

**Contraceptive Equity: Addressing Sex Discrimination in Prescription Drug Plans**

Historically, women in the United States have paid more for their health care than men. Studies have shown that women of reproductive age spend 68% more out-of-pocket for health care, in large part due to the failure of health plans to cover prescription contraception.<sup>1</sup>

Public attention became more focused on this inequity after 1998, when many insurance companies extended coverage to the male erectile dysfunction drug Viagra but continued to deny coverage for contraception needed by women to avoid unplanned pregnancies. Since then, several federal district courts and an Equal Employment Opportunity Commission (EEOC) decision have made clear that it violates Title VII of the Civil Rights Act of 1964 (Title VII), as amended by the Pregnancy Discrimination Act (PDA), for employers to exclude prescription contraceptives from their prescription drug plans.

Moreover, more than 20 states now require insurance plans that include prescription drug coverage to cover prescription contraceptives. Oregon may soon follow suit in the current legislative session. Although these measures have gone a long way toward rectifying the inequity, more work remains to be done in Oregon and elsewhere to ensure that women do not face sex discrimination in their health insurance plans.

**Title VII and ORS Chapter 659A Require Coverage**

An employer's failure to cover contraception as part of a prescription drug plan has been found

**Sondra Goldschein  
Carrie Flaxman**  
ACLU Reproductive Freedom Project

to constitute discrimination on the basis of sex in violation of federal and state laws prohibiting employment discrimination.

**Title VII**

Title VII prohibits employers with 15 or more employees from discriminating on the basis of sex in all aspects of employment, including the provision of benefits such as health insurance.<sup>2</sup> With the passage of the PDA in 1978, Congress amended Title VII to clarify that discrimination on the basis of sex includes discrimination "on the basis of pregnancy, childbirth, or related medical conditions." The PDA directs employers to treat "women affected by pregnancy, childbirth, or related medical conditions . . . the same for all employment-related purposes, including the receipt of benefits under fringe benefit programs."<sup>3</sup> With this amendment, Title VII reflects the "commonsense view" that discrimination on the basis of pregnancy is "per se" discrimination on the basis of sex.<sup>4</sup>

Although the U.S. Supreme Court has not addressed whether employers must cover prescription contraception, the EEOC and several federal district courts have held that an employer's failure to do so violates the protections of Title VII.

Since 2000, the EEOC, the federal agency charged with enforcement of Title VII, has directed employers to cover contraception on the same terms as other drugs and devices,

cover contraception-related outpatient services to the same extent as other outpatient services, and offer the full range of prescription contraceptive choices.<sup>5</sup> In a formal opinion, the EEOC determined that excluding contraceptives from coverage both discriminates against women based on their ability to become pregnant and treats expenses related to pregnancy differently than expenses related to other medical conditions. With its passage of the PDA, Congress intended to prohibit discrimination against women "based on 'the whole range of matters concerning the child-bearing process.'"<sup>6</sup>

Several federal district courts have followed suit. In 2001, in *Erickson v. Bartell Drug Co.*, Jennifer Erickson challenged the failure of her employer, a Washington drugstore chain, to cover contraceptive drugs as part of its "generally comprehensive prescription drug plan."<sup>7</sup> On behalf of a class of female employees, Erickson claimed that this omission was sex discrimination in violation of Title VII, and the federal district court in Washington agreed.

The court reasoned that when an employer chooses to offer a prescription drug plan, it has the legal obligation to ensure that the plan does not discriminate based on sex-based

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# Supreme Court Update

**Rachelle Hong Barton**  
Fisher & Phillips LLP

**Matthew Duckworth**  
Busse & Hunt

## Decided

***Carey v. Musladin,***  
**No. 05-785 (Dec. 11, 2006)**

The U.S. Supreme Court unanimously reversed the Ninth Circuit, ruling that it had improperly overturned Musladin's state murder conviction on the ground that the courtroom spectators included three of the victim's family members who wore buttons depicting the deceased.

***Philip Morris USA v. Williams,***  
**No. 05-1256 (Feb. 20, 2007)**

The Supreme Court ruled 5-4 in this case from the Oregon Supreme Court that a punitive damages award that punishes a defendant for harm to nonparties is an unconstitutional deprivation of property without due process of law.

## Argument Held

***Davenport v. Washington***  
***Education Ass'n,***  
**No. 05-1589 (Jan. 10, 2007)**  
***Washington v. Washington***  
***Education Ass'n,***  
**No. 05-1657 (Jan. 10, 2007)**

The Court held oral argument in these consolidated cases from the Washington Supreme Court. The issue is whether labor unions have a First Amendment right to take the wages of employees who have chosen not to become union members and use them for political purposes.

***Hein v. Freedom From Religion***  
***Foundation, Inc.,***  
**No. 06-157 (Feb. 28, 2007)**

The Court heard oral argument in this case from the Seventh Circuit regarding whether plaintiffs claiming taxpayer standing can challenge executive branch actions financed through general congressional appropriations as violating the establishment clause,

when no congressional funds were directly disbursed to individuals or entities outside the government. The plaintiffs allege that actions taken pursuant to an Executive Order violate the establishment clause by singling out faith-based organizations for eligibility for federal funds.

***Scott v. Harris,***  
**No. 05-1631 (Feb. 26, 2007)**

In this case from the Eleventh Circuit, the court heard oral argument regarding whether a police officer who stops a high-speed chase by ramming his police cruiser into a fleeing suspect's car is entitled to qualified immunity. The court will decide whether the officer's conduct violates the Fourth Amendment's protection against unreasonable seizure and whether it is "clearly established" in federal law that an officer violates the Fourth Amendment by using deadly force during a high-speed chase.

***Winkelman v. Parma City School***  
***Dist., No. 05-983 (Feb. 27, 2007)***

The court heard oral argument in this case from the Sixth Circuit regarding whether, and if so, under what circumstances, nonlawyer parents of a disabled child may proceed pro se in federal court in an action brought under the Individuals with Disabilities Education Act. The Court's decision will settle a three-way split among six circuits on this issue.

## Certiorari Granted

***BCI Coca-Cola Bottling Co.***  
***of Los Angeles v. EEOC,***  
**No. 06-341 (Jan. 5, 2007)**

The Court agreed to hear a case from the Tenth Circuit regarding the circumstances under which an employer may be liable under federal antidiscrimination laws, based on a

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The *Oregon Civil Rights Newsletter*  
is published by  
the Civil Rights Section  
of the Oregon State Bar  
P.O. Box 1689  
Lake Oswego, Oregon 97035

The purpose of this publication is  
to provide information on current  
developments in civil rights and con-  
stitutional law. Readers are advised to  
verify sources and authorities.

