OREGON
CIVIL RIGHTS
NEWSLETTER

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# Same-Sex Couples Can Marry in Oregon

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Oregon's same-sex marriage ban was struck down on May 19, when U.S. District Court Judge Michael McShane announced his decision in *Geiger v. Kitzhaber*.[1] On that Monday afternoon in Oregon, amidst numerous celebrations, same-sex marriages began taking place almost immediately.

Oregon Attorney General Ellen Rosenblum had announced in February that the state could find no constitutional grounds on which to defend Oregon's same-sex marriage ban. That announcement heightened the anticipation that had been building as all parties to the case, including two sets of plaintiffs, as well as the state and county defendants, took the position that Oregon's same-sex marriage ban could not withstand constitutional scrutiny. *Geiger v. Kitzhaber* also represented a remarkable turnaround from the events that had occurred ten years earlier, in 2004, when Multnomah County determined that Oregon's marriage laws were unconstitutional, and briefly issued marriage licenses to same-sex couples.

This article examines the context, arguments, and reasoning that led Oregon to shift from categorically rejecting same-sex marriage in 2004 to embracing it, along with many other states, in 2014. The article concludes with a brief description of the motions to intervene and stay the case that were brought by a national organization opposed to same-sex marriage, including an emergency application for relief to the U.S. Supreme Court.

Judge McShane's opinion in *Geiger v. Kitzhaber* opens with the vivid observation that Oregon law "affords the same set of rights and privileges to Tristan and Isolde that it affords to a Hollywood celebrity waking up in Las Vegas with a blurry memory and a ringed finger," while denying those very same rights to same-sex couples. The opinion then proceeds to dismantle the arguments for limiting marriage to "traditional" marriage in a straightforward and workmanlike fashion.

## The Legal Context in Oregon

As the opinion notes, in 2004, Multnomah County determined that refusing to issue marriage licenses to same-sex couples violated the Oregon Constitution's equal protection clause.[2] In a matter of weeks, approximately 3,000 same-sex couples were able to secure marriage licenses in Multnomah County. But the Oregon state registrar would not register the marriages, and a legal challenge to Oregon's marriage laws ensued.[3]

Multnomah County's move to recognize same-sex marriages, before doing so was either easy or politically safe, helped increase support for Ballot Measure 36, which Oregon voters passed in November 2004, amending the Oregon Constitution to declare that only marriages between "one man and one woman" would be recognized.[4] The amendment made explicit what Oregon's marriage laws already implicitly mandated: same-sex couples were barred from getting married in the state.

In 2007, the Oregon legislature passed the Oregon Family Fairness Act (FFA), which extended some of the rights available to opposite-sex spouses to same-sex couples. Whether or not the legislature intended it, the FFA would eventually contribute to Oregon's marriage laws being found unconstitutional. The FFA created registered domestic partnerships, which were intended to provide "more equal treatment" of same-sex couples and their families under state law.[5] The legislature's intentions may have been noble, but in practice, registered domestic partnerships were confusing and cumbersome.

Registered domestic partnerships did, however, provide an essential context for assessing Oregon's same-sex marriage ban. As the state contended before Judge McShane,

CONTINUED ON PAGE 9

## ✦ In This Issue

# ✦ You're Invited ✦

Please join
the Oregon State Bar Civil Rights Section
for our free
Public Forum

Thursday, **July 10**, 7:15 p.m.

Matt Dishman Community Center
77 NE Knott, Portland, OR 97212

Special guest speaker Walidah Imarisha presents:

**Why Aren't There More Black People in Oregon?**
**A Hidden History**

Please join us as we commemorate the
50th anniversary of the Civil Rights Act of 1964.

Photo credit: Pete Shaw

"For a black community to exist here in Portland is incredible," says Imarisha, "because it wasn't supposed to exist at all."

from "Why Aren't There More Black People in Oregon?" by Pete Shaw, *Portland Occupier*, November 28, 2012

Have you ever wondered why the black population in Oregon is so small? Oregon has a history not only of black exclusion and discrimination, but also of a vibrant black culture that helped sustain many communities throughout the state—a history that is not taught in schools. This is the focus of "Why Aren't There More Black People in Oregon? A Hidden History." All are welcome to join us in this public conversation with Portland State University author and adjunct professor Walidah Imarisha.

**OREGON CIVIL RIGHTS NEWSLETTER**



The *Oregon Civil Rights Newsletter* is published by the Civil Rights Section of the Oregon State Bar.

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

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Back to page 1

# Where Are We Going? Trailblazing the Next 50 Years for Civil Rights

> As heirs to the achievements of prior generations, today's leaders—and especially today's lawyers—must do much more than simply prevent the unraveling of the progress that's been entrusted to us. We are charged with building on the advances that others once sacrificed so much to bring about. And we are called to keep fighting for civil rights and equal justice by expanding our focus—to include the cause of women, of Latinos, of Asian Americans, of American Indians, of LGBT individuals, of people with disabilities—and countless others across the country who still yearn for equality, opportunity, and fair treatment.
>
> The Honorable Eric H. Holder, Jr., United States Attorney General. See http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-1402111.html.

**Adrian Brown**
U.S. Attorney's Office
District of Oregon

Attorney General Holder's charge reminds us that civil rights enforcement, the unfinished business of the United States, as it was so aptly called by the late Senator Edward Kennedy, is the business not only of the U.S. Department of Justice (DOJ), but of the people of the United States, especially its lawyers, and that this business remains unfinished 50 years after the passage of the Civil Rights Act of 1964. As a nation, as a state, as a bar, we must decide where are we going in the next 50 years to meet this charge, to finish this business. Spoiler alert: it will require some trailblazing.

The Civil Rights Act of 1964 ended legal segregation in public places and banned employment discrimination on the basis of race, color, religion, sex, or national origin. It also blazed the trail for subsequent, related legislation: the Voting Rights Act, the Fair Housing Act, and the Americans with Disabilities Act (to name just a few). While the Civil Rights Act was first proposed by President John F. Kennedy, it was his successor, President Lyndon B. Johnson, who got the bill passed by Congress and who signed it into law, on July 2, 1964.

