. 81 ll. 1-5.) She then placed it on Whitis' desk. (Whitis, p. 31 ll. 17-25, p. 32 ll. 1-16; Plaintiff, p. 80 ll. 1-11, p. 82 ll. 12-16; Religious Accommodation Request, attached hereto as **Exhibit F**.) Specifically, Plaintiff requested that based upon her belief against processing same-sex marriage licenses that she be exempt from her job duty of doing so. *Id.* Plaintiff testified she was alone in the office that morning from around 7:30 a.m. until around

8:50 a.m. when Whitis arrived, as Kirkham had an appointment and Whitis was prescheduled to not arrive until later. (Plaintiff, p. 81 ll. 23-25, p. 82 ll. 1-25, p. 83 ll. 1-12.)

Shortly after arriving, Whitis gave Plaintiff a letter notifying her that her employment with the Clerk's Office was terminated "due to insubordination as defined by the [Harrison County Personnel Policies Handbook] on page 64." (Whitis, p. 35 ll. 2-25, p. 36 ll. 1-25, p. 37 ll. 1-16; Plaintiff, p. 86 ll. 18-25, p. 87 ll. 1-9, p. 88 ll. 24-25, p. 89 ll. 1-11; Termination Letter, attached hereto as **Exhibit G**.) Specifically, Plaintiff was insubordinate because "she refused to do a task that she was asked to do," namely, process a marriage license. (Whitis, p. 37 ll. 20-25, p. 38 ll. 1-2.) Plaintiff received a copy of the Handbook prior to her termination, which she acknowledged lists "[I]nsubordination by refusing to perform assigned work or to comply with written or verbal instructions of supervisors creating a hostile work environment for supervisors, employees, and/or the public" as a "Group Three Offense," punishable by "[a]ny appropriate discipline, up to and including termination of employment." (Plaintiff, p. 89 ll. 4-25, p. 90 ll. 1-25, p. 91 ll.-25, p. 92 ll. 1-12; **Exhibit E**, p. 1, 63, 64, 65.)

Whitis does not recall whether the Termination Letter was drafted on the evening of December 8th or the morning of December 9th. (Whitis, p. 35 ll. 20-23.) Regardless, the decision to terminate Plaintiff was indisputably made on December 8th. (Whitis, p. 31 ll. 20-25, p. 32 ll. 1.)

VI. PLAINTIFF'S RELIGION.

Plaintiff is of the Christian faith, but does not identify with any particular denomination. (Plaintiff, p. 126 ll. 24-25, p. 127 ll. 1-6.) Plaintiff testified she cannot be involved in the processing of same-sex marriage licenses based upon Bible verses Leviticus 18, Romans 1, Genesis 2 and 1 Corinthians 2. (Plaintiff, p. 127 ll. 8-20.) Plaintiff did not seek counseling or

guidance from any of her church's religious leaders regarding whether she should process same-sex marriage licenses prior to refusing to do so. (Plaintiff, p. 127 ll. 21-25, p. 128 ll. 1-11.) Rather, she listened to her pastor's sermons, prayed, read the bible and "felt led" to refuse to process the marriage licenses. *Id*. Plaintiff would not process marriage licenses for same-sex couples because she felt it was "against God's law" to do so and God's law is "above legal law." (Plaintiff, p. 132 ll. 4-7, p. 145 ll. 24-25, p. 146 ll. 1.) However, Plaintiff never attended a sermon or was instructed by her religious leaders that she should take steps not to be involved with processing same-sex marriages. (Plaintiff, p. 113 ll. 10-13.)

As stated above, until the same-sex couple entered the Clerk's Office on December 8, 2014 – over two months after Plaintiff was aware she would be required to process marriage licenses for same-sex couples and over five months after the Clerk's Office openly discussed the possibility of having to issue marriage licenses for same-sex couples—Plaintiff did not know whether she would refuse to process a marriage license to a same-sex couple due to her religious beliefs or inform Defendants of that fact. (Plaintiff, p. 59 ll. 24-25, p. 60 ll. 1-25, p. 61 ll. 1-25, p. 62 ll. 1-25, p. 63 ll. 1-25, p. 64 ll. 1-25, p. 65 1-25, p. 66 ll. 1-25, p. 67 ll. 1-17.)

VII. PLAINTIFF'S CLAIMS OF RELIGIOUS DISCRIMINATION/ FAILURE TO ACCOMMODATE.

At the time Whitis received Plaintiff's religious accommodation request, she had already determined there was no possible way to accommodate Plaintiff or any other employee in her office opposed to same-sex marriage. (Whitis, p. 48 ll. 12-19.) Further, when individuals are seeking the marriage licenses, they usually just walk into the Clerk's Office rather than calling ahead to schedule an appointment. (Whitis, p. 44 ll. 10-18, p. 45 ll. 18-24.) Therefore, the Clerk employees do not know when or if same-sex couples will come into the office seeking marriage

licenses. *Id*. As such, there would be no way of making advance arrangements to ensure someone other than Plaintiff would be at the Office to process a same-sex marriage license. *Id*.

Whitis did not want to, nor did she feel she legally could, have anyone denied a marriage license in the event Plaintiff was the one person in the Office. *Id*. Whitis acknowledged that if Plaintiff was the only person in the office when a same-sex couple came in to have a license processed it is possible Plaintiff could send the couple to the downtown Circuit Court Clerk location, but stated that would be inconvenient to the public to refer them somewhere else and a violation of their own rights. (Whitis, p. 41 ll. 16-25.) Whitis further stated she did not want to have the possibility of having the Office turn a same-sex couple away because then the Clerk's Office would be discriminating against those couples. (Whitis, p. 45 ll. 25, p. 46 ll. 1-16.)