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## Antidiscrimination Laws and the Refusal to Fill Prescriptions

*A 14-year-old girl goes to her doctor with uterine bleeding. Her doctor prescribes a regimen of high-dose oral contraceptive pills to control the bleeding. The girl and her mother take the prescription to the local pharmacy. Rather than filling the prescription, the pharmacist accuses them of “trying to induce an abortion” and refuses to dispense the medication.*

*A woman receives a prescription for prenatal vitamins from her local women’s health clinic, a clinic that also provides abortion. When she presents the prescription to a pharmacist, the pharmacist refuses to fill the prescription because it came from the women’s health clinic.*

*A pharmacist confiscates a woman’s prescription for birth control pills, preventing her from getting it filled elsewhere.*

*A patient is denied access to her lawful prescription for antidepressants by a pharmacist who tells her he does not believe in the efficacy of antidepressant medications.*

While the vast majority of pharmacists fill patients’ lawful prescriptions without incident, the events described above, all of which actually occurred, represent a movement among certain pharmacists to apply personal objections, sometimes based on religious beliefs, to their pharmacy work. Religious or moral objection to participating in certain kinds of health care is nothing new. In fact, 46 states, including Oregon, have passed laws allowing individual health care providers to opt out of providing abortion services.<sup>1</sup> Likewise, Oregon’s Death with Dignity Act expressly allows health care providers such as pharmacists to refuse to participate in giving medication intended to end the life of a terminally ill patient as permitted by this law.<sup>2</sup>

The current focal point for some pharmacists’ personal objections is emergency contraception. This article discusses access to lawfully prescribed

**Sara Ainsworth  
Nancy Sapiro**  
Northwest Women’s Law Center

medicine, and to emergency contraception in particular—the refusal by some pharmacists to fill prescriptions, public responses to those refusals, and the laws that apply in a dispute between a patient who needs emergency contraception and a pharmacist who refuses to provide it.

### The Flash Point: Emergency Contraception

The drug commonly known as emergency contraception has gained significant public attention over the last several years because of the federal Food and Drug Administration’s controversial delay in approving it for over-the-counter status.<sup>3</sup> The focus on this particular drug is driven in part by religious beliefs, and also apparently by confusion about what it does and what it does not do. Emergency contraception contains the same hormones used in regular birth control pills, and has been used to prevent pregnancy within a short time after intercourse for more than 30 years.

This drug, which has been available in Oregon by prescription for many years, is effective at preventing pregnancy if given within 72 (and possibly up to 120) hours of unprotected sexual intercourse.<sup>4</sup> The closer in time to the act of unprotected sex, the stronger the medication’s efficacy.

Some pharmacists and other people confuse emergency contraception with RU 486, or mifepristone, a drug that, when given in combination with other drugs, terminates an existing pregnancy. Thus, some pharmacists who mistakenly believe that emergency contraception is an abortifacient are morally opposed to providing it to patients with lawful prescriptions. In fact, emergency contraception does not disrupt an existing pregnancy,

which is defined by both medicine and law as occurring at the point a fertilized ovum implants in a woman’s uterus.<sup>5</sup> In our experience, some of those pharmacists change their minds and do agree to fill prescriptions for emergency contraception once their confusion about these two different drugs is addressed.

Other pharmacists understand that emergency contraception does not harm an existing pregnancy, but believe that it may act in a way that prevents implantation—an act they consider against their religious beliefs. It is unlikely, however, that emergency contraception prevents implantation of a fertilized ovum.<sup>6</sup> Existing studies indicate that emergency contraception most likely acts by stopping ovulation, and that it can also act by preventing fertilization of an ovum after ovulation. Regardless, for those who believe that life begins at fertilization, and who believe that it is immoral to interfere after that point, involvement in the provision of emergency contraception causes discomfort and opposition.

Finally, some pharmacists have also indicated that they believe emergency contraception leads to promiscuity and that women should suffer the consequences of unprotected sex. To name just one example, a pharmacist in Seattle announced that she would fill prescriptions for married women only.<sup>7</sup> Finally, others, such as Pharmacists for Life, an advocacy group, do not believe that any contraceptive use is morally acceptable and urge pharmacists not to fill prescriptions for any birth control medications or devices.<sup>8</sup>

For all these pharmacists, any mandate that requires them to disregard their personal beliefs and suppress their “right of conscience” is unacceptable. In particular, those who come to these beliefs though religion argue that to require pharmacists to fill such prescriptions discriminates against them on the basis of their religious beliefs.

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## Public Responses

This movement among some pharmacists has met with significant public outcry throughout the United States. Polls indicate that almost 80% of Americans—Republican or Democrat—oppose any attempt on the part of pharmacists to interfere on a religious or moral basis with their lawfully prescribed drug therapies.<sup>9</sup> In response, many state legislatures, governors, and boards of pharmacy have clarified rules and policies designed to guide pharmacists and protect public health. In the first widely publicized response, Governor Rod Blagojevich of Illinois issued an emergency rule in April 2005 requiring pharmacists to dispense all drugs.

In May 2004, the Massachusetts Board of Registration in Pharmacy issued a policy interpreting state laws and regulations to require pharmacists to use their professional judgment to screen prescriptions for potential contraindications, drug interactions, and other medical concerns, but not to permit pharmacists to refuse to dispense drugs on the basis of personal beliefs. In April 2005, the North Carolina Board of Pharmacy set forth a statement of policy that specifically addresses the right of the patient to access to emergency contraception and requires an objecting pharmacist to “get the patient and the prescription to a pharmacist who will dispense that prescription in a timely manner.” In December 2005 and January 2006, the Nevada and Wyoming Boards of Pharmacy, respectively, decided against rules that would have permitted religious objections.

In its November 2005 newsletter, the Oregon Board of Pharmacy issued a position statement setting forth its opinion that Oregon pharmacists have the right to refuse to participate in activities that they find morally objectionable, but that they may not stand in the way of a patient’s right to access a prescription.<sup>10</sup> This first statement from that body echoed the opinion of the American Pharmacists

Association (APhA), which adopted a policy in 1998 supporting the right of a pharmacist to “step away” from filling prescriptions based on religious objections, but not to “step in the way” of a patient’s right to access the prescription drug.<sup>11</sup>

However, in response to public concerns about its position statement, the Oregon Board of Pharmacy amended that statement in June 2006 to emphasize that a pharmacist’s responsibility to his or her patients is the pharmacist’s foremost ethical obligation. The current position statement, while not an administrative rule, carries significant legal force in the pharmacy industry, and violations can lead to disciplinary action against a pharmacist.

The position statement requires Oregon pharmacists to inform employers in advance of any potential objection, and requires pharmacists-in-charge to put in place specific written protocols designed to ensure that the patient gets his or her prescription needs met regardless of a religious objection. It forbids pharmacists from moralizing, confiscating a patient’s prescription, or violating the patient’s privacy. The Board of Pharmacy further clarified this position statement to explain that the pharmacist must either fill the patient’s prescription on site, have someone else available to fill it in a timely manner, or give the patient a meaningful referral to a nearby pharmacy that has the drug in stock and will fill the prescription.<sup>12</sup>

## Law and the Clash Between Pharmacist and Patient

In the midst of these responses, advocates for women and patients, including the Northwest Women’s Law Center, have argued that constitutional rights are at stake, and that antidiscrimination laws provide the framework for addressing this situation. Lawyers for refusing pharmacists argue the same thing but draw different conclusions. There is very little case law thus far, but as of February

2007, courts have rejected pharmacists’ claims.