The landmark law was enacted only after the unnecessary deaths and beatings of far too many civil rights activists, and after much political compromise. And, despite five decades of enforcement efforts, the DOJ Civil Rights Division's 22-page report of its *selected* accomplishments from 2013 details that the pursuit of civil rights is far from over, and enforcement efforts continue to remain strong. *See* http://www.justice.gov/crt/publications/accomplishments/accomp2013.pdf.

This article focuses on just a few of the key issues for which we, as Oregonians, will need to continue to blaze a trail to ensure the protection of civil rights for all individuals over the next 50 years: the rights of LGBT individuals to enjoy all the legal rights and protections that heterosexual married couples take for granted, voting rights for American Indians and other vulnerable populations, and the full integration of persons with disabilities into our society—including where we work.

Unfortunately, there is not enough room in this article to showcase the efforts moving other civil rights issues forward, such as hate crime prosecution, the prosecution of labor and sex slavery (known as human trafficking), constitutional policing, ensuring educational opportunities (including school-to-prison pipeline issues and bullying), fair and affordable housing protection, protection of our service members, and others. To learn more the DOJ's efforts in fulfilling its mission in these areas, please visit the Civil Rights Division's website, http://www.justice.gov/crt/.

## True Equality for LGBT Individuals

In February 2011, Attorney General Holder announced that the Department of Justice would no longer defend the constitutionality of section 3 of the Defense of Marriage Act (DOMA), which defined "marriage" and "spouse" under federal law as applying only to persons in opposite-sex marriages. Subsequently, in *United States v. Windsor,* 570 U.S. 12 (2013), the Supreme Court agreed that section 3 of DOMA was unconstitutional, striking it down as a deprivation of liberty under the Fifth Amendment.

Following court decisions in Utah and Michigan striking down impediments to same-sex marriages in those states, Attorney General Holder issued statements recognizing same-sex marriages conducted in those states as lawful for all purposes under federal law. And soon thereafter, the toppling of what was akin to the Berlin Wall for marriage began throughout the nation, including in Oregon, as discussed in the cover story of this newsletter.

Attorney General Holder continued to pursue equality for LGBT individuals. In 2012, he issued guidance that clarified that the longstanding constitutional prohibition on exercising juror strikes based on race also extended, as a matter of DOJ policy, to juror strikes based on sexual orientation. And in February of this year, Attorney General Holder issued a policy memorandum requiring the Department of Justice to provide equal treatment for same-sex married couples throughout various employment contexts. The policy also extends to interpretations of the U.S. Bankruptcy Code and to visitation and notification rights afforded by the U.S. Bureau of Prisons. And DOJ attorneys have been directed to respect invocations of the marital communications privilege

CONTINUED ON PAGE 4

CONTINUED FROM PAGE 3

and the marital testimonial privilege in federal cases when asserted by participants in same-sex marriages.

In announcing these sea changes, Attorney General Holder left no room to doubt that it is the DOJ's policy to fully and completely recognize lawful same-sex marriages, to ensure equal treatment for all members of society regardless of sexual orientation. All of these efforts should not go unnoticed. While Attorney General Holder recently recognized that "our work is far from over" in his remarks at the DOJ LGBT Pride Month program, he also reminded us that we must celebrate the "legions of attorneys, activists, and dedicated citizens throughout America." See http://www.justice.gov/iso/opa/ag/speeches/2014/ag-speech-1406101.html.

At the same time, Attorney General Holder also cautioned that "this is no time to rest on our laurels." Indeed, he continued the charge to his employees when he stated, "Despite everything that's been achieved in recent years, each of us has much more work to do—to combat discrimination; to promote opportunity, access, and inclusion; and to keep extending the legacy of accomplishment we gather to commemorate today."

President Obama's May 30 proclamation charged the people of the United States to do the same: "to eliminate prejudice everywhere it exists, and to celebrate the great diversity of the American people." See http://www.whitehouse.gov/the-press-office/2014/05/30/presidential-proclamation-lesbian-gay-bisexual-and-transgender-pride-mon.

Our own Representative Suzanne Bonamici (D-OR) has taken up that charge by advocating for a reinvigoration of the Older Americans Act (OAA), with specific provisions to assist LBGTQ seniors. See http://bonamici.house.gov/press-release/bonamici-discusses-older-americans-act-lgbtq-seniors-and-advocates. The OAA funds programs like Meals on Wheels, but funding for programs under the OAA expired in 2011. "This bill addresses social and cultural barriers that could keep LGBTQ seniors from living independently, and it ensures that they receive the services and care they deserve as they age," stated Representative Bonamici in her press release about the proposed legislation. Others would be wise to follow her trail.

## Voting Rights for American Indians

In early June 2014, the Department of Justice tackled the specific charge of voting rights, asserting its role in preventing voter disenfranchisement in the wake of the Supreme Court's ruling in *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013). The *Shelby County* holding essentially gutted key provisions of the Voting Rights Act, which ensured that jurisdictions with a history of voter discrimination were required to receive DOJ approval of changes to their voting processes.

As Associate Attorney General Tony West said while speaking to the National Conference of American Indians, "while many of us know the story of African-American disenfranchisement that sparked Freedom Summer, which began 50 years ago this month, the history of Native disenfranchisement it is no less disgraceful." See http://www.justice.gov/iso/opa/asg/speeches/2014/asg-speech-140609.html. The DOJ's proposal to prevent further disenfranchisement includes "a polling place in their community where they can cast a ballot and receive voter assistance to make sure their vote will be counted." *Id.*

While Oregon's "polling places" include the comfort of our own homes, whether those homes sit on tribal land or in the metro area, the second part of the proposal ensures that "voter assistance" is provided to citizens on tribal land. The DOJ's proposal may very likely improve voting access to tribes living in Oregon. The contours of the proposal and its impact will become clear as we blaze a trail in these efforts going forward.