Moreover, Wanda Kirkham was the third employee employed at the Superior Court Clerk's Office at the time of Plaintiff's termination. (Plaintiff, p. 114, ll. 17-25, p. 115, ll. 1-20.) Plaintiff does not know whether Kirkham has ever refused to process a same-sex marriage but stated Kirkham did not do so before Plaintiff's termination (as she was not presented with the opportunity). (Plaintiff, p. 54 ll. 1-14, 114, ll. 17-25, p. 115 ll. 1-20.) However, Plaintiff knew Kirkham did not want to process them, as Kirkham had expressed to Plaintiff she was opposed to processing same-sex marriage licenses. *Id*. Plaintiff and Kirkham also attend the same church. (Plaintiff, p. 124 ll. 13-25, p. 125 ll. 1-4.)

While Plaintiff acknowledges the Handbook gave Whitis the right to terminate her for insubordination, she stated she feels she was treated unfairly because she heard another employee in the Circuit Court Clerk's Office, Elizabeth Kitterman, was often late and never was fired for insubordination. (Plaintiff, p. 162 ll. 12-25, p. 163 ll. 1-25; p. 164 ll. 1-25, p. 165 ll. 1.) However, Plaintiff acknowledged there were periods where she was tardy or late and was not

terminated, either. *Id*. Plaintiff also acknowledged that per the Handbook, tardiness or failure to report are "Group One Offenses," which are not punishable by termination, unlike insubordination. *Id*. Plaintiff also stated that while she feels she was treated less favorably than Kitterman, she does not feel the reason for such treatment was her religious beliefs. *Id*.

Plaintiff was under the impression Whitis did not like her but did not feel Whitis' dislike of her had anything to do wither religion. (Plaintiff, p. 133 ll. 17-25, p. 134 p. 1-25, p. 135 ll. 1-16.)[3]

STANDARD OF REVIEW

Summary judgment is proper where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). A genuine issue of material fact exists if "there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for that party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Some alleged factual dispute that does not rise to a genuine issue of material fact will not alone defeat a summary judgment motion. *Id*. at 247-48.

In deciding whether a genuine issue of material fact exists, the court views the evidence and draws all inferences in favor of the nonmoving party. *Miranda v. Wis. Power & Light Co.*, 91 F.3d 1011, 1014 (7th Cir. 1996). However, when a summary judgment motion is made and

[3] After Plaintiff's termination, she did not make any formal communications to try to appeal or overturn her termination. (Plaintiff, p. 95 ll. 3-9.) Plaintiff applied for and was granted unemployment benefits immediately after her termination. (Plaintiff, p. 95 ll. 10-24.) Plaintiff filed a charge with the United States Equal Employment Opportunity Commission (EEOC) in February 2015. (Plaintiff, p. 77 ll. 14-25, p. 78 ll. 1-8, p. 146 ll. 10-25, p. 147 ll. 1-25, p. 148 ll. 1-19; EEOC Opportunity Intake Questionnaire and Charge of Discrimination, attached hereto as **Exhibit H**.) On May 5th, 2015 the EEOC issued a Dismissal and Notice of Rights wherein it stated it could not establish a violation of Plaintiff's rights. (Plaintiff, p. 148 ll. 17-25, p. 149 ll. 1-21; EEOC Dismissal and Notice of Rights, attached hereto as **Exhibit I**.)

supported by evidence as provided in Rule 56(c), the nonmoving party may not rest on mere allegations or denials in its pleadings but "must set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e).

ARGUMENT

I. PLAINTIFF CANNOT MAKE A PRIMA FACIE CASE OF DISCRIMINATION UNDER TITLE VII SO HER CLAIM SHOULD BE DISMISSED.

Title VII prohibits discrimination based on religion. *Redmond v. GAF Corp.*, 574 F.2d 897, 898 (7th Cir. Ill. 1978)(citing 42 U.S.C. § 2000e(a)(1)). In order to establish a prima facie case of religious discrimination, Plaintiff must show that (1) the observance or practice conflicting with an employment requirement is religious in nature, (2) she called the religious observance or practice to her employer's attention, and (3) the religious observance or practice was the basis for her discharge or other discriminatory treatment. *EEOC v. Ilona of Hung.*, 108 F.3d at 1575 (citing *EEOC v. United Parcel Serv.*, 94 F.3d 314, 317 (7th Cir. 1996); *Wright v. Runyon*, 2 F.3d 214, 216 n.4 (7th Cir. 1993); *Beasley v. Health Care Serv. Corp.*, 940 F.2d 1085, 1088 (7th Cir. 1991); *Baz*, 782 F.2d at 706 & n. 5)). Plaintiff has failed to establish a prima facie case of religious discrimination here because she cannot establish any of the requisite elements.

A. Plaintiff's Job Requirement of Merely Processing Same-Sex Marriage Licenses does not Conflict with her Religious Opposition to Gay Marriage.

An employer is only required to accommodate an employee "when a neutral rule of general applicability conflicts with the religious practices of a particular employee." *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 87 (1977). Because the mere act of processing marriage licenses—i.e., entering data and handing out information—does conflict with her religious belief, she cannot establish the first element of her discrimination claim.