## Pharmacy laws in Oregon

Oregon pharmacists are professionals, licensed and regulated by the state of Oregon.<sup>13</sup> The practice of pharmacy involves, in part, interpreting and evaluating prescriptions; compounding, dispensing, and labeling drugs; and advising patients about the use and potential hazards of prescription drugs.<sup>14</sup> Pharmacists are required to dispense drugs correctly in accordance with prescriptions.<sup>15</sup> In carrying out that responsibility, pharmacists have the professional duty to counsel patients about the uses of drugs and must ensure that there are no medical reasons that a particular drug should not be provided to a patient.<sup>16</sup>

Pharmacists have no explicit right to refuse to dispense prescription contraceptives on moral or religious grounds. In 1999, the Oregon legislature rejected a bill that would have shielded pharmacists from liability for refusing to dispense drugs or make referrals on the basis of religious or moral beliefs.<sup>17</sup> In contrast, physicians, family planning workers, and private hospitals have an explicit right to refuse to participate in abortions or provide contraception through family planning programs.<sup>18</sup> These statutory refusal rights are limited to providers other than pharmacists, and are limited to very specific contexts: abortion and contraceptives in the context of family planning programs receiving state funds.

Because Oregon statutes do not provide an express right to refuse to participate in filling prescriptions, antidiscrimination laws, tort law, and constitutional provisions provide the legal framework for determining the rights of patient and pharmacist in this context.

## Liability in tort

Very few court decisions have been issued regarding negligence claims against pharmacists in Oregon,<sup>19</sup> and

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we are aware of no such case in the context of religious or moral refusals. However, cases outside of Oregon are instructive. The Washington State Pharmacy Association (WSPA) states that “[b]ecause emergency contraception pills are considered the accepted standard of treatment to prevent an unwanted pregnancy after unprotected intercourse, refusal to provide services and/or refer patients to another provider may leave a pharmacist open to liability.”<sup>20</sup> In its analysis, WSPA cites a California case in which a court denied immunity from suit to a religiously affiliated hospital that refused to provide a patient with information about and access to emergency contraception.<sup>21</sup> A patient harmed by a pharmacist’s refusal to fill a prescription may have claims against that pharmacist and/or the employer for damages resulting from the refusal.

### Antidiscrimination laws

Advocates on both sides of the issue have placed significant emphasis on antidiscrimination laws. The American Center for Law and Justice, an organization founded by the evangelist Pat Roberts, and Americans United for Life, an anti-abortion group, filed EEOC complaints on behalf of objecting pharmacists employed by Target and Walgreen’s in Missouri and Illinois, respectively.<sup>22</sup> The outcome of those complaints has not yet been determined. However, a similar charge filed in federal court in Wisconsin was dismissed on summary judgment.<sup>23</sup>

In that case, Neil Noesen, a Wisconsin pharmacist, sued his employer (Medical Staffing Network, Inc.), the state of Wisconsin, and Wal-Mart, at which he had been temporary employed.<sup>24</sup> Wal-Mart hired him to fill a vacancy in a store despite the fact that his pharmacist’s license was under review for refusing to fill a prescription for birth control pills and for refusing to refer the patient for assistance elsewhere.<sup>25</sup> Noesen informed Wal-Mart that he was Catholic and that it vio-

lated his religious beliefs to fill birth control prescriptions, and Wal-Mart accommodated him by ensuring that another pharmacist on duty would fill those prescriptions.<sup>26</sup> Eventually, after interfering with patients and failing to follow the written accommodation plan he had agreed to, Mr. Noesen was fired by both Medical Staffing Network and Wal-Mart.<sup>27</sup> All of Mr. Noesen’s complaints, including his Title VII complaint against Wal-Mart, were dismissed on summary judgment. In its decision, the court determined that while Wal-Mart had a duty under Title VII to offer Mr. Noesen an accommodation of his religious beliefs, it had in fact done so and it had no further duty to accommodate Mr. Noesen’s additional requests.<sup>28</sup>

As this case illustrates, an employer has a duty under federal law to reasonably accommodate an employee’s religious beliefs and practices.<sup>29</sup> The objection to performing a job function or the request for an accommodation in job responsibilities must be based on a sincerely held religious belief.<sup>30</sup> Thus, only those pharmacists whose objections to filling prescriptions are based on their religious precepts (rather than on a moral disapproval of sexual activity or a disbelief in the efficacy of antidepressants) can claim protections under antidiscrimination law. Furthermore, the employer’s duty to accommodate the objection is limited. The employer is not required to provide every accommodation requested by the employee, and it need not accommodate a request that would cause the employer to suffer “undue hardship”—which has been defined in case law as more than *de minimus*.<sup>31</sup>

Oregon’s antidiscrimination law also prohibits job discrimination on the basis of religious beliefs.<sup>32</sup> The required accommodation of those beliefs is limited by the occupational requirements of the job, and the accommodation need only be “reasonable.”<sup>33</sup> In other words, there is a point at which religious objections to

performing one’s job may overwhelm the job itself and create an unreasonable burden on an employer. Given the requirements—and limits—of state and federal employment discrimination laws, it appears unlikely that an Oregon pharmacy that follows the directives of the Oregon Board of Pharmacy’s position statement would run afoul of those laws.

Advocates for women’s rights have also countered the pharmacists’ employment discrimination argument by pointing out that public accommodation laws that prohibit gender discrimination also apply in this context. Significantly, pharmacies, whether they stand alone or are located in hospitals or retail stores, are places of public accommodation required by Oregon antidiscrimination law to serve all customers without regard to gender.<sup>34</sup> By refusing to provide a service that only women need, pharmacists (and by agency, their employers) discriminate against women.<sup>35</sup> There is no “reasonableness” or other constraining factor: Oregon pharmacies are simply not permitted to discriminate against their customers on the basis of gender. Accordingly, public accommodations law strongly supports the rights of women customers to receive their prescription contraceptives regardless of the individual pharmacist’s personal beliefs about the particular drug.

### Constitutional rights

The constitutional issues raised are complex and beyond the scope of this article. However, it is important to point out that in this context, tension exists between the constitutional right to religious freedom and the constitutional rights to equal treatment and privacy.<sup>36</sup> There are as yet no published (or known unpublished) decisions addressing an objecting pharmacist’s claim of interference with First Amendment rights to the free exercise of religion, other than the dismissal of Neil Noesen’s claims

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on summary judgment, as noted above.<sup>37</sup> However, while the state may not burden the free exercise of religion in the absence of an overriding governmental interest,<sup>38</sup> such state interests have generally been upheld against the individual's free exercise claim. In this instance the state has a compelling interest in securing the health and safety of women, as well as ensuring a woman's constitutional right to privacy.

At the same time, an individual has a constitutional right to use birth control.<sup>39</sup> Thus, in the context of contraception, religious refusals interfere with constitutionally protected privacy rights, and state laws and rules permitting such refusals are subject to constitutional attack on that basis.

### Future Developments

It remains to be seen how the law will develop in this area. It is apparent that some pharmacists will continue to fight for policies, state laws, and court decisions that recognize a right to refuse to participate in certain health care services. What is also certain is that advocates for women's rights, and those concerned with patient access to health care, will continue to advocate strongly for the ability of all patients to receive lawfully prescribed medications without interference at the pharmacy counter. ♦

Sara Ainsworth and Nancy Sapiro are both senior legal and legislative counsel with the Northwest Women's Law Center, a nonprofit public interest law organization that advances legal rights for women. Through its Northwest Reproductive Freedom Network, the Law Center defends reproductive health and freedom in Washington, Oregon, Alaska, Montana, and Idaho. Law Center attorneys have been among the leaders in the Pacific Northwest in efforts to ensure that patients have access to health care, including prescriptions.