## Full Community Integration of Persons with Disabilities

This June marked the 15th anniversary of the Supreme Court's decision in *Olmstead v. L.C.*, 527 U.S. 581 (1999). The Court's ruling put teeth into the integration mandate of Title II of the ADA, which prohibits unnecessary segregation of persons with disabilities and requires that persons with disabilities receive services in the most integrated setting appropriate to their needs.

In 2009 President Obama directed the Department of Justice to redouble its *Olmstead* enforcement efforts, and since then the DOJ has been working with state and local government officials, disability rights groups, private and nonprofit attorneys, and representatives of the U.S. Department of Health and Human Services to fashion an effective, nationwide program for enforcement of the ADA integration mandate.

As of 2013, the DOJ was involved with 18 *Olmstead*-type matters across the United States. One of those matters involves the state of Oregon and persons with intellectual or developmental disabilities who are currently working in sheltered workshops or are otherwise segregated in nonwork day programs. That case is pending in U.S. District Court. *See Lane v. Kitzhaber,* No. 3:12-cv-00138-ST (D. Or.).

On April 8, 2014, the United States entered into the nation's first statewide settlement agreement involving integrated employment in the state of Rhode Island. Like the Oregon case, the Rhode Island case involves individuals with intellectual or developmental disabilities who were being unnecessarily segregated in sheltered workshops and facility-based day programs. *See* http://www.ada.gov/olmstead/olmstead_cases_list2.htm#ri-state.

CONTINUED ON PAGE 5

# *Schuette v. Coalition to Defend Affirmative Action:* Voters Can Prohibit Public Universities from Considering Race

**Benjamin Becker**
Oregon School Boards Association

On April 22, the U.S. Supreme Court issued its opinion in *Schuette v. Coalition to Defend Affirmative Action*.[1] The Court determined that a voter-enacted amendment to the state of Michigan's constitution was valid under the Fourteenth Amendment's equal protection clause.

In the opinion, the Court's recitation of the facts begins with a summary of *Gratz v. Bollinger*[2] and *Grutter v. Bollinger*,[3] which are 2003 Supreme Court cases that reviewed the constitutionality of the University of Michigan's undergraduate and law school admissions policies. In those two lawsuits, applicants who were denied admission challenged the university's explicit consideration of race in the admissions process. The Court held that race-based decision making can be constitutional because diversity in higher education is a compelling governmental interest.

In response, the university revised its admissions policies but continued to consider race. After a statewide debate on racial preferences in governmental decision making, in 2006 Michigan voters amended the state's constitution to prohibit decision making based on race, sex, color, ethnicity, or national origin.

The constitutional amendment was challenged in two lawsuits, which the district court consolidated before granting summary judgment in favor of the defendants. The plaintiffs appealed, and the Sixth Circuit Court of Appeals ruled that the amendment was unconstitutional under *Washington v. Seattle School District*[4] because the amendment restructured the political process by moving decision making regarding race in admissions from each university's board of directors to the electorate, a more remote level. The law prohibiting such restructuring is known as the political-process doctrine.

The defendants appealed to the U.S. Supreme Court, and Justice Kennedy wrote the main opinion, supported in full by a total of three justices. The opinion clearly states that "this case is not about . . . the constitutionality, or the merits, of race-conscious admissions policies in higher education."[5] Instead, the issue was whether voters in the states may prohibit the consideration of racial preferences in governmental decisions.[6]

Justice Kennedy's opinion held that the appellate court erred by misinterpreting the precedent from which the political-process doctrine arose, precedent that includes *Reitman v. Mulkey*,[7] *Hunter v. Erickson*,[8] and *Seattle*. In summarizing these cases, he focused on the injury and discriminatory effect or intent rather than on the restructuring of a political process. In *Mulkey*, voters amended California's constitution to give property owners the right to rent or sell on any basis; the Court ruled the amendment unconstitutional because its intent was to establish a right to racially discriminate.[9]

In *Hunter*, voters amended the city of Akron's charter to require that future antidiscrimination provisions be approved by referendum; the Court ruled the amendment unconstitutional because it effectively or purposely aided racial discrimination.[10] In *Seattle*, voters barred race-based busing programs used by the Seattle School District to alleviate the racial isolation of minority students in local schools. The Court ruled the initiative unconstitutional because it inhibited

CONTINUED ON PAGE 7

## TRAILBLAZING THE NEXT 50 YEARS

CONTINUED FROM PAGE 4

The settlement's remedial measures include supported employment placements to approximately 2,000 individuals, including at least 700 people currently in sheltered workshops, at least 950 people currently in facility-based nonwork programs, and 300–350 students leaving high school. Individuals in these populations will receive sufficient services to support a normative 40-hour workweek, with the expectation that individuals will work, on average, in a supported employment job at competitive wages for at least 20 hours per week.

In addition, Rhode Island will provide transition services to approximately 1,250 youth between the ages of 14 and 21, ensuring that transition-age youth have access to a wide array of transition, vocational rehabilitation, and supported employment services intended to lead to integrated employment outcomes after they leave secondary school.

As President Obama and Attorney General Holder have stated, we are all charged with the task of completing our country's unfinished business: enforcing civil rights for all Americans. Indeed, only if all of us—the Department of Justice, state and local agencies, private and nonprofit attorneys, and concerned citizens—collaborate will we help blaze the trail to successful completion of this task. That is where we are going in the next 50 years. Are you coming with us? ✦

Adrian Brown is an assistant United States attorney for the District of Oregon and is currently on a yearlong detail as the national civil rights coordinator with the Executive Office for United States Attorneys in Washington, D.C. She is the chair of the OSB Civil Rights Section.

Back to page 1

# Supreme Court Update

## Decided

***McCutcheon v. Federal Election Commission*, No. 12-536**
**(April 2, 2014)**

The U.S. Supreme Court, divided along traditional ideological lines in this 5–4 decision, reversed the U.S. District Court for the District of Columbia, holding that federal law imposing aggregate limits on an individual's overall campaign contributions violates the individual's First Amendment rights. The Federal Election Campaign Act of 1971 (FECA), as amended by the Bipartisan Campaign Reform Act of 2002 (BCRA), imposes restrictions on (1) how much money an individual may contribute to a particular candidate or committee, and (2) how much money, in the aggregate, a donor may contribute in total to all candidates or committees.