In *Garmin v. United States Postal Service*, 509 F. Supp. 507, 508 (N.D. Ind. 1981), a distribution and window clerk at a U.S. Postal Office refused to comply with his employer's orders to perform the necessary ministerial duties—including distribution of registration forms and informational brochures, review of completed forms for legibility and accuracy and forwarding the completed forms to a data processing center—connected with the selective service program, alleging he held certain religious beliefs which required him not participate in the registration system. The U.S. Postal Service's assistance with the registration program was pursuant Proclamation 4771, 45 Fed. Reg. 45247, issued by the President, pursuant to § of the Military Act, 50 U.S.C.S. § 453, as well as an agreement between the U.S. Postal Service and U.S. Government pursuant to 39 U.S.C. § 441 which authorized the U.S. Postal Service to furnish non-postal services to agencies of the U.S. Government. *Id*. The clerk filed suit and sought to enjoin the U.S. Postal Service from "discharging, suspending or otherwise disciplining [him] for his words or actions in opposition to registering individuals from military conscription. . . and. . . that the U.S. Postal Service provide reasonable accommodation to [him] because of his religious beliefs and practices." *Id*. at 508-09.

In denying the clerk's request for injunctive relief, the U.S. District Court for the Northern District of Indiana, South Bend Division noted that "courts have squarely held that 'the requirement [of Selective Service registration] does not infringe or curtail religious freedom since registering is not religious interference.' " *Id*. at 509 (citations omitted). Because the act of registration is not an interference with the free exercise of one's religion, the ministerial act of furnishing, checking and receiving completed registration forms by the clerk could not be an unconstitutional interference with his religious freedom. *Id*. at 509-10.

The Court went on to say that to succeed in obtaining a preliminary injunction, a plaintiff seeking reinstatement in an employment case "must establish (1) a reasonable probability of success on the merits, (2) irreparable injury, (3) the (4) lack of serious adverse effects on others, and sufficient public interest." *Id*. at 510 (citing *Ekanem v. Health & Hospital Corp.*, 589 F.2d 316, 318 (7th Cir. Ind. 1978)). Plaintiff was unable to establish a reasonable success on the merits because the U.S. Postal Service "established that the act of registration with the Selective Service is not an interference with the free exercise of one's religion." *Id*. at 511 (citations omitted).

Notwithstanding, the Court also held that with regard to the third and fourth required elements, the legitimate concerns of the U.S. Postal Service and the public outweigh any arguable First Amendment religious rights of the clerk. *Id*.

> The First Amendment in no way abrogates all conditions of public employment, even those directly or indirectly affecting political or religious expression. For example, courts have upheld the requirement that a public employee take a loyalty oath which is narrowly drawn as a condition to public employment. *E.g., Cole v. Richardson*, 405 U.S. 676 (1972); *Biklen v. Board of Education*, 333 F. Supp. 902 (N.D.N.Y. 1971). Nor must an employer tolerate disruptive unlawful conduct, even in the name of protest over alleged unconstitutional employment practices. *See, McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 803-04 (1973)(unlawful protest valid basis for discharge under Title VII; *Gonzalez v. Bolger*, 486 F. Supp. 595 (D.D.C. 1980).
>
> The condition imposed by the Postal Service on [the clerk's] employment that he perform the duties assigned to him, including distribution of registration forms is squarely a legitimate condition. At the heart of the employee-employer relations and essential to the proper functioning of any business is the employer's right to expect his employees to perform the duties assigned or face the consequences of a disciplinary action. The First Amendment is not a license to employees to perform only those duties which meet their private approval. The chaos that would result from such a holding is obvious; in the context of the vital services performed by the Postal Service.

Id. The Court pontificated that permitting the clerk to refuse to process registration forms based upon his religious beliefs would also permit a postal carrier to refuse to do tasks such as deliver a

registrant a letter confirming his registration or refuse to deliver mail either to or from the Department of the Defense, Army or Navy. *Id.* The Court stated that similar consequences prompted Supreme Court Justice Cardozo to reject constitutional claims by state university students that they should be exempt from taking statutorily required courses in military science, stating that such a holding would permit a conscientious objector to refuse to contribute taxes in furtherance of war. *Id.* at 511-12 (citing *Hamilton, et al. v. Regents of Cal.*, 293 U.S. 245 (1934). In so holding, Justice Cardozo stated, "[t]he right to private judgment has never yet been so exalted above the powers and compulsion of the agencies of government. One who is a martyr to a principle may turn out in the end to be a delusion or an error does not prove by his martyrdom that he has kept within the law." *Id.* at 512. Moreover, the Court stated the infringement of the clerk's alleged religious rights is clearly justified by the compelling interests of the U.S. Postal Service and the public and that the clerk's claim failed, both for purposes of a preliminary injunction and the ultimate merits of the claim. *Id.*