### Endnotes

1. See Guttmacher Institute, *State Policies in Brief: Refusing to Provide Health Services* (Feb. 2007), available at [www.guttmacher.org/statecenter/spibs/spib\\_RPHS.pdf](http://www.guttmacher.org/statecenter/spibs/spib_RPHS.pdf).

2. ORS 127.800–127.897.

3. More than four years after Barr Pharmaceuticals applied for over-the-counter status for Plan B, its emergency contraception, the FDA finally approved the drug's over-the-counter distribution only for women age 18 and older, effective November 2006. The pharmacist may ask for proof of age in order to distribute the medication. This decision came after an initial denial of Barr's application, made in 2004 by the FDA's acting director, Steven Galson, over the objections of scientists and his own staff. The American College of Obstetricians and Gynecologists responded to Galson's 2004 decision with harsh criticism, calling it "morally repugnant" and a "tragedy for American women." Planned Parenthood Federation of America, Inc., *A Planned Parenthood Report on the Administration and Congress*, 30, available at [www.plannedparenthood.org/files/PPFA/report\\_warwomen-chronology.pdf](http://www.plannedparenthood.org/files/PPFA/report_warwomen-chronology.pdf).

4. For facts about emergency contraception, see <http://ec.princeton.edu/questions/index.html>.

5. *Id.* See also ORS 432.005(8), which defines an abortion as the "purposeful interruption of an *intrauterine* pregnancy with the intention other than to produce a live-born infant and that does not result in a live birth" (emphasis added).

6. The Population Council, "Emergency Contraception's Mode of Action Clarified," *Population Briefs*, Vol. 11, No. 2 (May 2005), available at [www.popcouncil.org/publications/popbriefs/pb11\(2\)\\_3.html](http://www.popcouncil.org/publications/popbriefs/pb11(2)_3.html); American College of Obstetricians and Gynecologists (ACOG) Practice Bulletin No. 69, at 2 (Dec. 2005); Davidoff & Trussell, "Plan B and the Politics of Doubt," 296 *JAMA* 1775 (2006).

7. Reported to the authors by a Seattle clinic, which disciplined the pharmacist in response to a sign she posted stating "Emergency Contraception for Married Women Only."

8. See the website of Pharmacists for Life, [www.pfli.org](http://www.pfli.org).

9. See, e.g., CBS News/NY Times Opinion Poll, Nov. 24, 2004.

10. *Oregon State Board of Pharmacy Newsletter*, OR Vol. 26, No. 4, at 1 (Nov. 2005).

11. See [www.aphanet.org](http://www.aphanet.org). According to the APhA, this policy was adopted in response to the enactment of Oregon's Death with Dignity Act, ORS 127.800–127.897.

12. The position statement, available at [www.pharmacy.state.or.us/Pharmacy/Position\\_Statements.shtml#Considering\\_Moral\\_and\\_Ethical\\_Objections](http://www.pharmacy.state.or.us/Pharmacy/Position_Statements.shtml#Considering_Moral_and_Ethical_Objections), was last revised by the Board of Pharmacy on February 7, 2007, to include drugs and devices approved by the U.S. Food and Drug Administration for restricted distribution by pharmacies.

13. ORS 689.025.

14. ORS 689.015.

15. OAR 855-041-0065.

16. OAR 855-041-0100.

17. House Bill 2010, available at [www.leg.state.or.us/99reg/pubs/hsemh.txt](http://www.leg.state.or.us/99reg/pubs/hsemh.txt).

18. ORS 435.485, 435.215.

19. See, e.g., *Docken v. Ciba-Geigy*, 101 Or. App. 252, 253, 790 P.2d 45 (1990) (plaintiff could not prove pharmacist was negligent without expert testimony regarding the standard of care in the community for warning of prescription drug dangers).

20. WSPA website at [www.wsparx.org/cem/TreatmentMinorsVictimsofAbuseAdditional.doc](http://www.wsparx.org/cem/TreatmentMinorsVictimsofAbuseAdditional.doc).

21. *Brownfield v. Daniel Freeman Marina Hospital*, 256 Cal. Rptr. 240 (Cal. Ct. App. 1989).

22. Reported on CBS News and by Kaiser-network.org, available at [www.kaisernet-network.org/daily\\_reports/rep\\_index.cfm?DR\\_ID=35058&hint=2](http://www.kaisernet-network.org/daily_reports/rep_index.cfm?DR_ID=35058&hint=2).

23. *Noesen v. Medical Staffing Network, Inc.*, 2006 U.S. Dist. LEXIS 36918 (W.D. Wis. June 1 2006).

24. *Id.* at 1.

25. *Id.* at 4–5.

26. *Id.*

27. *Id.* at 8.

28. *Id.* at 11–13.

29. 42 USC § 2000(e) (Title VII of the Civil Rights Act of 1964, as amended).

30. See, e.g., *Bhatia v. Chevron USA, Inc.*, 734 F.2d 1382, 1383 (9th Cir. 1984).

31. *Id.* at 1384; see also *Ansonia Bd. of Education v. Philbrook*, 479 U.S. 60, 69–70, 107 S. Ct. 367, 97 L. Ed 2d 305 (1986).

32. ORS 659A.030.

33. ORS 659A.030; see, e.g., *Heller v. EBB Auto Co.*, 8 F.3d 1433 (9th Cir. 1993); *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599 (9th Cir. 2004).

34. ORS 659A.403.

35. See, e.g., *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266 (W.D. Wash. 2001) (federal civil rights laws prohibited employer from denying contraceptive coverage to women employees when it covered drugs for male employees).

36. See the Oregon Constitution, Article I, section 3 (protecting rights of conscience); the Oregon Constitution, Article I, section 20 (equality of treatment required), and *Planned Parenthood v. Dept. of Human Resources*, 297 Or. 562, 687 P.2d 785 (1984), and *Sterling v. Cupp*, 290 Or. 611, 625 P.2d 123 (1981), for a discussion of the source of the right to privacy.

37. Pharmacists in Illinois, represented by the aforementioned American Center for Law and Justice, have filed suit against the state of Illinois, arguing that the governor's emergency rule requiring pharmacies that provide birth control to provide emergency contraception violates the First Amendment. That lawsuit is pending. *Menges v. Blagojevich*, U.S. District Court for the Central Dist. of Illinois, Case No. 05-3307.

38. See, e.g., *Employment Division v. Rogue Valley Youth for Christ*, 307 Or. 490, 770 P.2d 588 (1989) (upholding state-imposed tax on religious organization).

39. *Griswold v. Connecticut*, 381 U.S. 479, 85 S. Ct. 1678, 14 L. Ed. 2d 510 (1965).

## Recent Decisions

### Ninth Circuit Court of Appeals

#### ***Bates v. United Parcel Service, Inc.*, 465 F.3d 1069 (9th Cir. 2006)**

The court held that the defendant (UPS) violated the Americans with Disabilities Act (ADA) by excluding all deaf employees from its package-car driver positions. The U.S. Department of Transportation (DOT) requires a physical exam for employees driving vehicles with a "gross vehicle weight" greater than 10,000 pounds. The DOT physical contains a hearing exam that requires employees to be able to perceive "a forced whisper in the better ear at not less than 5 feet with or without the use of a hearing aid . . ." UPS made passing the DOT physical a condition of employment for all its package-car drivers, including employees who would drive vehicles not subject to DOT regulations.

