

## FACT SHEET

# States Take Action to Stop Bosses' Religious Beliefs from Trumping Women's Reproductive Health Care Decisions

July 2014

*Across the country, employers are using their religious beliefs to discriminate against their employees because of their employees' personal reproductive health care decisions. Women are being punished or fired for using birth control, for undergoing in vitro fertilization in order to get pregnant, or for having sex without being married. The Supreme Court's recent decision permitting some bosses to refuse to provide insurance coverage of birth control to their female employees highlights how a boss's religious beliefs are trumping an employee's health and access to the health care they and their families need.*

*Employers should not be allowed to use their personal religious beliefs to discriminate against employees who typically come from all different faiths. Fortunately, states have begun to step forward to protect employees, introducing legislation to make it clear that bosses cannot obstruct or coerce an employee when that employee makes a personal reproductive health care decision.*

## Employers are Increasingly Using their Religion to Discriminate Against their Employees for their Private Reproductive Health Decisions

Women remain at serious risk of workplace discrimination based on their reproductive health decisions, and based on an employer's religious beliefs about such decisions.

*Employers are discriminating against women for seeking to prevent pregnancy*

Employers are threatening to fire workers for using birth control, and employers are refusing to provide insurance coverage of birth control.

- Despite the fact that 48.5 million women now have access to the federal health care law's guarantee of insurance coverage of birth control without cost-sharing,<sup>1</sup> the Supreme Court recently decided that some bosses can get out of that requirement because of their religious beliefs.<sup>2</sup> As Justice Ginsburg said in her dissent, the decision "would deny legions of women who do not hold their employers' beliefs access to contraceptive coverage that the ACA would otherwise secure."<sup>3</sup> Even more lawsuits are pending, from other kinds of employers seeking the same exemption.<sup>4</sup>
- Just two years ago, politicians in Arizona revised a long-standing law requiring insurance coverage of birth control, to make it easier for a boss to penalize an employee for using it.<sup>5</sup>
- After Wisconsin passed a law in 2009 requiring insurance plans to cover birth control, the Madison Catholic Dio-

cese warned employees that if they took advantage of the benefit, they could face termination.<sup>6</sup>

Allowing employers to take birth control coverage away from women jeopardizes the health of women and any children they might conceive. It subjects them to financial burdens that men in the same group health plan do not face. And it has long-term negative consequences for women's and their families' economic, educational, and employment opportunities.<sup>7</sup>

### *Employers are firing women for pursuing pregnancy through the use of assisted reproductive technology*

- Christa Dias, an unmarried teacher for two schools with the Archdiocese of Cincinnati, Ohio, was fired after she became pregnant through artificial insemination.<sup>8</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>9</sup>
- Emily Herx was fired from her teaching job at a Catholic school in Indiana for using in vitro fertilization. In a letter Herx wrote to school officials shortly after being informed of her dismissal, she said "it was terrible to be forced to choose between trying to have children and keeping her job as a language arts teacher."<sup>10</sup>

### *Employers are firing women for having sex outside of marriage*

- 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>11</sup>
- Earlier this year, 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."<sup>12</sup>
- After revealing her pregnancy, preschool teacher Michelle McCusker was fired from a Catholic school in New York for becoming pregnant outside of marriage.<sup>13</sup>

These women were dedicated to their jobs and fully qualified for their positions. It is unfair that they – or any person – would be fired simply because of private activities outside of the workplace, including the decision to start a family.

## **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 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" and that an employer may violate federal law by excluding coverage of prescription contraceptives from health insurance.<sup>14</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.

- In 2007, a divided panel of the Eighth Circuit Court of Appeals held that the failure of Union Pacific Railroad to provide birth control coverage to its employees was not sex discrimination under the federal law prohibiting discrimination in employment.<sup>15</sup> The court determined that because Union Pacific excluded coverage for all contraceptives (prescription and non-prescription) and did not cover sterilization procedures for either men or women, insurance coverage was equal for men and women. This decision was in error and reflects a basic mis-

understanding of the fundamental principles of discrimination.<sup>16</sup>

- 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>17</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>18</sup>

State laws must make it clear that an employer cannot ask an employee to choose between a job and their right to make personal decisions for themselves and their families.

### **State Legislators Are Stepping In to Ensure that Non-Discrimination Laws Explicitly Protect Reproductive Health Decisions**

Legislators in Michigan, New York, North Carolina, and the District of Columbia have introduced bills that would explicitly ban discrimination based on an individual’s reproductive healthcare decisions. These bills ensure that no one is discriminated against with respect to “compensation, terms, conditions, or privileges of employment ... on the basis of ... reproductive health” decisions or based on employer’s personal beliefs about the use of particular drugs or services related to reproductive health.<sup>19</sup> On June 19, 2014, the New York bill passed the State Assembly.<sup>20</sup>

When introducing the Reproductive Health Non-Discrimination Amendment Act of 2014, District of Columbia Councilmember David Grosso explained, “While the District enjoys some of the strongest non-discrimination laws in the country, this specific legislation signals that we stand by the rights of women and families to make their own reproductive health decisions.”<sup>21</sup> Affirming his support for the New York legislation, New York State Senator Gustavo Rivera said, “It is simply unacceptable that under New York law women are still susceptible to discriminatory practices in the workplace when it comes to making personal decisions about their reproductive health.”<sup>22</sup>

True religious freedom gives each of us the right to make our own personal decisions, including whether and when to use prescription birth control and 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. State non-discrimination laws must explicitly reaffirm this basic principle.