While the present case is a Title VII case, the same rationale applies. Here, like in *Garmin*, Plaintiff's ministerial act of processing marriage licenses by recording marriage applications, including the licenses and certificate of marriages in a book for public record and collecting a $10.00 fee were statutorily mandated by I.C. § 31-11-4-4(b) and were not an interference with her religious freedom. Supportive of this idea is the United States District Court for the Eastern District of Kentucky's Memorandum Opinion in In *Miller v. Davis*, 123 F. Supp. 3d 924, 937 (E.D. Ky. 2015), attached hereto as **Exhibit J**, wherein the court granted one same-sex couple and one opposite-sex couple's motion for a preliminary injunction to enjoin Rowan County Clerk, Kim Davis, from enforcing her marriage licensing policy where she refused to issue any marriage licenses at all so as to avoid issuing marriage licenses to same-sex

couples without discriminating against them. As one of her arguments against the injunction, Davis argued that "[c]ompelling all individuals who have any connection with the issuance of marriage licenses . . . to authorize, approve, and participate in that act against their sincerely held religious beliefs about marriage, without providing accommodation, amounts to an improper religious test for holding (or maintaining) public office" in violation of Article VI, § 3 of the Constitution. *Id*. at 942-43. Therein, the court pointed out that "the act of issuing a marriage license to a same-sex couple merely signifies that the couple has met the *legal requirements* to marry. It is not a sign of moral or religious approval. The State is not requiring Davis to express a particular religious belief as a condition of public employment, nor is it forcing her to surrender her free exercise rights in order to perform her duties. Thus, it seems unlikely that Davis will be able to establish a violation of the Religious Test Clause." Plaintiff, like Davis, was not required to express a particular religious belief—rather, it only required her to engage in data entry and pass out forms. (Whitis, p. 22 ll. 19-25, p. 23 ll. 1-25, p. 24 ll. 1; Plaintiff, p. 114 ll. 5-13, 148 ll. 3-10.)

Similar to the above-cited cases, Plaintiff's First Amendment religious freedom rights were not implicated nor is her job requirement of processing marriage licenses akin to requiring her to express a particular religious belief as a condition of public employment. Therefore, her job requirement of processing marriage licenses does not conflict with her religious beliefs.

B. Plaintiff Did Not Call her Religious Opposition to Processing Same-Sex Marriage Licenses to Whitis' Attention Until After the Decision to Terminate her had been Made.

i. <u>The Decision to Terminate Plaintiff was Made Before she Notified Whitis and the County of her Religious Beliefs.</u>

The Seventh Circuit has held that establishing a prima facie case of religious discrimination under Title VII requires the employee to demonstrate that she informed the employer of his religious beliefs. *See Beasley v. Health Care Serv. Corp.*, 940 F.2d 1085, 1088 (7th Cir. 1991); *Redmond v. GAF Corp.*, 574 F.2d 897, 901-01 (7th Cir. 1978). In the context of non-obvious disabilities and religious beliefs, "where there is no genuine issue that an employer did not know of an employee's disability [or religion] **when it decided to fire [her]**, the employee cannot make out a case of discriminatory discharge." *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 929-30, n. 5 (7th Cir. Ind. 1995)(emphasis added.)

For example, in *Hedberg v. Indiana Bell Tel. Co.*, 47 F.3d 928, 929-30 (7th Cir. Ind. 1995), Indiana Bell began a process of evaluating and firing workers during a company restructuring in September 1992. During that period, Hedberg, an employee at Indiana Bell, suffered from primary amyloidosis—a disease which all parties agreed was a qualifying disability. *Id*. at 929-31. On October 12, 1992, department heads decided to fire ten of twenty-two managers in Hedberg's salary grade, including Hedberg. *Id*. at 930. On Hedberg's ranking sheet, the following was noted: "[i]nterpersonal skill problems. Doesn't come to work. Capable but [lacks] work ethic." *Id*. While the final decision to fire Hedberg was made at the October 12 meeting, Hedberg was not told of his discharge until a November 16 meeting with Knowling—Hedberg's supervisor's boss and head of the department in which Hedberg worked. *Id*

After his termination, Hedberg sued Indiana bell, asking for damages under the American with Disabilities Act. *Id*. The district court granted Indiana Bell's motion for summary judgment, reasoning that "Hedberg cannot succeed on his ADA claim if the decision to terminate Hedberg was reached without knowledge that Hedberg had a disability." *Id*. at 931. Indiana Bell offered sworn affidavits of Knowling and other decision-makers stating they had not known of

Hedberg's disability **when they decided to discharge him** and Hedberg offered no evidence to contradict that. *Id*. However, Knowling (the person that fired him and one of the decision-makers) and Hedberg agreed Knowling knew something about Hedberg's illness at his actual termination on November 16 because he asked Hedberg at that meeting about the results of his medical tests. *Id*. Moreover, Knowling stated in his affidavit he learned of Hedberg's illness around November 11. *Id*.

Based on that information, the Court of Appeals held the district court properly found Hedberg had not met his burden of producing some evidence to raise a genuine issue of Indiana Bell's knowledge on October 12. *Id*. at 932. The Court went on to say that "unlike with race or sex discrimination, there are situations in alleged disability discrimination cases where an employer clearly did not know and could not have known of an employee's disability. We think that an employer cannot be liable under the ADA for firing an employee when it indisputably had no knowledge of the disability." *Id*. The Court said this is because an employer cannot fire an employee "because of" a disability unless it knows of the disability. *Id*.