The plaintiffs were a class of individuals who failed the DOT's hearing exam, but who were not legally required to pass the test because they would operate vehicles unregulated by the DOT. They argued that UPS's exclusion of deaf individuals from consideration for non-DOT-regulated driving positions violated the ADA. UPS asserted a "business necessity" defense, arguing that substantially all deaf drivers presented a higher risk of accidents than non-deaf drivers and that UPS could not modify its existing training and assessment programs to determine which deaf drivers were safe. Following the district court, the Ninth Circuit held that UPS had failed to meet its burden, and that injunctive relief was appropriate.

#### ***Carson v. Billings Police Department*, 470 F.3d 889 (9th Cir. 2006)**

When the plaintiff won a civil rights case, the plaintiff's attorney filed for attorney fees and submitted affidavits stating that he was experienced and knowledgeable. He also submitted affidavits from other experienced attorneys stating that he was an exceptionally good lawyer who deserved the rates he charged. However, the attorney submitted no affidavits to

**Richard F. Liebman**  
Barran Liebman LLP

counter the employer's affidavits that stated that the rate he was claiming was, in fact, higher than the prevailing community rate. A lower rate was found appropriate.

#### ***Chamber of Commerce v. Lockyer*, 463 F.3d 1076 (9th Cir. 2006)**

The plaintiff brought an action for injunctive and declaratory relief, challenging a California statute that prohibits employers that annually receive more than \$10,000 in state funds from using those funds to assist or deter unionization efforts by their employees. The issue before the Ninth Circuit was "whether a state's exercise of its sovereign power to control the use of its funds conflicts with national labor policy as expressed in the National Labor Relations Act." By a 12-3 margin, the court held that California's law was not preempted by the NLRA. "[A]n employer has and retains the freedom to spend its own funds however it wishes," the court stated, "it simply may not spend state grant and program funds on its union-related advocacy."

#### ***Engquist v. Oregon Dept. of Agriculture*, Nos. 05-35170 and 05-35263 (9th Cir. Feb. 8, 2007)**

The Ninth Circuit held that the controversial "class-of-one" theory of equal protection does not apply to the employment decisions of public employers. The class-of-one theory permits individuals to allege equal protection violations against government entities for having been singled out for arbitrary, irrational, or malicious treatment. Engquist was a food specialist for the Oregon Department of Agriculture (ODA). She sued the ODA after losing a management position to a less qualified employee and having her original position eliminated as part of a departmental reorganization. Engquist prevailed under the class-of-one equal protection theory

as well as on other claims, and was awarded \$175,000 in compensatory damages and \$250,000 in punitive damages. [For more about the case, please see the December 2005 issue of this newsletter.]

The Ninth Circuit reversed the lower court on Engquist's equal protection claim. Relying on three public policy concerns, the Ninth Circuit ruled that "the class-of-one theory of equal protection is inapplicable to decisions made by public employers with regard to their employees." First, in the employment context the rights of public employees should not be as expansive as the rights of ordinary citizens. Given the number of other legal protections that public employees enjoy, the court found the need for equal protection review of the decisions of public employers "especially thin." Second, applying the class-of-one theory in the employment context would "upset long-standing personnel practices" of public employers. Reaffirming the doctrine of at-will employment, the court found that "[t]he power of employers to discharge employees for reasons that may appear arbitrary, unless constrained by contract or statute, is well-established." Third, applying the class-of-one theory in the employment context would "generate a flood of new cases, requiring the federal courts to decide whether any public employee was fired for an arbitrary reason or a rational one." Although a majority of circuits permit the class-of-one theory to apply to public employment decisions, the Ninth Circuit is now an exception to the rule.

#### ***Freitag v. Ayers*, 468 F.3d 528 (9th Cir. 2006)**

The issue before the Ninth Circuit was whether "a state department of corrections [could] be held liable for prison officials' failure to correct a hostile work environment that is the result of male prisoners' sexual harassment of female guards." The Ninth Circuit decided that the department of corrections could be held liable.

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**Robertson v. Kulongoski,**  
**466 F.3d 1114 (9th Cir. 2006)**

The plaintiff-appellants challenged legislation passed by the Oregon legislature in 2003 that amended the Oregon Public Employees Retirement System (PERS). Prior to the 2003 legislation, PERS members were allowed to contribute 6% of their salaries to the PERS fund, and the contributions were directed to either a regular or a variable account. In addition, retirement benefits for PERS members were calculated using the most favorable of three formulas—known as Pension Plus Annuity, Full Formula, and Money Match. The effect of the 2003 legislation was to redirect PERS member contributions to an Individual Account Program (IAP) rather than to the regular or variable accounts, resulting in retirement benefits calculations less favorable than under the prior PERS system.

The employees argued that the 2003 legislation violated the federal contracts clause of the U.S. Constitution, which provides that “No State shall . . . pass any . . . Law impairing the Obligation of Contracts.” The court, however, found that the key issue was not “whether the parties had a contract,” but whether the Oregon legislature specifically intended (1) to promise the employees “a perpetual or ‘immutable’ right to contribute to the regular and variable accounts” and (2) “that PERS would be maintained so that the Money Match [the most favorable formula] remains the primary calculator of member service retirement allowances . . . .” Finding no such intentions, the Ninth Circuit affirmed the Oregon Supreme Court’s granting of summary judgment to the defendants.

**Syverson v. International Business Machines, No. 04-16449, 2007 WL 8119 (9th Cir. Jan. 3, 2007)**

The plaintiffs were employees terminated by IBM pursuant to a reduction-in-force. As part of the plaintiffs’ severance package, the plaintiffs were required to waive any rights or claims

they may have had under the Age Discrimination in Employment Act (ADEA). Under the Older Workers Benefit Protection Act (OWBPA), employees may not waive rights or claims arising under the ADEA unless the waiver is “knowing and voluntary.”

To qualify as “knowing and voluntary,” a waiver included in an agreement between an employer and its employees must, among other things, be “written in a manner calculated to be understood” by the average employee. The question before the Ninth Circuit in *Syverson* was whether the waiver form used by IBM in connection with its reduction-in-force met this standard.

The Ninth Circuit focused on the fact that IBM’s agreement contemplated, on the one hand, “a release of all claims . . . including claims arising from the [ADEA]” and “a covenant not to institute a claim of any kind against IBM,” and, on the other hand, that “[t]his covenant not to sue *does not apply* to actions based solely under the [ADEA].” The Ninth Circuit acknowledged that IBM’s distinction between “release” and “covenant not to sue” was both significant and legally correct. Nonetheless, the court held that because an average employee could not be expected to understand the language chosen by IBM, the waiver did not satisfy the “manner calculated” requirement of the OWBPA. Therefore, the plaintiffs’ waiver was not “knowing and voluntary” and, hence, was unenforceable.

