

## FACT SHEET

# D.C. Employees and Students Deserve Protection Against Discrimination, Not Congressional Interference

April 2015

*Representative Diane Black (R-TN) and Representative Vicky Hartzler (R-MO) have introduced resolutions that would disapprove two District of Columbia laws recently passed by the D.C. Council. The disapproval resolutions – H.J. Res. 43 and 44 – would block laws aimed at protecting women and their families and LGBT students in the District of Columbia from harsh discrimination at work and school.*

## **H.J. Res. 43 Would Disapprove the D.C. Reproductive Health Non-Discrimination Amendment Act of 2014, a Local Law that Protects D.C. Employees From Discrimination Based on their Reproductive Health Decisions**

Across the country, employees are being discriminated against because of their reproductive health decisions, such as whether and how to start a family. Women are being punished, threatened, or fired for using birth control, for undergoing in vitro fertilization to get pregnant, or for having sex without being married. For example:

- Employees of the Madison Catholic Diocese were warned in 2010 that if they used birth control, they could face termination.<sup>1</sup>
- Kelly Romenesko was fired from her 7 year job teaching French at two Wisconsin Catholic schools because she and her husband used in vitro fertilization to become pregnant.<sup>2</sup>
- Christine John, a kindergarten teacher at a Christian school in Michigan, was called into a meeting with school officials. They asked why she was four months pregnant when she was married only two months before. John says that officials told her that premarital sex is strictly forbidden by the school and that her services were no longer needed.<sup>3</sup>

The Council of the District of Columbia recently passed a law protecting D.C. women and families from such discrimination, making it clear that bosses cannot penalize or retaliate against an employee because of the employee's personal reproductive health care decision.

## **D.C.'s Reproductive Health Non-Discrimination Amendment Act is Necessary Because Discrimination Based on Reproductive Health Decisions May Fall Into Gaps in Existing Laws**

Many state and federal laws – particularly those that protect against discrimination on the basis of sex or pregnancy – offer protections against reproductive health discrimination. For example, recent guidance from the agency that interprets and enforces the federal law prohibiting sex and pregnancy discrimination in employment states that this law “necessarily includes a prohibition on discrimination related to a woman’s use of contraceptives.”<sup>4</sup>

Yet, narrow or erroneous decisions by courts and officials have created loopholes in the existing laws that leave women without a legal remedy when they face discrimination for their reproductive health decisions. For example:

- A federal court in Michigan in 2001 held that firing an employee for taking time off work in order to undergo fertility treatment was not pregnancy discrimination under federal law because infertility is not part of “pregnancy, childbirth, or related medical conditions.”<sup>5</sup>
- In the case of Kelly Romenesko, who was fired for using in vitro fertilization, an investigator for the state’s agency charged with enforcing anti-discrimination laws upheld her termination. The agency said that she had not been fired for becoming pregnant, which would have been illegal, but for undergoing in vitro fertilization, which was not protected under state law.<sup>6</sup>

## **H.J. Res. 44 Would Disapprove the Human Rights Amendment Act, a Local Law that Protects LGBT Students in D.C. from Discrimination**

The Human Rights Amendment Act restores D.C.’s Human Rights Act’s prohibition on sexual orientation discrimination against students, ensuring all LGBT students in D.C. are protected.<sup>7</sup> Discrimination in the context of higher education—including by denying students equal access to facilities and services—is particularly pernicious because participation in student organizations is a significant way that students obtain meaningful leadership opportunities, personal and professional contacts, and other important benefits.

### **The D.C. Laws Do Not Violate Religious Liberty**

The Acts do not violate the Free Exercise Clause of the First Amendment. The Supreme Court has held that neutral, generally applicable laws do not violate the Free Exercise Clause even if they happen to burden some individuals’ religious exercise.<sup>8</sup> These Acts do not target a particular religion or religious practice. Their objective is to protect against discrimination.

The Acts do not violate the Religious Freedom Restoration Act. The Acts do not substantially burden religious exercise, and they further the compelling government interest of combating discrimination.<sup>9</sup>

### **Congress Must Respect D.C. Home Rule**

The D.C. Council passed the D.C. Reproductive Health Non-Discrimination Amendment Act of 2014 and the Human Rights Amendment Act to protect its residents from discrimination. These local decisions must not be disturbed.

### **These Congressional Resolutions Interfering with D.C. Law Misuse Religion**

True religious freedom gives each of us the right to make our own personal decisions, including whether and when to have children, based on our own beliefs and what is best for our health and the well-being of our families.