In this case, it is undisputed that Plaintiff did not call her religious beliefs to Whitis' attention until after the decision to terminate her was made on December 8, 2014. Indeed, it would be impossible for Plaintiff to allege she told Whitis of her religious opposition to same-sex marriage prior to the decision to terminate her had been made, as she admitted that she herself did not know until the moment came whether she would process a marriage license for a same-sex couple or not. (Plaintiff, p 59 ll. 24-25, p. 60 ll. 1-25, p. 61 ll. 1-25, p. 62 ll. 1-25, p. 63 ll. 1-25, p. 64 ll. 1-25, p. 65 1-25, p. 66 ll. 1-25, p. 67 ll. 1-17.) Moreover, based upon *Hedberg*, the fact that Plaintiff informed Whitis of her religious belief **after** the decision to terminate her was made but **before** her actual termination does not defeat summary judgment in favor of

Whitis and the County. In *Hedberg*, like in this case, the supervisor became aware of Hedgberg's disability **after** the decision to terminate him was made but **before** his actual termination and the Seventh Circuit still granted summary judgment to the defendant employer on the grounds that he could not have been fired "because of" his disability as it did not know of his disability at the time the decision to fire him was made.

ii. Plaintiff's Alleged Comment to Whitis that she did not Want to Process Same-Sex Marriage Licenses did not Constitute Notification of Plaintiff's Religious Beliefs.

Plaintiff may argue that while Whitis had no knowledge of her religious beliefs, Whitis knew Plaintiff did not want to process same-sex marriage licenses based on Plaintiff's allegation that when Whitis indicated she did not want to process same-sex marriage licenses, Plaintiff responded "not me either." However, the Seventh Circuit has declined to extend liability to an employer when said employer indisputably had no knowledge of the disability, but knew of the disability's effects, far removed from the disability itself and with no obvious link to the disability. *Hedberg*, 47 F.3d at 932. In *Hedberg*, Hedberg argued actual knowledge of his disability was irrelevant because they fired him "because of" the symptoms of his disability. *Id.* at 933. Hedberg pointed to the notes jotted at the October 12 meeting which stated he was tardy and lacked work ethic and stated he was fatigued because of his illness, which caused such tardiness and laziness. *Id.* The Court rejected this argument. *Id.* at 934. The Court said even had Hedberg been discharged simply because of his tardiness and laziness, Indiana Bell would not have violated the ADA as tardiness and laziness had many causes, few of which were based on illness. *Id.* Moreover, it was common for employers to fire employees for poor work performance. *Id.* The Court declined to create what it called an "enormous sphere of potential liability" stating that the "ADA does not require clairvoyance." *Id.*

Likewise, in this case, Whitis and the County should not be required to read Plaintiff's mind and know that when she agreed she did not want to process same-sex marriage licenses, such a preference was based on her religious beliefs or that she would refuse to do it. Just as laziness and tardiness have many causes besides illness, an expressed opposition to same-sex marriage could have many causes besides religion. These causes are wide and varied and could range from a mere desire to be in agreement with her supervisor and co-workers (i.e., a need to fit in) or political reasons all the way to unabashed prejudice, and anywhere in between. Thus, the Court should decline to extend liability to Defendants when they indisputably had no knowledge of the Plaintiff's religion, but knew of Plaintiff's preference (an "effect" of her religion) which had no obvious or known link to her religious belief.

C. The Basis for Plaintiff's Termination was her Insubordination—Not her Religious Beliefs.

A plaintiff may prove his or her claim of discrimination under Title VII either directly or indirectly. *See Silverman v. Bd. of Educ. Of City of Chi.*, 637 F.3d 728, 733 (7th Cir. 2011)(citing *Griffin v. Sisters of St. Francis, Inc.*, 489 F.3d 838, 844 (7th Cir. 2007)); *see also Martino v. W. & S. Fin. Group*, 2012 U.S. Dist. LEXIS 34188 (N.D. Ind. Mar. 13, 2012)(stating the same thing in the religious discrimination context). To avoid summary judgment under the direct approach, the plaintiff must produce sufficient evidence, either direct or circumstantial, to create a triable question of intentional discrimination in the employer's decision. *Id*. (citing *Miller v. American Family Mutual Insurance Co.*, 203 F.3d 997, 1005 (7th Cir. 2000); *Geier v. Medtronic, Inc.*, 99 F.3d 238, 241 (7th Cir. 1996)). A plaintiff may also proceed under the indirect, burden-shifting method adapted from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). *Id.* In this case, Plaintiff has not and cannot set forth sufficient evidence under either approach to establish her religious observance was the basis for her discharge.

i. Plaintiff Cannot Establish her Title VII Discrimination Claim Under the Direct Approach.

To succeed under the direct method, Plaintiff must offer either: (1) direct evidence that would prove Whitis' discriminatory intent without reliance on inference or presumption, or (2) "a convincing mosaic" of circumstantial evidence that would allow a jury to infer intentional discrimination by the decision maker. *Id*. (citing *Venturelli v. ARC Community Services, Inc.*, 350 F.3d 592, 599 (7th Cir. 2003; *Coffman v. Indianapolis Fire Department*, 578 F.3d 559, 563 (7th Cir. 2009); *Phelan v. Cook County*, 463 F.3d 773, 779 (7th Cir. 2006); *Davis v. Con-Way Transportation Central Express, Inc.*, 368 F.3d 776, 783-84 (7th Cir. 2004)). There are three types of circumstantial evidence including (1) "suspicious timing, ambiguous statements oral or written, behavior toward or comments directed at other employees in the protected group, and other bits and pieces from which an inference of discriminatory intent might be drawn;" (2) evidence showing that Whitis "systematically treated other, similarly situated, [Christian] employees better; and (3) evidence that Plaintiff suffered an adverse employment action and that Whitis' justification was pretextual. *Id*. at 734 (citations omitted).