**Walsh v. Nevada Department of Human Resources, No. 04-17440, 2006 WL 3704779 (9th Cir. Dec. 18, 2006)**

The Ninth Circuit had previously held in *Miller v. Maxwell’s International, Inc.*, 991 F.2d 583 (9th Cir. 1993), that individuals may not be sued for damages under Title VII of the Civil Rights Act of 1964. In *Walsh*, the Ninth Circuit extended that prohibition against individual liability to claims arising under Title I of the Americans with Disabilities Act.

## Oregon Courts

**Love v. Polk County Fire District, 03P1524; A129097, 2006 WL 3501338 (Or. App. Dec. 6, 2006)**

In clarifying the fundamental basis of a wrongful discharge claim under Oregon law, the court held that the “public duty” must be found through cases, statutes, rules, or constitutional provisions that “either (1) specifically encourage or require a particular action or (2) otherwise demonstrat[e] that such act[ion] enjoy[s] high social value.” The term “high social value” is “very narrowly circumscribed” but nevertheless includes at least the following two types of conduct: “(1) conduct that, by statute or rule, is explicitly described as being of high social value; and (2) conduct that is similar to that giving rise to legally compelled obligations to act in other, analogous contexts.”

**Tarlow v. Landye Bennett Blumenstein LLP, 209 Or. App. 171, 147 P.3d 355 (2006)**

The defendant law firm represented Tarlow’s former employee in an action for wrongful discharge and intentional interference with contractual relations. After obtaining summary judgment in that case, Tarlow filed an action against the law firm, alleging wrongful initiation of civil proceedings. Tarlow maintained that the law firm knew or reasonably should have known that there was no legally cognizable basis for the claims brought by Tarlow’s former employee.

The appeals court found that summary judgment for the defendants was appropriate because nothing in the record contradicted the affidavit of one of the defendants, who swore that “the defendants’ sole purpose in filing [the original] complaint was to give [the plaintiff] an opportunity to adjudicate what she (and we) believed to be valid claims.” ♦

Rick Liebman, a partner at Barran Liebman LLP, has represented employers in labor and employment law for 34 years.

characteristics and that it provides equally comprehensive benefits to both genders. Bartell failed in both respects. First, the court held that by “carv[ing] out benefits that are uniquely designed for women” from a comprehensive prescription plan, the employer unlawfully discriminated against its female employees on the basis of “unique, sex-based characteristics.” “[T]he law is no longer blind to the fact that only women can get pregnant, bear children, or use prescription contraception.” Second, the court held that excluding contraceptive coverage offers female employees less complete coverage than their male counterparts. “Title VII requires employers to recognize the differences between the sexes and provide equally comprehensive coverage, even if that means providing additional benefits to cover women-only expenses.”<sup>8</sup>

More recently, in 2005, in *In re Union Pacific Railroad Employment Practices Litigation*, female employees of the Union Pacific Railroad Company filed a class action lawsuit alleging that the railroad violated Title VII by excluding prescription contraceptive coverage from its health insurance plan.<sup>9</sup> Although the plan covered a wide variety of “preventive” drugs, such as blood pressure medication to prevent heart disease and drugs to prevent erectile dysfunction, it did not cover contraception to prevent pregnancy; the plan covered contraception only for “non-contraceptive” purposes.

The federal district court in Nebraska held that the employer’s plan violated Title VII, focusing its analysis on the PDA. The court reasoned that because the Supreme Court has interpreted the PDA to prohibit discrimination on the basis of an employee’s “risk of pregnancy”<sup>10</sup> or “childbearing capacity,”<sup>11</sup> Title VII requires health plans to treat “the risk of pregnancy no less favorably than . . . other similar health risks.” The court held that the railroad’s exclusion of contraceptives from its prescription drug plan dis-

criminated against women because the health plan covered a wide variety of medications and medical services to prevent diseases and conditions that are the same or less threatening to employees’ health than pregnancy, such as tooth decay and male-pattern baldness.<sup>12</sup>

To attempt to avoid liability under Title VII, the railroad argued that contraception controls fertility, a condition that affects both men and women, and not pregnancy. The court squarely rejected this argument: “[O]nly women have the ability to conceive. . . . Health plans that deny coverage for fertility treatments or for sterilization may apply equally to men and women and not violate Title VII and the PDA. Health plans that deny coverage for contraception, by definition, affect only the health of women.”<sup>13</sup>

In addition to the *Erickson* and *Union Pacific* decisions, other federal district courts have recognized that an employer’s failure to cover contraception in a comprehensive prescription drug plan can constitute employment discrimination in violation of Title VII.<sup>14</sup>

### Oregon law

An employer’s failure to include contraceptive coverage in its prescription drug plan also raises issues under Oregon’s laws prohibiting sex discrimination in employment.<sup>15</sup>

Oregon’s laws regarding unlawful employment practices prohibit an employer from discriminating on the basis of sex, including “pregnancy, childbirth or related medical conditions or occurrences,”<sup>16</sup> in all aspects of employment, including benefits.<sup>17</sup> These protections cover all Oregon employers; the law applies to any employers with at least one employee.<sup>18</sup> Modeled after Title VII and the PDA, the statute directs that “[w]omen affected by pregnancy, childbirth or related medical conditions or occurrences shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs.”<sup>19</sup>

Just as an employer’s failure to include contraceptive coverage in its prescription drug plan has been found to violate Title VII, this omission would also violate the state’s almost identical antidiscrimination law. When construing a state statute “patterned after Title VII,” Oregon courts find federal cases “instructive.”<sup>20</sup> As explained above, several federal courts have found such an exclusion to conflict with Title VII’s sex discrimination protections.

In addition, a state court has already held that the civil rights law prohibits employment benefit packages from providing less favorable benefits to one gender. In *Hillesland v. Paccar, Inc.*, an employer provided a shorter time period of insurance coverage for pregnant female employees than it provided for male employees’ pregnant spouses.<sup>21</sup> The Oregon Court of Appeals held that the employer engaged in unlawful sex discrimination because its medical package “singles out pregnancy as a covered risk in a manner that adversely affects female employees as against male employees” in violation of both Title VII and the Oregon antidiscrimination law.<sup>22</sup>

### Many States Have Enacted “Contraceptive Equity” Laws

Many states have enacted “contraceptive equity” laws, which require health insurance policies that cover prescription drugs to also cover the full range of FDA-approved prescription contraceptive drugs and devices. In 1998, Maryland became the first state to enact such a law,<sup>23</sup> and in the years since, 22 additional states have followed suit.<sup>24</sup>

The Oregon legislature considered such a measure in 2005. Like the contraceptive equity laws adopted by other states, Senate Bill 756 would have required Oregon insurance plans that cover prescription drugs and devices to cover FDA-approved contraceptive drugs and devices to the same extent. Although the Senate passed the bill, it died in committee in the House, having never received a hearing in the

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House Judiciary Civil Subcommittee. This session, a similar bill, House Bill 2700, has been introduced.

In large part, the key issue considered by state legislatures that have enacted contraceptive equity mandates has been whether, and under what circumstances, to exempt employers or insurers who object to the mandates on religious grounds. Several state mandates include “refusal clauses” that exempt religious employers, with varying definitions, from providing coverage.