Neither of the local laws violates freedom of religion. Instead, the Reproductive Health Non-Discrimination Amendment Act and the Human Rights Amendment Act are about basic fairness for D.C. residents and students. Congress must stand firm in the principle that religion should never be used as an excuse to discriminate or to harm others.

1. Doug Erickson, *Wisconsin Diocese Offers Birth Control Insurance but Warns Employees Not to Use It*, WFCOURIER.COM (Aug. 10, 2010), [http://wfcourier.com/news/local/wisconsin-diocese-offers-birth-control-insurance-but-warns-employees-not/article\\_0b904262-a4e4-11df-bde9-001cc4c002e0.html](http://wfcourier.com/news/local/wisconsin-diocese-offers-birth-control-insurance-but-warns-employees-not/article_0b904262-a4e4-11df-bde9-001cc4c002e0.html).
2. *Teacher Appeals Firing: Appleton Catholic System Cites In Vitro Pregnancy*, JOURNAL SENTINEL (Madison, Wis.), May 11, 2006, <http://news.google.com/newspapers?nid=1683&dat=20060511&id=-yMqAAAAIbAJ&sjid=GkUEAAAAIbAJ&pg=6530.702621>. See also Charles D. Wilson, *Sides in Ind. In Vitro Lawsuit Argue Over Doctrine*, INDYSTAR (Feb. 8, 2014, 6:21 PM), <http://www.indystar.com/story/news/crime/2014/02/08/sides-in-ind-in-vitro-lawsuit-argue-over-doctrine/5319763/> (Emily Herx was fired from her teaching job at a Catholic school in Indiana for using in vitro fertilization. According to a local paper, Herx wrote a letter to school officials after being informed of her firing in which she lamented being forced to choose between keeping her job and starting a family); *Jury Rules Discrimination by Cincinnati Archdiocese*, RECORD-JOURNAL (Meriden, Ct.), June 8, 2013, 2013 WLNR 14096999 (Christa Dias, an unmarried teacher for two schools with the Archdiocese of Cincinnati, Ohio, was fired after she became pregnant through artificial insemination).
3. *Teacher Punished for Pregnancy*, GRAND RAPIDS PRESS, May 12, 2005, 2005 WLNR 7571283; see also Molly Redden & Dana Liebelson, *A Montana School Just Fired a Teacher for Getting Pregnant. That Actually Happens All the Time*, MOTHER JONES (Feb. 10, 2014, 10:32 AM), <http://www.motherjones.com/politics/2014/02/catholic-religious-schools-fired-lady-teachers-being-pregnant> (after an anonymous letter revealed her pregnancy, unmarried middle school teacher Shaela Evenson was fired by a Catholic school district in Montana for having sex outside of marriage. She was fired despite her 10 year career with them and the fact that the principal called her an "excellent teacher"); Statement of Michelle McCusker, *Pregnant Teacher Fired by Catholic School* (Nov. 21, 2005), <http://www.nyclu.org/node/861>. (After revealing her pregnancy, preschool teacher Michelle McCusker was fired from a Catholic school in New York for becoming pregnant outside of marriage.)
4. Equal Emp't Opportunity Comm'n, No. 915.003, EEOC Enforcement Guidance on Pregnancy Discrimination and Related Issues (July 14, 2014), [http://www.eeoc.gov/laws/guidance/pregnancy\\_guidance.cfm](http://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm).
5. *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758 (W.D. Mich. 2001).
6. See Redden & Liebelson, *supra* note 3.
7. Educational institutions affiliated with religious organizations would not be allowed to prohibit LGBT student groups and would have to provide them equal use of the school's facilities and services.
8. Courts have rejected attempts to challenge non-discrimination laws on Free Exercise grounds. For example, a federal appellate court held that an employer violated Title VII and the Equal Pay Act by offering health insurance only to "heads of households"—which the employer defined as single persons and married men, not married women. The court rejected the employer's claim that these laws violate the Free Exercise Clause, finding only a minimal burden on religion, if any, and that any burden was nonetheless justified by the government's compelling interest in eliminating gender-based employment discrimination. *Equal Emp't Opportunity Comm'n v. Fremont Christian Sch.*, 781 F.2d 1362 (9th Cir. 1986).
9. The *Hobby Lobby* decision does not lend support to a view that RFRA claims would succeed against non-discrimination laws. In fact, the *Hobby Lobby* majority makes it clear that its decision should not be used as a "shield" to escape legal sanction for discrimination in hiring on the basis of race because such prohibitions further a "compelling interest in providing an equal opportunity to participate in the workforce without regard to race," and are narrowly tailored to meet that "critical goal." *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, slip op. at 46 (2014).