In this case, Plaintiff has no direct evidence of intent to discriminate against her on the basis of religion. In her deposition testimony, Plaintiff conceded that while she felt Whitis disliked her and treated her differently than another employee in the Circuit Court Clerk's Office that she did not feel such dislike or disparate treatment was because of her religious beliefs. (Plaintiff, p. 162 ll. 12-25, p. 163 ll. 1-25; p. 164 ll. 1-25, p. 165 ll. 1, p. 135 ll. 12-16.)

There is also no "convincing mosaic" of circumstantial evidence that would allow a jury to infer intentional discrimination on Whitis' part. The first two types of circumstantial evidence do not exist. Whitis did not know of Plaintiff's religious belief prior to making the decision to

terminate her and therefore could not have possibly fired her "because of" her religion. Additionally, Plaintiff testified that Whitis herself indicated an aversion for processing same-sex marriage licenses and did not fire other clerks that expressed that same aversion. While Plaintiff argues Kitterman was treated differently than she was (which Whitis disputes), she acknowledges it was not because of her religion. Thus, a jury could not infer Whitis was intentionally discriminating against Plaintiff.

The third type of circumstantial evidence is substantially the same as the evidence required to prove discrimination under the indirect method and will therefore be addressed below.

ii. Plaintiff Cannot Establish her Title VII Discrimination Claim Under the Indirect, Burden-Shifting Method.

Under the indirect method, Plaintiff carries the initial burden of establishing a *prima facie* case of discrimination, which requires her to offer evidence that: "(1) she is a member of a protected class; (2) she was qualified for the applicable positions; (3) she suffered an adverse employment action; and (4) similarly-situated persons not in the protected class were treated more favorably. *McGowan v. Deere & Co.*, 581 F.3d 575, 579 (7th Cir. 2009) (citing *McDonnell Douglas*, 411 U.S. at 802;; *Fane v. Locke Reynolds, LLP*, 480 F.3d 534, 538 (7th Cir. 2007)). An establishment of these four burdens shifts the burden of production to Whitis and the County to offer a permissible, nondiscriminatory reason for the adverse employment action. *Id.*

Plaintiff has presented no evidence to meet the fourth requirement and is therefore has failed to establish a prima facie case of discrimination. Assuming *arguendo* that she had, she would still fail to survive summary judgment because Whitis had a legitimate, nondiscriminatory basis for the adverse employment action. Specifically, the Handbook expressly authorized Whitis and the County to terminate Plaintiff for her insubordination and acted in accordance with

that authority. There are no facts to suggest Whitis and the County exceeded that authority or overreached in finding that Plaintiff was insubordinate.

Because Whitis and the County presented a legitimate, nondiscriminatory basis for terminating Plaintiff, the burden returns to Plaintiff to show that the stated reason for her termination—i.e., insubordination—was not a pretext for discrimination. *Id.* "Pretext is not shown. . . merely by demonstrating that [Whitis] erred or exercised poor business judgment; instead [Plaintiff] must establish that [Whitis] did not believe the reasons she gave for eliminating her position." *Steeno v. Wabash Nat'l Trailer Ctrs.*, 822 F. Supp. 2d 855, 864 (N.D. Ind. 2011)(citing *Ritter v. Hill 'N Dale Farm, Inc.*, 231 F.3d 1039, 1044 (7th Cir. 2000)). The Court does "not sit as a 'super-personnel department,' weighing the wisdom of a company's employment decisions; rather, it is concerned only with whether the employer's proffered explanation was honest." *Id.* (citing *O'Regan v. Arbitration Forums, Inc.*, 246 F.3d 975, 984 (7th Cir. 2001)). The Court is not to determine the quality of the employment decision, only whether it was motivated by a discriminatory intent. *Id.* at 865.

Here, there has been no evidence which suggested Whitis' and the County's stated reason for their decision is suspect and that their real motivation was discriminatory. As stated above, they did not have knowledge of Plaintiff's religious beliefs at the time the decision to terminate her was made. Moreover, Plaintiff concedes she was not treated differently or disliked because of her religious beliefs. There is simply no evidence to suggest Whitis was biased against Plaintiff because of her religious beliefs.

II. DEFENDANTS HAD NO DUTY TO ACCOMMODATE PLAINTIFF BECAUSE HER WORK REQUIREMENT OF PROCESSING SAME-SEX MARRIAGE LICENSES DOES NOT CONFLICT WITH HER RELIGIOUS FAITH, SHE DID NOT NOTIFY THEM OF HER NEED FOR A RELIGIOUS ACCOMMODATION AND BECAUSE IT WAS IMPOSSIBLE TO DO SO WITHOUT INCURRING AN UNDUE BURDEN.

A. Plaintiff's Compliance with her Work Requirement of Processing Same-Sex Marriage Licenses is not Contrary to her Religious Faith.

As stated above, an employer is only required to accommodate an employee "when a neutral rule of general applicability conflicts with the religious practices of a particular employee." *Trans World Airlines, Inc.*, 432 U.S. at 87. For reasons already stated herein, the mere processing of same-sex marriage licenses does not conflict with her religious faith. Therefore the Defendants were not required to accommodate her.

B. Defendants' Duty to Accommodate was not Triggered because Plaintiff did not Notify Defendants of her Need for a Religious Accommodation Until After the Decision to Terminate her had been Made.