The scope of the refusal clauses in state contraceptive equity mandates varies widely. For example, Maryland’s law permits any religious organization to request an exemption from providing coverage, but it fails to define the term “religious organization.”<sup>25</sup> By contrast, other states, such as California, exempt only a narrowly defined class of religious employers. Under California’s Women’s Contraception Equity Act, enacted in 1999, to qualify as a “religious employer,” an employer must satisfy four conditions: (1) the “inculcation of religious values” must be its primary purpose; (2) it must “primarily employ[] persons who share [its] religious tenets”; (3) it must primarily serve “persons who share [its] religious tenets”; and (4) it must qualify under a U.S. tax code provision that applies to churches, church auxiliaries and religious orders.<sup>26</sup> This refusal clause effectively exempts only institutions that are engaged in religious worship, teaching, or proselytization (that is, those that operate in the religious sphere). Unlike Maryland’s broad refusal clause, it does not exempt institutions engaged in secular activities, such as hospitals and universities that employ and serve people of diverse backgrounds and faiths. California’s more narrowly defined refusal clause ensures that women who do not share their employer’s religious beliefs can obtain coverage for their prescription contraception while protecting pervasively sectarian institutions from

having to comply with a contraceptive equity mandate that interferes with their religious practices.<sup>27</sup>

Catholic Charities of Sacramento, which does not qualify as a “religious employer” under this definition, filed suit, claiming that the California law violated the free exercise and establishment clauses of the U.S. and California constitutions. In 2004, in *Catholic Charities of Sacramento, Inc. v. Superior Court*, the California Supreme Court held that the law satisfied constitutional scrutiny.<sup>28</sup> The court disposed of Catholic Charities’ claim that the law violated its free exercise rights under the U.S. Constitution because the law is both “neutral” and “generally applicable” as required by federal law. In addition, without deciding whether strict scrutiny is required of laws that burden the free exercise of religion under the California Constitution, the court held that the law would satisfy the rigorous standard because the law is narrowly tailored to further California’s compelling interest in eliminating gender discrimination.

The court also rejected Catholic Charities’ argument that the narrow refusal clause impermissibly distinguishes between the secular and religious activities of the church in violation of the establishment clause of the federal Constitution. The court noted that state and federal governments frequently make such distinctions in crafting exemptions from laws. The court explained that “[t]his case does not implicate internal church governance; it implicates the relationship between a nonprofit public benefit corporation and its employees, most of whom do not belong to the Catholic Church. Only those who join a church impliedly consent to its religious governance on matters of faith and discipline.”<sup>29</sup> The New York Court of Appeals, the state’s highest court, recently rejected a similar challenge to an identical refusal clause in New York’s contraceptive equity law.<sup>30</sup>

While state contraceptive equity laws have gone a long way toward

increasing the number of women with contraceptive coverage, these state mandates reach only those women with health insurance policies purchased by employers from insurers. Approximately half of all covered employees, by contrast, work for employers who self-insure. Because the latter insurance plans are covered by the federal ERISA law, any state regulation is preempted. To reach all women, action by the U.S. Congress is necessary. Congress has considered, but never passed, the Equity in Prescription Insurance and Contraceptive Coverage Act (EPICC), which would require health insurance plans to provide the same level of coverage for prescription contraception and services as they provide for other prescription drugs.<sup>31</sup>

### Employers Benefit From Providing Coverage

As a result of these recent decisions and newly enacted laws, coverage of prescription contraceptives has increased substantially in recent years. A 2004 study showed that between 1993 and 2002, the percentage of typical employer-purchased insurance plans covering the full range of reversible contraceptive methods tripled from 28% to 86%, and the percentage covering no method at all fell from 28% to 2%.<sup>32</sup>

Indeed, the incremental additional cost to employers and insurers of providing coverage for contraception is significantly outweighed by the cost savings that would result from making contraceptives available through employer-provided health insurance plans. It has been estimated that if health insurance policies were to include coverage for contraception, the increased cost to employers would be minimal—as little as \$1.43 per employee per month or \$17.12 per year (if employers contributed 80% of the cost), which would raise employer premiums by less than one percent.<sup>33</sup>

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At the same time, contraceptive coverage saves employers and insurers far more. While the average cost associated with a healthy pregnancy, child birth, and newborn care for the child's first year is \$10,000, the average annual cost of oral contraceptives is far less: only \$300–\$350.<sup>34</sup> Other estimates show that providing contraceptive coverage reduces the other costs to employers from unintended pregnancy, such as the health care expenditures associated with births, abortions, miscarriages, and other complications, as well as the indirect costs, such as wages and benefits associated with employee absences, maternity leave, and sick leave; reduced productivity during pregnancy; and the cost of replacing employees who do not return to work after a pregnancy. Indeed, a recent study estimates that failing to provide contraceptive coverage costs employers 15–17% more in these direct and indirect costs than providing coverage.<sup>35</sup>

Providing insurance coverage for contraceptives is also sound health care policy. A recent report found that 52% of the unplanned pregnancies each year occur to the 11% of women who were not using a birth control method during the month they became pregnant.<sup>36</sup> Lack of insurance coverage forces many women to choose less expensive and less reliable methods of contraception, which increases the likelihood of unintended pregnancy.

### Contraceptive Equity Deserves Attention From Employers and Legislators

Great strides have been made in the last decade toward full contraceptive equity in insurance coverage, but more work remains to ensure that women can afford their contraception. Oregon may well follow other states that have enacted contraceptive equity legislation that requires insurance policies to cover FDA-approved contraceptive drugs and devices to the

same extent as other types of prescription drugs. For those women enrolled in employer self-insured plans, the U.S. Congress's passage of federal legislation addressing the inequity is necessary to make contraceptive equity a reality. Even in the absence of legislation, however, an employer's failure to cover contraception in a comprehensive prescription drug plan is unlawful discrimination on the basis of sex. Employers should include prescription contraception in their insurance plans to ensure that the health care needs of their female employees are met. ♦

Sondra Goldschein has been an attorney at the ACLU Reproductive Freedom Project since 2001. Carrie Flaxman is a consultant with the ACLU Reproductive Freedom Project and was a staff attorney at Planned Parenthood Federation of America from 2000 to 2004. The Reproductive Freedom Project works in courts, legislatures, and communities to protect everyone's right to make informed decisions free from government interference about whether and when to become a parent.

### Endnotes

1. See generally Rachel Benson Gold, "The Need for and Cost of Mandating Private Insurance Coverage of Contraception," 1 *Guttmacher Report on Public Policy* 5, 5 (1998).
2. 42 USC §§ 2000e(b), 2000e-2(a)(1); see *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 682, 103 S. Ct. 2622, 77 L. Ed. 2d 89 (1983).
3. 42 USC § 2000e(k). Congress passed the PDA in response to the U.S. Supreme Court's decision in *General Electric v. Gilbert*, 429 U.S. 125, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976), which held that an employer's exclusion of pregnancy-related disabilities from an otherwise comprehensive short-term disability policy was not discrimination on the basis of sex.
4. H.R. Rep. No. 95-948, at 3.
5. EEOC, Commission Decision on Coverage of Contraception, 2000 WL 33407187 (Dec. 14, 2000), available at [www.eeoc.gov/policy/docs/decision-contraception.html](http://www.eeoc.gov/policy/docs/decision-contraception.html).
6. *Id.* (citing H.R. Rep. No. 948, at 5).
7. 141 F. Supp. 2d 1266, 1268 & n.2 (W.D. Wash. 2001) (granting employee's motion for summary judgment).
8. *Id.* at 1271–1272, 1274, 1277.
9. 378 F. Supp. 2d 1139, 1141–1142 (D. Neb. 2005) (granting employee's motion for summary

judgment), *argued*, No. 06-1706 (8th Cir. Nov. 16, 2006).