Turning its attention to the second category of restrictions, the Court found that although the government has an interest in protecting our political process from quid pro quo corruption or the appearance of it, the BCRA's aggregate limits on contributions are not "closely drawn" to avoid inappropriate infringement on an individual's First Amendment right to participate fully in the electoral process.

***Schuette v. Coalition to Defend Affirmative Action, Integration and Immigration Rights and Fight for Equality by Any Means Necessary (BAMN)*, No. 12-682**
**(April 22, 2014)**

The Supreme Court reversed the Sixth Circuit Court of Appeals in this 6–2 decision (abstention by Kagan), upholding a constitutional amendment by Michigan voters that prohibits the use of race-based preferences in admissions decisions by state universities. [See article on page 5.]

**Kyle Busse**
Busse & Hunt

**Elizabeth Bonucci**
Fisher & Phillips LLP

***Town of Greece, New York v. Galloway*, No. 12-696**
**(May 5, 2014)**

In this 5–4 decision, the Supreme Court reversed the Second Circuit Court of Appeals, holding that a New York town's practice of opening town board meetings with a prayer does not violate the First Amendment's establishment clause. In Greece, New York, monthly town board meetings begin with roll call, the pledge of allegiance, and a prayer given by local clergy. Although participation is not limited to Christian clergy, the predominantly Christian composition of the town's faith community has resulted in mainly Christian prayers.

Respondents, community members who were uncomfortable with the prayer practice, sought to limit the town to "inclusive and ecumenical" prayers that referred only a "generic God." The Supreme Court, relying heavily on our country's tradition of co-mingling religion and politics, ruled that this was not necessary to avoid a constitutional violation. The Court's opinion states:

> Ceremonial prayer is but a recognition that, since this Nation was founded and until the present day, many Americans deem that their own existence must be understood by precepts far beyond the authority of government to alter or define and that willing participation in civic affairs can be consistent with a brief acknowledgment of their belief in a higher power, always with due respect for those who adhere to other beliefs. . . .
>
> The Town of Greece does not violate the First Amendment by opening its meetings with prayer that comports with our tradition and does not coerce participation by nonadherents.

***Wood v. Moss*, No. 13-115**
**(May 27, 2014)**

Unanimously reversing the Ninth Circuit Court of Appeals in this case, the Supreme Court held that two U.S. Secret Service officers were entitled to qualified immunity from a lawsuit alleging viewpoint discrimination in violation of the First Amendment. The Secret Service officers ordered that people protesting the policies of President George W. Bush be moved away from the outdoor area of the Jacksonville, Oregon, restaurant where the president was dining. Because the protesters were moved out of sight of the president, and to a location further removed from the president than the Bush supporters who had also gathered in the area, the protesters alleged they had been subjected to unconstitutional censorship by the Secret Service.

In an opinion focused on potential threats to the president's safety, the Court ruled that although the Secret Service could not treat protesters differently than supporters based on their respective messages, the Secret Service may take reasonable precautions to keep the president out of the line of fire, as it did in this case.

## Certiorari Denied

***Hedges v. Obama*, No. 13-758**
**(April 28, 2014)**

The Court denied review of this case out of the Second Circuit Court of Appeals. The case was brought in the U.S. District Court for the Southern District of New York to block the government from enforcing specific aspects of the National Defense Authorization Act (NDAA). The petitioners, including activists and journalists such as Noam Chomsky, Cornel West,

CONTINUED ON PAGE 7

## SUPREME COURT UPDATE

CONTINUED FROM PAGE 6

Daniel Ellsberg, and Chris Hedges, specifically targeted provisions of the NDAA authorizing indefinite detention of individuals, presumably including American citizens, suspected of allying with or supporting al Qaeda or its affiliates.

Although the Obama administration has stated that the detention provisions of the NDAA will not be enforced against Americans, the language of the NDAA itself does not preclude such an application. The petitioners sued because, under the language of the statute, they could theoretically be detained under the provisions in question. The district court agreed and enjoined the enforcement of the disputed provisions.

The Second Circuit reversed, however, reasoning that because the Obama administration had promised that American citizens, activists, and journalists would not be detained under the law, there was no need to block its enforcement. The Supreme Court's denial of review has left the Second Circuit's ruling intact. ✦

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Elizabeth Bonucci is an associate at the Portland office of Fisher & Phillips LLP, representing employers in labor and employment law.

Back to page 1

## *SCHUETTE V. COALITION TO DEFEND AFFIRMATIVE ACTION*

CONTINUED FROM PAGE 5

*Thus, Schuette holds simply that courts may not disempower voters from choosing which path to follow.*

the school board's authority to address a racial problem—and only a racial problem—in a way that burdened minority interests.[11]

According to Justice Kennedy's opinion in *Schuette*, the Sixth Circuit's holding suffers from two main errors. First, *Schuette* is distinguishable from the precedent because *Schuette* does not involve specific injuries resulting from racial discrimination. Moreover, the Sixth Circuit's expansive reading of the *Hunter-Seattle* political-process doctrine had no principled limitation.[12]

Thus, *Schuette* holds simply that courts may not disempower voters from choosing which path to follow.[13] The U.S. Constitution includes the right of an individual to not be injured by the unlawful exercise of governmental power.[14] But the Constitution also includes the right of the collective to shape policies through the political process,[15] and the courts, Justice Kennedy wrote, should not deny the collective right because the policy at issue involves a sensitive subject.

Four justices wrote concurring opinions. Chief Justice Roberts noted that racial preferences themselves have debilitating effects.[16] Justices Scalia and Thomas concurred on the basis that the equal protection clause cannot forbid what its text plainly requires.[17] Justice Breyer concurred on the basis that the *Hunter-Seattle* political-process doctrine is not applicable because the facts do not involve the restructuring of a *political* process when the universities' boards had delegated admissions-related decision-making authority to unelected officials.[18] Justice Kagan abstained.