After an employee . . . notifies the employer . . . of his or her need for a religious accommodation, the employer or labor organization has an obligation to reasonably accommodate the individual's religious practices. 29 C.F.R. § 1605.2)(emphasis added.) Because Plaintiff did not notify Whitis of her need for a religious accommodation until after the decision to terminate her had been made, Plaintiff had no duty to reasonably accommodate her. Per the EEOC Compliance Manual, "[a]n. . . employee who seeks religious accommodation must make the employer aware both of the need for accommodation and that it is being requested due to a conflict between work and religion. The employee is obligated to explain the religious nature of the belief or practice at issue, and cannot assume that the employer will already know or understand it. U.S. Equal Employment Opportunity Commission Enforcement Compliance Manual on Religious Discrimination (citing *Seshardi v. Kasraian*, 130 F.3d 798, 800 (7th Cir.

1997); *Chrysler v. Mann*, 561 F.2d 1281, 1285 (8th Cir. 1977); *Redmond v. GAF Corp.*, 574 F.2d 897 (7th Cir. Ill. 1978)). Here, Plaintiff did not notify Whitis her religious beliefs or need for an accommodation until after the decision to terminate her had been made and therefore any failure to accommodate her did not violate Title VII.

C. Defendants Could Not Accommodate Plaintiff Without Suffering an Undue Burden.

Notwithstanding, if this Court were to find Defendants had a duty to accommodate Plaintiff, Defendants still did not violate Title VII because they could not accommodate Plaintiff without suffering an undue hardship. *Id*. (citing *Ansonia Bd. Of Educ. V. Philbrook*, 479 U.S. 60, 63 (1986); *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63, 74 (1977)). An undue hardship is anything that imposes more than a *de minimus* burden on the employer. *Reed v. Great Lakes Companies, Inc.*, 330 F.3d 931, 935 (7th Cir. 2003). The reasonable accommodation requested by Plaintiff is that she be exempt from her job duty of processing same-sex marriage licenses.

Assuming the only other two employees in the Superior Court Clerk's Office—Whitis and Kirkham—were willing to process same-sex marriage licenses so that Plaintiff could avoid doing so, there would still be regular situations in which Plaintiff would be alone at the Clerk's Office where a same-sex couple may walk in and be refused a marriage license. (Whitis, p. 44 ll. 10-18; p. 45 ll. 18-24.) The Clerk's office has no way of knowing when a clerk employee will be called on to do this task so cannot schedule around it.

i. <u>The Risk of Refusal of Marriage Licenses to Same-Sex Couples Creates an Undue Hardship for Defendants.</u>

The costs imposed on Defendants by having a policy which permits government employees to avoid performing their duties of issuing or processing same-sex marriage licenses—duties which Defendants are statutorily and constitutionally required to see are

completed—are more than de minimus. When considering these hardships, it is important to remember that the County and Whitis are state actors and, as such, are constitutionally prohibited from violating individuals' fundamental rights—such as the right to marry.

First, if a same-sex couple were to be seek and be refused a marriage license by Plaintiff during one of the times she is alone in the Clerk's Office, the Defendants, and Whitis, as County Clerk, in particular, would be violating Indiana Statutes as well as the United States Constitution and United States Supreme Court ruling. "Our form of government will not survive unless we, as a society, agree to respect the U.S. Supreme Court's decisions, regardless of our personal opinions." *Miller*, 123 F. Supp. 3d at 937 (E.D. Ky. 2015). One's disagreement with the law does not excuse him or her from complying with it.

In *Bey v. Oakton Cmty. College*, 2015 U.S. Dist. LEXIS 131 877, *21-22 (N.D. Ill. Sept. 30, 2015)(unpublished opinion), attached hereto as **Exhibit L**, plaintiffs brought religious discrimination claims under Title VII arguing their employers' refusal to stop using their Social Security Numbers on employment forms violated their belief against participating in any social security program. The court held said beliefs were not required to be accommodated because the requirement of providing a Social Security Number was the government's not the employer's and because, as a matter of law, the requested accommodation would impose an undue hardship on the employer. *Id*. at *23.

Here, the requirement that the Clerk's Office issue same-sex marriage licenses was the government's (by way of law), not Whitis' or the County's, and an accommodation which permitted violation of the law would cause an undue hardship and cannot be deemed to be reasonable.

Second, any refusal by the Clerk's Office to issue same-sex marriage licenses would constitute violations of the Establishment Clause. The State and Defendants have an obligation to prevent Establishment Clause violations. *See U.S. Const. amend. I* (declaring that "Congress shall make no law respecting the establishment of religion"). If Defendants were to openly adopt a policy that promotes her clerks' religious convictions at the expense of others, they would be arguably committing an Establishment Clause violation. *See Miller v. Davis,* 123 F. Supp. 3d at 937. "In such situations, 'the scope of the employees' rights must yield to the legitimate interest of governmental employer in avoiding litigation." *Id*. (citing *Marchi v. Bd. of Coop. Educ. Serv. of Albany*, 173 F.3d 469, 476 (2d. Cir. 1999)).

Third, refusal by the Clerk's Office to issue same-sex marriage licenses would also result in 14th Amendment violations. On June 26, 2015, after Indiana's Seventh Circuit recognized the fundamental right to marry, the United States Supreme Court held that states are constitutionally required to recognize same-sex marriage. *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015). This is because the right to marry is fundamental and implicitly recognized in the Due Process Clause of the 14th Amendment. *Id*. Thus, any refusal on the part of the Harrison County Clerk's Office to process marriage licenses would result in violations of Whitis' constituents' fundamental rights.