STATES TAKE ACTION TO STOP BOSSES' RELIGIOUS BELIEFS FROM TRUMPING WOMEN'S REPRODUCTIVE HEALTH CARE DECISIONS • FACT SHEET

- 1 Amy Burke & Adelle Simmons, Office of the Assistant Secretary for Planning and Education, Dep't of Health and Human Services, Increased Coverage of Preventive Services With Zero Cost Sharing Under the Affordable Care Act (June 27, 2014), [http://aspe.hhs.gov/health/reports/2014/PreventiveServices/ib\\_PreventiveServices.pdf](http://aspe.hhs.gov/health/reports/2014/PreventiveServices/ib_PreventiveServices.pdf).
- 2 *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. \_\_\_ (2014).
- 3 *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354, slip op. at 8 (U.S. June 30, 2014) (Ginsburg, J., dissenting)
- 4 See National Women's Law Center, Status of the Lawsuits Challenging the Affordable Care Act's Birth Control Coverage Benefit, <http://www.nwlc.org/status-lawsuits-challenging-affordable-care-acts-birth-control-coverage-benefit>.
- 5 ARIZ. REV. STAT. ANN. §§ 20-1057.08 (2002) (amended 2012).
- 6 Doug Erickson, *Wisconsin Diocese Offers Birth Control Insurance, but Warns Employees Not to Use It*, WCF COURIER.COM (Aug. 10, 2010, 8:00 PM), [http://wcfcourier.com/news/local/wisconsin-diocese-offers-birth-control-insurance-but-warns-employees-not/article\\_0b904262-a4e4-11df-bde9-001cc4c002e0.html](http://wcfcourier.com/news/local/wisconsin-diocese-offers-birth-control-insurance-but-warns-employees-not/article_0b904262-a4e4-11df-bde9-001cc4c002e0.html).
- 7 Brief for the National Women's Law Center and Sixty-Eight Other Organizations As *Amici Curiae* In Support of the Government, *Sebelius v. Hobby Lobby Stores, Inc.* 723 F.3d 1114 (10th Cir. 2013), *cert. granted*, 134 S.Ct. 678 (Nov. 26, 2013) (No. 13-354); *Conestoga Wood Specialties Corp. v. Sebelius*, 724 F.3d 377 (3d Cir. 2013), *cert. granted*, 134 S.Ct. 678 (Nov. 26, 2013) (No. 13-356), <http://www.nwlc.org/resource/nwlc-supreme-court-amicus-brief-supporting-contraceptive-coverage-benefit>.
- 8 *Jury Rules Discrimination by Cincinnati Archdiocese*, RECORD-JOURNAL (Meriden, Ct.), June 8, 2013, 2013 WLNR 14096999.
- 9 *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=-yMqAAAAIAJ&sjid=GkUEAAAAIAJ&pg=6530.702621>.
- 10 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/>.
- 11 *Teacher Punished for Pregnancy*, GRAND RAPIDS PRESS, May 12, 2005, 2005 WLNR 7571283.
- 12 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>.
- 13 Statement of Michelle McCusker, *Pregnant Teacher Fired by Catholic School* (Nov. 21, 2005), <http://www.nyclu.org/node/861>.
- 14 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).
- 15 *In re Union Pacific Railroad Employment Practices Litigation*, 479 F.3d 936, 943 (8th Cir. 2007).
- 16 See Equal Emp't Opportunity Comm'n, *supra* note 14 (explaining why the Commission disagrees with the panel's conclusion).
- 17 *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758 (W.D. Mich. 2001)
- 18 See Redden & Liebelson, *supra* note 12.
- 19 See B20-0790, 2014 Leg., Council Period 20 (D.C. 2014); H.B. 5416, 2014 Leg., Reg. Sess. (Mich. 2014); SB 855, 2013 Leg., Reg. Sess. (N.C. 2013); S6578B, 2013 Leg., Reg. Sess. (N.Y. 2013).
- 20 Press Release, Ellen Jaffee, "Boss Bill" Passes Assembly with Bipartisan Support Jaffee and Krueger Call for Senate Vote before Close of Session (June 19, 2014) <http://assembly.state.ny.us/mem/Ellen-Jaffee/story/58970/>.
- 21 Press Release, David Grosso, D.C. Council At-Large, Grosso's Reproductive Rights Legislation to Protect Women and Families (May 6, 2014), <http://www.davidgrosso.org/news/2014/5/6/grossos-reproductive-rights-legislation-to-protect-women-and-families>.
- 22 See Press Release, Senator Liz Krueger, Sen. Krueger, Advocates Applaud Passage of "Boss Bill" in Senate Labor Committee, Call for Floor Vote Before End of Session (June 3, 2014) <http://www.nysenate.gov/press-release/sen-krueger-advocates-applaud-passage-boss-bill-senate-labor-committee-call-floor-vote>.