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# STATES TAKE ACTION TO STOP DISCRIMINATION BASED ON REPRODUCTIVE HEALTH CARE DECISIONS

Across the country, employers are discriminating against their employees because they disagree with their employees' personal reproductive health care decisions. Women are being punished, threatened, or fired for having an abortion, using birth control, for undergoing in vitro fertilization in order to get pregnant, or for having sex without being married. It is unfair to fire a person or discriminate against them because of a decision about whether or how to start a family.

Fortunately, states are taking action to protect employees, introducing and passing legislation to make it clear that bosses cannot discriminate against an employee because of their personal reproductive health care decisions.

## EMPLOYERS ARE DISCRIMINATING AGAINST THEIR EMPLOYEES FOR THEIR PERSONAL REPRODUCTIVE HEALTH DECISIONS.

Employees remain at serious risk of workplace discrimination based on their reproductive health decisions.

### **Employers are discriminating against employees for seeking to prevent pregnancy and threatening to fire workers for using birth control.**

- 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>1</sup>
- After Wisconsin passed a law requiring insurance plans to cover birth control, the Madison Catholic Diocese warned employees that if they took advantage of the benefit, they could face termination.<sup>2</sup>

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

- When Anne Williams Dorsey, an assistant principal at a West Palm Beach high school, disclosed that she was undergoing in-vitro-fertilization, she was allegedly reassigned to a position with a lower salary and replaced by a man with less experience.<sup>3</sup>
- Christa Dias, an unmarried teacher for two schools with the Archdiocese of Cincinnati, Ohio, was fired after she became pregnant using artificial insemination.<sup>4</sup>
- Kelly Romenesko was fired from her job of seven years teaching French because she and her husband used in vitro fertilization to become pregnant.<sup>5</sup>
- Emily Herx was fired from her teaching job 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.<sup>6</sup>

### **Employers are firing employees for having sex outside of marriage.**

- Christine John, a kindergarten teacher 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>7</sup>
- After an anonymous letter revealed her pregnancy, unmarried middle school teacher Shaela Evenson was fired by a school district in Montana for having sex outside of marriage. She was fired despite her ten-year career at the school and the fact that the principal called her an “excellent teacher.”<sup>8</sup>
- After revealing her pregnancy, preschool teacher Michelle McCusker was fired from a New York school for becoming pregnant outside of marriage.<sup>9</sup>

### **Employers are firing employees for taking time off to seek abortion care.**

- In 2016, Elena DeJesus was fired by Florida Central Credit Union for having abortion, despite the fact that

her time off for the procedure was approved and she had just received a positive performance review.<sup>10</sup>

- Nicole Ducharme was fired from her job as a bartender and server in Louisiana in 2017. She told her manager that she was pregnant and needed two days off to have an abortion but was fired on the day of the procedure.<sup>11</sup>

These employees were dedicated to their jobs and fully qualified for their position. It is unfair that they—or any person—would be fired simply because of their decisions related to their reproductive health, including whether 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, a federal district court clarified in 2019 that the federal Pregnancy Discrimination Act’s protections include abortion, and that a woman “terminated from employment because she had an abortion was terminated because she was affected by pregnancy.”<sup>12</sup> And guidance from the federal 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>13</sup>

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

- A federal court in Michigan 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>14</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>15</sup>

State laws must make it clear that an employer cannot ask an employee to choose between a job and decisions about whether, when, or how to start a family.

## STATE LEGISLATORS ARE WORKING TO ENSURE THAT NON-DISCRIMINATION LAWS EXPLICITLY PROTECT REPRODUCTIVE HEALTH DECISIONS

States across the country—including California, Delaware, Hawaii, Illinois, Iowa, Maine, Michigan, Missouri, New York, North Carolina, Ohio, Oklahoma, Texas, Virginia, Washington, and Wisconsin—and the District of Columbia have considered measures to protect employees from discrimination based on their reproductive health decisions. These important anti-discrimination protections have been enacted in New York,<sup>16</sup> the District of Columbia,<sup>17</sup> Delaware,<sup>18</sup> and Hawaii,<sup>19</sup> as well as in New York City<sup>20</sup> and St. Louis, Missouri.<sup>21</sup>

Protecting employees' reproductive health decisions enjoys widespread support from voters. A 2019 poll by the National Women's Law Center found that 87% of voters support lawmakers working to make sure women can't be fired or discriminated against because of their reproductive health decisions. This included support across party lines and across geographic areas.