10. *Id.* at 1143 (citing *Newport News Shipbuilding and Dry Dock Co. v. EEOC*, 462 U.S. 669, 678 (1976)).

11. *Id.* (citing *Int'l Union v. Johnson Controls, Inc.*, 499 U.S. 187, 199 (1991)).

12. *Id.* at 1143, 1148–1149.

13. *Id.* at 1145 (internal citations omitted); see also *Stocking v. AT&T Corp.*, 436 F. Supp. 2d 1014, 1016–1017, 1017 & n.2 (W.D. Mo. 2006), *appeal docketed*, No. 06-3071 (8th Cir. Aug. 15, 2006).

14. *Stocking*, 436 F. Supp. 2d 1014 (denying employer's summary judgment motion); *Wright v. DaimlerChrysler Corp.*, No. 4:03CV1843 CDP (E.D. Mo. Jan. 10, 2005) (denying employer's motion to dismiss); *Cooley v. DaimlerChrysler Corp.*, 281 F. Supp. 2d 979 (E.D. Mo. 2003) (denying employer's motion to dismiss); *EEOC v. UPS, Inc.*, 141 F. Supp. 2d 1216 (D. Minn. 2001) (denying employer's motion to dismiss). *But see Cummins v. Illinois*, No. 2002-cv-4201-JPG (S.D. Ill. Aug. 30, 2005), *appeal docketed*, No. 05-3877 (7th Cir. Sept. 30, 2005) (granting employer's motion for summary judgment because both men and women use contraception without addressing the fact that women are the sole users of prescription contraception).

15. Attorneys general in several other states have determined that the failure to include contraception in a comprehensive prescription drug plan violates state laws similar to Oregon's antidiscrimination protections. See Office of the Attorney General, State of Montana, Opinion No. 16 (2006), 2006 WL 842284; Office of the Attorney General, State of Wisconsin, Opinion 1-04 (2004), 2004 WL 3078999; see also Office of the Attorney General, State of Washington, Opinion No. 5 (2002), 2002 WL 31936085.

16. ORS 659A.029, 659A.030.

17. OAR 839-005-0021.

18. ORS 659A.001(4).

19. ORS 659A.029.

20. *A.L.P. Inc. v. Bureau of Labor and Industries*, 161 Or. App. 417, 422, 984 P.2d 883, 886 (1999) (internal quotation marks and citation omitted).

21. 80 Or. App. 286, 288–289, 722 P.2d 1239, 1240 (1986).

22. *Id.*, 722 P.2d at 1242–1243.

23. Md. Code Ann., Ins. § 15-826.

24. Arizona, Arkansas, California, Connecticut, Delaware, Georgia, Hawaii, Illinois, Iowa, Maine, Massachusetts, Missouri, Nevada, New Hampshire, New Jersey, New Mexico, New York, North Carolina, Rhode Island, Vermont, Washington, and West Virginia have all enacted such statutes. Guttmacher Institute, *State Policies in Brief: Emergency Contraception* (Mar. 1, 2007), available at [www.guttmacher.org/statecenter/spibs/\\_EC.pdf](http://www.guttmacher.org/statecenter/spibs/_EC.pdf).

25. Md. Code Ann., Ins. § 15-826(c).

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subordinate's discriminatory animus, when the person who actually made the adverse employment decision admittedly harbored no discriminatory motive toward the employee affected. Here, the EEOC alleges race discrimination—the termination decision-maker did not know the employee's race, but the supervisor who provided the decision-maker with information on the employee did.

***Brendlin v. California*, No. 06-8120 (Jan. 19, 2007)**

The Court accepted review of this case from the California Supreme Court, which determined that a passenger in a vehicle was not seized under the Fourth Amendment when the vehicle was pulled over by police absent circumstances that would cause a reasonable person to think he was the subject of the officer's investigation or authority. After the police pulled the vehicle over, they discovered there was a warrant out for the passenger's arrest, arrested the passenger, and found drug paraphernalia on the passenger's person and in the vehicle.

***Panetti v. Quarterman*, No. 06-6407 (Jan. 5, 2007)**

The Court granted certiorari to this case from the Fifth Circuit addressing whether the Eighth Amendment permits the execution of an inmate who has a factual awareness of the reason for his execution, but who, because of severe mental illness, does not have a rational understanding of the reason for the execution.

***Tennessee Secondary School Athletic Ass'n v. Brentwood Academy*, No. 06-427 (Jan. 5, 2007)**

The Court agreed to review a decision from the Sixth Circuit regarding whether a recruitment rule, as applied to punish a private school for contacting newly enrolled students about football practice, violated First Amendment free speech and Fourteenth Amendment procedural due process protections.

Rachelle Hong Barton is an associate with the Portland office of Fisher & Phillips LLP, one of the largest national law firms representing employers in labor and employment law matters.

Matthew Duckworth is an associate of Busse & Hunt, which represents employees in employment cases, concentrating in civil rights, discrimination, harassment, wrongful discharge, defamation, and fraud.

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26. Cal. Health & Safety Code § 1367.25(b).
27. For more information on refusal clauses in the provision of reproductive health care, see ACLU Reproductive Freedom Project, *Religious Refusals and Reproductive Rights* (2002), available at [www.aclu.org/reproductiverights/religion/12679pub20020122.html](http://www.aclu.org/reproductiverights/religion/12679pub20020122.html).
28. 32 Cal.4th 527, 85 P.3d 67 (Cal. 2004).
29. *Id.*, 85 P.3d at 76–79, 81–89, 92–94.
30. *Catholic Charities of the Diocese of Albany v. Serio*, 7 N.Y.3d 510, 859 N.E.2d 459 (N.Y. 2006).
31. Prevention First Act, H.R. 819, 110th Cong. §§ 201–204 (2007).
32. Adam Sonfield et al., "U.S. Insurance Coverage of Contraceptives and the Impact of Contraceptive Coverage Mandates, 2002," 36 *Perspectives on Sexual and Reproductive Health*, 72, 78 (2004).
33. Cynthia Dailard, "The Cost of Contraceptive Insurance Coverage," 6 *Guttmacher Report on Public Policy* 12, 13 (2003); Jacqueline E. Darroch, Guttmacher Institute, "Cost to Employer Health Plans of Covering Contraceptives: Summary, Methodology and Background" (1998), available at [www.guttmacher.org/pubs/kaiser\\_0698.html](http://www.guttmacher.org/pubs/kaiser_0698.html).
34. Dailard, *supra* note 33, at 12.
35. Cynthia Dailard, "Contraceptive Coverage: A 10-Year Retrospective," 7 *Guttmacher Report on Public Policy* 6, 7 (2004).
36. Guttmacher Institute, *Abortion in Women's Lives*, 7–8 (2006), available at [www.guttmacher.org/pubs/2006/05/04/AiWL.pdf](http://www.guttmacher.org/pubs/2006/05/04/AiWL.pdf).