Justices Sotomayor and Ginsburg dissented in a 58-page opinion, which argues that the *Hunter-Seattle* political-process doctrine squarely prohibits the restructuring of the political process in a manner that places unique burdens on racial minorities.[19] Long before the 2006 amendment, the Michigan Constitution granted plenary authority over Michigan's universities to each school's governing board,[20] and the amendment at issue reconfigured that structure specifically with regard to race.[21]

The resulting injury is consistent with the injuries articulated in *Hunter* and *Seattle*, the dissent argues, and the plurality disregarded the facts and reasoning on which *Hunter* and *Seattle* relied. Neither case relied on intentional race discrimination, but rather on an impermissible restructuring of a political process.[22] ✦

Benjamin Becker is an attorney at the Oregon School Boards Association.

### Endnotes

1. *Schuette v. Coalition to Defend Affirmative Action, Integration and Immigrant Rights and Fight for Equality by Any Means Necessary (BAMN)*, 132 S. Ct. 1623, 1631 (2014).
2. *Gratz v. Bollinger*, 539 U.S. 244 (2003).
3. *Grutter v. Bollinger*, 539 U.S. 306 (2003).
4. *Washington v. Seattle School District No. 1*, 458 U.S. 457 (1982).
5. *Id*. at 1631 (2014).
6. *Id*. at 1630.
7. *Reitman v. Mulkey*, 387 U.S. 369 (1967).
8. *Hunter v. Erickson*, 393 U.S. 385 (1969).
9. *Schuette*, 132 S. Ct. at 1631.
10. *Id*. at 1632.
11. *Id*. at 1632–1633.
12. *Id*. at 1634.
13. *Id*. at 1635.
14. *Id*. at 1636.
15. *Id*. at 1636–1637.
16. *Id*. at 1638–1639.
17. *Id*. at 1639.
18. *Id*. at 1650.
19. *Id*. at 1660.
20. *Id*. at 1660.
21. *Id*. at 1661.
22. *Id*. at 1663–1664.

Back to page 1

# Recent Decisions

## Ninth Circuit Court of Appeals

***Ventress v. Japan Airlines*, __ F.3d__, No. 12-15066 (9th Cir. March 28, 2014)**

The plaintiff, a former flight engineer, alleged that the defendants retaliated against him for reporting safety concerns and constructively terminated him for reasons related to his medical and mental fitness.

Because a ruling on the plaintiff's claims would necessarily "require the finder of fact to consider whether or not [the plaintiff] was medically fit to carry out his duties as a flight engineer," the district court reasoned, a ruling on the merits "would intrude in the area of airmen medical standards," which Congress intended to occupy exclusively through the Federal Aviation Act. Accordingly, the trial court granted the employer's motion for judgment on the pleadings on preemption grounds. The Ninth Circuit affirmed on the same basis.

***Family PAC v. Ferguson*, __ Fed. Appx. __, No. 12-35640 (9th Cir. March 19, 2014)**

The Ninth Circuit held in a civil rights case that the term "costs" under Rule 39 of the Federal Rules of Appellate Procedure does not include attorneys' fees recoverable as part of costs under 42 USC § 1988 and similar statutes. The court determined that the trial court properly concluded that the clause "each party shall bear its own costs of appeal" did not preclude the plaintiff, as prevailing party, from obtaining an award of appellate attorneys' fees under § 1988.

**Richard F. Liebman**
**José Klein**
Barran Liebman LLP

The appellate court did, however, reduce the fee award because the plaintiff's counsel billed a flat 10 hours each for the day of argument and the days before and after argument, and a practice of flat billing rates regardless of the amount of work performed is not consistent with law firm practice in the relevant legal market.

***Escriba v. Foster Poultry Farms, Inc.*, 743 F.3d 1236 (9th Cir. 2014)**

The plaintiff sued alleging violations of the Family and Medical Leave Act (FMLA) and state law after she was terminated for violating the employer's "three day no-show, no-call rule." She claimed to have sought leave to care for her father in Guatemala, and the dispositive issue was whether the trial court erred in agreeing with the employer's contention that Escriba did not intend to take FMLA leave.

The Ninth Circuit held that the trial court did not err in denying Escriba's motion for summary judgment on the basis that the employer cited evidence demonstrating that Escriba was given the option and was prompted to exercise her right to take FMLA leave, but she unequivocally refused to exercise that right. The court concluded that there was substantial evidence supporting the verdict that she chose to take vacation time to preserve her full 12 weeks of FMLA leave, and held that "an employee can affirmatively decline to use FMLA leave, even if the underlying reason for seeking the leave would have invoked FMLA protection."

***Haro v. City of Los Angeles*, __ F.3d __, Nos. 12-55062, 12-55303, 12-55310, 12-55076 (9th Cir. March 18, 2014)**

The city classified dispatchers and aeromedical technicians as employees engaged in fire protection. As such, the city argued, those employees were not eligible for standard overtime pay under the Fair Labor Standards Act (FLSA). Instead the city used a distinct overtime calculation provided for workers engaged in fire protection, which requires employees to work a total of 212 hours during a 28-day work period before earning any overtime wages.

The trial court held that the city had incorrectly classified the workers, because the workers did not have the legal authority or responsibility to work in fire suppression. The court also found that the city's violations of the FLSA were willful and therefore extended the statute of limitations from two years to three years. The Ninth Circuit affirmed the decision of the trial court in all respects. ✦

Rick Liebman and José Klein, attorneys at Barran Liebman LLP, represent employers in labor and employment law.

## Newsletter Articles Needed

Have you recently done some research or written a memo that you could easily transform into an article for this newsletter?

Do you need an incentive to brush up on a recent development in the law?

We need articles for this newsletter. If you or someone in your office would like to contribute an article, please contact our editor at elise.gautier@comcast.net.