Fourth, refusal of a county clerk to provide marriage licenses to same-sex couples does not merely result in a bad customer experience. Rather, such a refusal results in the violation of same-sex couples' fundamental rights and can result in expensive, time-consuming, and highly publicized lawsuits filed against Whitis and the County. *Miller, et al. v. Kim Davis, both individually and in her official capacity as Rowan County Clerk, and Rowan County, Kentucky*, U.S.D.C. E.D. of Ky., Northern Division at Ashland, Case No. 0:15-cv-00044-DLB, attached

hereto as **Exhibit K**.) The risk of claims of discrimination against Whitis and the County, as well as the risk of costs of litigation, alone, impose an undue hardship.

A risk of costly litigation has been held to create an undue hardship in the Seventh Circuit. For example, in *Matthews v. Wal-Mart Stores, Inc.*, 417 Fed. Appx. 552, 553 (7th Cir. Ill. 2011), Matthews was terminated from Wal-Mart for violating Wal-Mart's Discrimination and Harassment Prevention Policy after an investigation revealed she stated gays were sinners and were going to hell to another employee. *Id*. Matthews, an Apostolic Christian, then sued Wal-Mart for religious discrimination under Title VII. *Id*. Wal-Mart moved for summary judgment, which the district court granted, holding there was no direct evidence of discrimination. *Id*. On appeal, the Seventh Circuit affirmed, stating Wal-Mart fired Matthews because she violated company policy when she harassed a coworker, not because of her religious beliefs. *Id*. The Court went on to say that requiring Wal-Mart to accommodate Matthews religious beliefs by allowing her to violate their anti-discrimination and harassment policy would cause an undue hardship by exposing Wal-Mart to legal liability for work place harassment. *Id*. (citing *Flanagan v. Ashcroft*, 316 F.3d 728, 729-30 (7th Cir. 2003)). Moreover, Wal-Mart's anti-harassment policy established Plaintiff's conduct as harassment and specifically stated Wal-Mart may fire her as a result of said harassment. *Id*. at 555.

The same is true in this case, as permitting Plaintiff to refuse to process marriage licenses for same-sex couples would cause an undue hardship by discriminating against same sex couples and exposing Whitis and the County to legal liability for discrimination, Establishment Clause violations, etc.

ii. <u>Defendants Could Not Ensure Plaintiff Would Never Be Alone at the Clerk's Office Without Suffering an Undue Hardship.</u>

As stated above, short of forbidding lunch breaks, sick days and vacation for Kirkham and Whitis, as well as requiring Whitis to abandon her statutory duties at the Election Office Circuit Court Clerk's Offices, there was no way to avoid the above-mentioned risks of Summers being left alone in the Clerk's office.

Moreover, once Indiana began legally recognizing same-sex marriages, Whitis was faced with an office where every single one of her employees, in both offices, expressed an opposition to processing same-sex marriage licenses. (Whitis, p. 48 ll. 12-19; Whitis, p. 28 ll. 12-25, p. 29 ll. 1-25, p. 30 ll. 1-12.) Therefore, any possible "swap" of Plaintiff with one of the Circuit Court Clerks—(which Defendants are not required to do *see Adams v. Retail Ventures, Inc.*, 325 Fed. Appx. F.3d 440, 443 (7th Cir. Ind. 2009)(unpublished opinion), attached hereto as **Exhibit M** (citing *Endres v. Ind. State Police*, 349 F.3d 922, 927, *Hardison*, 432 U.S. at 81)("Title VII does not require employers to deny the shift preferences of some employees in order to favor the religious needs of others)—would place Defendants in a position where they were infringing upon other employees' opposition (secular or religious) to processing same-sex marriage licenses by requiring them to assume Plaintiff's duty of doing so. This is not required by Title VII. U.S. Equal Employment Opportunity Commission Enforcement Compliance Manual on Religious Discrimination § 12(VI)(B)(2)(citing *Brown v. Polk County*, 61 F.3d 650, 655 (8th Cir. Iowa 1995)(allowing employee to assign secretary to type his Bible study notes posed more than *de minimis* cost because secretary would otherwise have been performing employer's work during that time); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004)("[A]n employer need not accommodate an employee's religious beliefs if doing so would result in discrimination against his co-workers or deprive them of contractual or other statutory rights."); *EEOC v. BJ Servs. Co.*, 921 F. Supp. 1509 (N.D. Tex. 1995)(employer was unable to accommodate

employee's religious request for certain day off because no other employees were available to work, there were safety concerns regarding untrained substitute personnel, there were significant costs in bringing employees from other locations, and this accommodation would deny other employees their day off); *Balint v. Carson City, Nevada*, 180 F.3d 1047, 1054 (9th Cir. 1999)(citing *Bhatia v. Chevron U.S.A., Inc.*, 734 F.2d 1382, 1384 (9th Cir. 1984)(cost of plaintiff's requested accommodation was more than *de minimis* when it required co-workers to assume plaintiff's share of the hazardous work); *Bruff v. N. Miss. Health Servs.*, 244 F.3d 495 (5th Cir. Miss. 2001)(requiring co-workers of plaintiff mental health counselor to assume disproportionate workload to accommodate plaintiff's request not to counsel certain clients on religious grounds would constitute undue hardship)).

CONCLUSION

As is set forth above, no genuine issue of material fact exists as to the viability of Plaintiff's claims and Defendants, Sally Whitis and Harrison County, are entitled to Judgment as a matter of law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing pleading was filed electronically on the 3rd day of June, 2016. Notice of this filing will be sent to the following parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system:

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