In this current climate of attacks on reproductive health care, an explicit protection against employment discrimination based on reproductive health decisions is needed more than ever. No person should have to worry about losing their job because of their reproductive health decisions.

### Footnotes

- 1 ARIZ. REV. STAT. ANN. § 20-1057.08 (2002) (amended 2012).
- 2 See 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](http://wcfcourier.com/news/local/wisconsin-diocese-offers-birth-control-insurance-but-warns-employees-not/article_0b904262-a4e4-11df-bde9-001cc4c002e0). Html.
- 3 Paula McMahon, *Feds File Discrimination Lawsuit against West Palm Beach School Board*, SOUTH FLORIDA SUN SENTINEL (May 25, 2016), <https://www.sun-sentinel.com/local/palm-beach/fl-doj-teacher-discrimination-20160525-story.html>.
- 4 See *Jury Rules Discrimination by Cincinnati Archdiocese*, RECORD JOURNAL (Meriden, Ct.), June 8, 2013, 2013 WLNR 14096999.
- 5 See *Teacher Appeals Firing: Appleton Catholic System Cites In Vitro Pregnancy*, JOURNAL SENTINEL (Madison, Wis.) (May 11, 2006), <https://news.google.com/news-papers?nid=1683&dat=20060511&id=yMqAAAAIABAJ&s-jid=GkUEAAAAIABAJ&pg=6530,702621>.
- 6 See Charles D. Wilson, *Sides in Ind. In Vitro Law- suit 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/>.
- 7 See *Teacher Punished for Pregnancy*, GRAND RAPIDS PRESS (May 12, 2005), 2005 WLNR 7571283.
- 8 See 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-la-dy-teachers-being-pregnant>.
- 9 Statement of Michelle McCusker, *Pregnant Teacher Fired by Catholic School* (Nov. 21, 2005), <https://www.nyclu.org/en/statement-michelle-mccusker-pregnant-teacher-fired-catholic-school>.
- 10 Judy Greenwald, *Bias Case of Worker Fired After Abortion Can Proceed: Court*, BUSINESS INSURANCE (Oct. 30, 2018), <https://www.businessinsurance.com/article/20181030/NEWS06/912324855?template=printart>.
- 11 Angela Underwood, *U.S. District Court Rules that State Law Forbids Abortion Discrimination in Workplace*, LOUISIANA, July 1, 2019, <https://louisianarecord.com/stories/512676950-u-s-district-court-rules-that-state-law-forbids-abortion-discrimination-in-work-place>.
- 12 *Ducharme v. Crescent City Deja Vu, L.L.C.*, No. CV 18-4484, 2019 WL 2088625, at \*5 (E.D. La. May 13, 2019) (holding that abortion is protected by the pregnancy language of Title VII).
- 13 See 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).
- 14 *LaPorta v. Wal-Mart Stores, Inc.*, 163 F. Supp. 2d 758 (W.D. Mich. 2001).
- 15 See Redden & Liebelson, *supra* note 7.
- 16 S.660, 2019-2020 Regular Session (New York).
- 17 D.C. CODE § 2-1401.05 (D.C. 2015).
- 18 DEL. CODE ANN. tit. 19, § 711 (2016).
- 19 HAW. REV. STAT. §378-2 (2018).
- 20 N.Y.C. ADMIN. CODE § 8-101 (2019).
- 21 ST. LOUIS, MO., REV. CODE § 15.175.020 (2017).