Back to page 1

arguments supporting a same-sex marriage ban cannot exist in a vacuum; any discriminatory policy must make sense and comport with other state actions or policies toward the group being discriminated against. The Oregon Family Fairness Act provided that context, through an eloquent legislative policy statement containing the following language:

> This state has a strong interest in promoting stable and lasting families, including the families of same-sex couples and their children. All Oregon families should be provided with the opportunity to obtain necessary legal protections and status and the ability to achieve their fullest potential.[6]

As Special Assistant Attorney General Mary Williams put it during oral argument:

> We have considered the arguments and possible justifications that could be presented to this court. But we, at the end of the day, find that those justifications cannot be put forward without undermining the legislative choices that have been made to protect Oregonians and to value Oregonians, including same-sex couples and their families.[7]

By making these legislative policy findings, Oregon, unlike other states where no such policy had been created, could not then adopt a position in direct contravention of those policies.

After tracing the evolution of Oregon's marriage and same-sex partner laws, Judge McShane examined the myriad ways those laws harmed the plaintiffs: the laws placed obstacles and complexities in front of many tasks, ranging from the relatively mundane (like obtaining spousal relocation benefits from an employer) to the most significant (like being required to complete and pay for a legal adoption process to become a legal parent to your own children). At nearly every important life juncture, the disparity between a registered domestic partnership and a marriage meant that securing the benefits and rights that automatically flowed between spouses was inordinately difficult for same-sex couples, if they could be obtained at all. Perhaps most exasperating, the federal recognition and benefits extended to married same-sex couples after the U.S. Supreme Court struck down the federal Defense of Marriage Act in *United States v. Windsor*[8] did not accrue to registered domestic partners in Oregon.

### *Windsor's* Effect

The *Windsor* decision, issued in June 2013, has already established itself as a fulcrum for marriage equality in the United States. Since last June, federal courts in 13 states have relied on *Windsor* in sustaining legal challenges to state same-sex marriage bans: Utah's ban on same-sex marriage was found unconstitutional in December 2013,[9] and Oklahoma's ban was held unconstitutional in January 2014.[10] In February 2014 alone, Kentucky was required to recognize out-of-state same-sex marriages,[11] Virginia's ban fell,[12] some Illinois couples were allowed to wed ahead of a scheduled expiry of the state ban,[13] and Texas's ban was ruled unconstitutional.[14] In March, Tennessee was required to recognize out-of-state same-sex marriages,[15] and Michigan's ban was struck down.[16] In April, Indiana was ordered to recognize a single out-of-state same-sex marriage,[17] while Ohio was ordered to recognize all of them,[18] and in May Idaho's,[19] Oregon's,[20] and Pennsylvania's[21] same-sex marriage bans were all successfully challenged in court. Nationwide, nearly 44% of the U.S. population now resides in states where same-sex couples have the freedom to marry.

Judge McShane acknowledged that *Windsor* is silent on whether state same-sex marriage bans are constitutional. He reasoned, however, that one principle espoused in *Windsor*—that state marriage laws which serve only to "degrade and demean" a certain class of people violate their rights to equal protection—necessitated the conclusion that if Oregon's marriage laws served no other purpose, they too were unconstitutional.[22]

### The Level of Scrutiny

To determine whether Oregon's ban was constitutional, Judge McShane first had to establish which level of scrutiny applied. The likelihood that any legal classification is constitutional is inversely proportional to the level of scrutiny it must receive. Strict scrutiny applies to classifications based on race or national origin; states must present evidence that such classifications are narrowly tailored to further a compelling governmental interest. Heightened scrutiny is reserved for classifications based on gender or illegitimacy; these must be substantially related to a sufficiently important governmental interest. Finally, rational basis review, applied to most classifications, requires only that a plausible policy reason for the classification exists, that legislative facts upon which the classification is apparently based may rationally have been considered to be true, and that the relationship of the classification to its goal is not overly attenuated.

The plaintiffs in this case, intentionally seeking a stricter standard than rational basis review in order to maximize the likelihood of overturning Oregon's ban, argued that heightened scrutiny should apply: the gender of the person you wanted to marry could determine whether or not Oregon would allow you to marry. Judge McShane disagreed. He held that the law's classification scheme hinged on whether an individual identified as homosexual or heterosexual: opposite-gendered persons of the same sexual orientation were treated the same.

Deciding that Oregon's marriage laws classified individuals on the basis of sexual orientation did not,

CONTINUED ON PAGE 10

CONTINUED FROM PAGE 9

however, provide absolute certainty as to which level of scrutiny applied. In 1990, the Ninth Circuit determined that laws discriminating on the basis of sexual orientation required only rational basis review.[23] But this year, the Ninth Circuit had the opportunity to reconsider that determination in light of *Windsor*. Since *Windsor* did not specify which level of scrutiny applied, the Ninth Circuit performed a close examination of exactly how the U.S. Supreme Court went about its reasoning in that case, and the Ninth Circuit discerned the application of heightened scrutiny to equal protection claims involving sexual orientation.[24]

In *Geiger v. Kitzhaber*, however, Judge McShane appears to have taken a suggestion from the state that the court should first consider whether Oregon's marriage laws could survive even rational basis review. If the laws could not withstand even the most lax level of scrutiny, then the issue whether heightened scrutiny applied could be avoided entirely. Noting that a mandate had not yet issued from the Ninth Circuit case discerning heightened scrutiny, and perhaps taking into account the Ninth Circuit's record in reaching accord with the Supreme Court's thinking, the state persuasively argued that a rational basis analysis would insulate the court's judgment from attack should the Ninth Circuit's decision be cast in doubt.

Judge McShane agreed, strategically avoiding the issue by concluding that Oregon's marriage laws were incapable of surviving even rational basis review. A rational basis review begins with the presumption that the classification being considered is valid: Rational basis classifications verge into unconstitutionality only when the sole reasonable conclusion is that the legislation in question was the result of irrational actions.[25] Classifications enacted solely to harm a particular group selected for unequal treatment violate the equal protection clause.[26]

## No Rational Basis

To determine whether some rational basis did lurk behind Oregon's marriage laws, Judge McShane examined them in light of the justifications provided at the time of Measure 36's passage, as well as the arguments advanced in other states in support of same-sex marriage bans. Those justifications and arguments fall into two broad categories: preserving the "traditional" definition of marriage as between one man and one woman, and protecting children through encouraging stable families.

Judge McShane found those arguments unsustainable in Oregon, where the legislature's statements and actions created a legal context in which no rational basis for prohibiting same-sex marriage could prevail. Judge McShane expressly acknowledged that for many Americans, longstanding religious and social traditions engendered a moral disapproval of same-sex marriage. Tradition standing alone, however, does not and cannot create a rational basis for a discriminatory classification.[27] Judge McShane reasoned that if tradition could make discriminatory classifications immutable, then the right to equal protection would be hollow. Similarly, he found that there can be no legitimate governmental interest present in the mere moral disapproval of a particular group.[28]

The second argument, that same-sex marriage bans protect children, was also found incurably flawed. Protecting children is undoubtedly one of the state's core interests. But Judge McShane persuasively reasoned that this interest applies equally to the children of same-sex and opposite-sex couples. Judge McShane found that the Oregon legislature's passage of the Oregon Family Fairness Act, which gave rise to registered domestic partnerships, was itself an acknowledgment of the value and importance of the families same-sex couples create.[29]

Refusing the full rights and responsibilities of marriage to same-sex couples actually harms the children of those couples, since their parents' relationship is, by law, afforded less status than the relationship of married couples. Oregon can be no less concerned with protecting the children of same-sex couples than it is with protecting adopted children, children born out of wedlock, or children born with the assistance of science. Judge McShane concluded that there was no rational basis to hold that the state is somehow possessed of a reduced interest in protecting the children of same-sex couples.

Judge McShane also made note of the many sociological and psychological studies showing that children raised by same-sex or opposite-sex couples fare the same. He also thoroughly debunked the argument that any state interest in "responsible procreation" supports a same-sex marriage ban: Procreative capacity is not a marital requirement, and there is no logical nexus between promoting responsible procreation and denying same-sex couples the right to marry.

In short, the court found that there is no factual context binding the classification made by Oregon's marriage laws to any legitimate state interest. Even under rational basis review, Oregon's marriage laws could not pass constitutional scrutiny.

Judge McShane concludes his opinion in part by acknowledging the genuinely held beliefs of those Oregonians who went to the polls in support of Measure 36 in 2004. As a measure of how quickly opinion on same-sex marriage has changed, consider that Measure 36 passed with 57% of votes in favor just ten years ago, while a recent poll shows that 58% of Oregonians are now in favor of same-sex marriage. Judge McShane held that no matter how fervently held a traditional belief may be, the equal protection clause requires that the rights of minorities be protected

CONTINUED ON PAGE 11

from expressions of moral disapproval that would, if permitted to remain law instead of simply expression, strip away fundamental rights.[30]

Posing a questioning about where all this will lead, Judge McShane's opinion closes by expressing the belief that if we rely on the common characteristics and values that we all, at our core, share, we will be able to exceed our own expectations and transcend our fears: "Let us look less to the sky to see what might fall; rather, let us look to each other . . . and rise."[31]

## Motions to Intervene and Stay the Case Denied

This case was one of at least seven across the county in which a state attorney general declined to defend the state's same-sex marriage ban. When Attorney General Rosenblum announced on February 20 that the state, in light of recent court decisions, could only conclude that Oregon's same-sex marriage ban could not withstand a federal constitutional challenge, the National Organization for Marriage (NOM) issued a press release criticizing the state's decision to not defend the ban.

NOM is a national organization that advocates against same-sex marriage, and has fought, so far unsuccessfully, to stay and to intervene in *Geiger v. Kitzhaber*. On April 21, two days before oral argument was to be heard on the plaintiffs' motion for summary judgment, and well after the briefing deadline had passed, NOM filed a motion with the district court seeking to intervene in the case. The next day, NOM filed another motion with the district court, asking that the summary judgment hearing scheduled for April 23 be delayed.

In its motion to intervene, NOM stated that it had only recently discovered among its Oregon members a county clerk, a wedding services provider, and a voter who supported Measure 36. NOM argued that it had third-party standing to assert the protectable interest of those members, who remained unnamed throughout the proceedings.

Judge McShane denied NOM's request to delay the summary judgment hearing, and ordered oral argument on the dispositive motion to proceed as scheduled on April 23. However, Judge McShane also indicated that the court would not issue an opinion until after NOM had an opportunity to be heard on its motion to intervene.

On April 23, the summary judgment motion hearing proceeded as scheduled, and no decision was issued.

The hearing on NOM's motion to intervene took place on May 14. After an hour of oral argument, Judge McShane ruled from the bench that NOM had provided no credible reason for failing to provide notification of its intent to intervene until almost immediately before the summary judgment hearing. Judge McShane found the motion to intervene untimely.

He also found that NOM, based on the scant information provided to the court, did not have a sufficiently significant protectable legal interest. Judge McShane indicated that it would be improper to essentially substitute the executive branch of Oregon's government with a private third party, simply because the private third party disagreed with the legal interpretation of Oregon's elected officials. Judge McShane denied the motion to intervene and denied NOM's request for a stay pending appeal of the denial to the Ninth Circuit.

NOM appealed to the Ninth Circuit, seeking to overturn the denial of its motion to intervene, and also seeking a stay of the case. The Ninth Circuit denied NOM's request for a stay on May 19, the same day Judge McShane's decision was issued and judgment was entered in the district court.

NOM next applied to the U.S. Supreme Court for an immediate stay pending NOM's Ninth Circuit appeal of the order denying intervention, and of the judgment and injunction entered by the district court. The appeal went to Justice Kennedy, the circuit justice for the Ninth Circuit.

Justice Kennedy requested briefing from the parties, to be submitted no later than June 2. On June 4, the U.S. Supreme Court issued a one-sentence order that read: "The application for stay presented to Justice Kennedy and by him referred to the Court is denied."[32]

Although NOM has exhausted its appeals to stay the case, its motion to intervene is still pending before the Ninth Circuit. The motion is extremely unlikely to prevail. The defendants have filed a motion to dismiss NOM's appeal as moot, arguing that effective relief cannot be granted because a judgment has been entered in the district court, and no party with standing plans to appeal. ✦

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### Endnotes

1. *Geiger v. Kitzhaber*, __ F. Supp. 2d __ (D. Or. May 19, 2014). The opinion is available to view and download at http://media.oregonlive.com/politics_impact/other/OPINION.pdf.

2. Or. Const. Art. I, § 20, reads: "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

3. *See Li v. State*, 338 Or. 376 (2005).

4. Or. Const. Art. XV, § 5a, reads: "It is the policy of Oregon, and its political subdivisions, that only a marriage between one man and one woman shall be valid or legally recognized as a marriage."

5. ORS 106.305.

6. *Id*.

7. Transcript of Oral Argument of April 23, 2014, at 49, *Geiger*, __ F.Supp.2d __.

8. *United States v. Windsor*, 570 U.S. 12 (2013).

9. *Kitchen v. Herbert*, 961 F. Supp. 2d 1181 (D. Utah 2013).

10. *Bishop v. U.S. ex rel. Holder*, 962 F. Supp. 2d 1252 (N.D. Okla. 2014).

11. *Bourke v. Beshear*, __ F. Supp. 2d __ (W.D. Ky. 2014).

12. *Bostic v. Rainey*, 970 F. Supp. 2d 456 (E.D. Va. 2014).

13. *Lee v. Orr,* 2014 WL 683680 (N.D. Ill. Feb. 21, 2014).

CONTINUED ON PAGE 12

# New Civil Rights Laws in Oregon

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Oregon's 77th Legislative Assembly began its 2014 regular session on February 3, 2014 and adjourned *sine die* on March 7. All five bills reported in the March 2014 issue of this newsletter have been signed by the governor. SB 1577 (vulnerable adults with disabilities) took effect March 3. HB 4023 (veterans' preference by private employers) and HB 4151 (elder abuse investigations) took effect April 1. SB 1506 (educational opportunity for military children) and HB 4110 (prisoner health care rights) will take effect January 1, 2015. Some additional bills enacted are listed below. The text and history of all bills are posted on the legislature's website, https://www.oregonlegislature.gov/.

### SB 1509: Native American Mascots

Senate Bill 1509 allows a district school board to enter into an approved written agreement with a federally recognized Native American tribe in Oregon for the use of a mascot that represents, is associated with, or is significant to the tribe. The bill requires any agreement to describe acceptable uses of the mascot and comply with Oregon Board of Education rules. In 2012, the board passed a sweeping ban on Native American mascots. Although the 2013 legislature passed SB 215, creating a loophole that would allow certain Native American mascots, Governor Kitzhaber vetoed it. The governor signed SB 1509 on March 6, and it became effective immediately based on a declaration of emergency.

### SB 1548: Expansion of OFLA "Health Care Provider" Definition

Senate Bill 1548 amends various Oregon statutes that reference "physician" to include references to "physician assistant" and "nurse practitioner." The bill amends ORS 659A.150(5) to add to the definition of qualified "health care provider" under the Oregon Family Leave Act (OFLA) a physician assistant licensed under ORS 677.505 to 677.525. The governor signed the bill on March 6, and it takes effect July 1, 2014.

### HB 4154: Whistleblower Protections for Employees of Cover Oregon Program

House Bill 4154 amends ORS chapters 659A, 735, and 741 and, among other provisions, amends ORS 659A.200 to make employees of the Cover Oregon program (those employed by the public corporation established under ORS 741.001) subject to state whistleblower protections. Governor Kitzhaber signed the bill on March 19, and it took effect immediately based on a declaration of emergency. ✦

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SAME-SEX MARRIAGE CONTINUED FROM PAGE 11

14. *De Leon v. Perry,* 975 F. Supp. 2d 632 (W.D. Tex. 2014).

15. *Tanco v. Haslam*, __ F. Supp. 2d __ (M.D. Tenn. 2014).

16. *DeBoer v. Snyder,* 973 F. Supp. 2d 757 (E.D. Mich. 2014).

17. *Baskin v. Bogan*, __ F. Supp. 2d __ (S.D. Ind. 2014).

18. *Henry v. Himes*, __ F. Supp. 2d __ (S.D. Ohio 2014).

19. *Latta v. Otter*, __ F. Supp. 2d __ (D. Idaho 2014).

20. *Geiger*, __ F. Supp. 2d __.

21. *Whitewood v. Wolf*, __ F. Supp. 2d __ (M.D. Pa. 2014).

22. *Windsor*, 133 S. Ct. at 2695.

23. *High Tech Gays v. Defense Industrial Security Clearance Office*, 895 F.2d 563, 574 (9th Cir. 1990).

24. *SmithKline Beecham Corp. v. Abbot Labs*, 740 F.3d 471, 481 (9th Cir. 2014).

25. *Vance v. Bradley*, 440 U.S. 93 (1979).

26. *Romer v. Evans*, 517 U.S. 620, 633 (1996).

27. *Heller v. Doe*, 509 U.S. 312 (1993); *Golinski v. Office of Personnel Management*, 824 F. Supp. 2d 968 (N.D. Cal. 2012).

28. *Lawrence v. Texas*, 539 U.S. 558, 583 (2003) (O'Connor, J., concurring).

29. ORS 106.305.

30. Though Judge McShane held that Oregon's marriage laws violated the equal protection clause, the argument advanced by the parties that the laws also violate the due process clause was not addressed.

31. *Geiger*, __ F. Supp. 2d __.

32. *Nat'l Org. for Marriage v. Geiger*, 13A1173, 2014 WL 2514491 (U.S. June 4, 2014).

Back to page 1