

GENDER JUSTICE

Final Report Prepared for the Barbara McDowell and Gerald S. Hartman Foundation

October 2021

CASE INTRODUCTION

In 2019, Gender Justice filed a complaint on behalf of Andrea Anderson, who was denied service by pharmacists at not one, but *two* pharmacies in rural Minnesota – the McGregor Thrifty White and Aitkin CVS – when she sought to fill a prescription for emergency contraception (ella) in January 2019, forcing her to drive over 100 miles in blizzard conditions to obtain time-sensitive medication.

Andrea's story highlights the particular struggle that rural women face with regards to health care access; a religious refusal at one pharmacy could be the difference between Anderson – and rural women like her across the state and country – getting her medication or going without. With this case, we hope to establish that a refusal to fill a prescription for Emergency Contraception is sex discrimination under the Minnesota Human Rights Act, and that the state's interest in preventing this type of discrimination can withstand an objection based on the religious beliefs of the health care provider.

ACTIVITIES TO DATE

In September and October 2020, Gender Justice attorneys deposed all non-expert witnesses for our case, including each of the pharmacists, pharmacy technicians, and pharmacy owners Andrea interacted with while attempting to fill her prescription. We learned that the Thrifty White pharmacist has previously denied emergency contraception to other women. In one situation, he not only refused to dispense the medication, he also confronted the young woman in the pharmacy aisle, causing her to cry.

Following depositions, we filed for affirmative summary judgment arguing that denial of contraception is *per se* sex discrimination under the Minnesota Human Rights Act. Thrifty White and CVS both filed for summary judgement as well. Thrifty White argued that the actions of their pharmacist could not be considered *per se* sex discrimination under the MHRA. CVS argued the same and also claimed that none of their pharmacists took issue with birth control but that they were simply out of supply and that the events were misinterpreted by our client as a motivated refusal. These motions were briefed, and oral argument took place mid-February. The judge invited a class from Saint Paul's Mitchell Hamline School of Law to attend the hearing.

So far, none of the defendants have properly raised a constitutional defense in the case. One plaintiff raised the issue in summary judgment, but they did not argue that they are exempt from the anti-discrimination law based on their constitutional rights. Instead, they argued that they did not intend to discriminate and that they were only acting pursuant to their religious beliefs. We noted that there is no statutory exception in the MHRA for sex discrimination in public accommodations or business. We also noted what the defendants would need to do to properly raise a constitutional claim, which includes serving the Attorney General with their papers.

On May 17th, the Aitkin County court issued a brief order on both our and the defendant's lengthy motions for summary judgement. The court ruled that the question of whether the pharmacists refused to dispense the emergency contraception is both material and in dispute, meaning that our case will be moving forward to trial. The court did not go into much detail, but we are pleased with this ruling. For the case to move forward to trial, it must mean that the court agrees with our position that a refusal to sell emergency contraception is sex discrimination under the MHRA. The factual question of whether what the pharmacist did amounts to a refusal will be the issue in dispute at the trial.

Since this ruling, we have been brainstorming and developing our message strategy for the jury. We are working closely with our expert witness [Kelly Cleland](#) on her report about Emergency Contraception, which is due this month. Kelly has more than 20 years of experience in the sexual and reproductive health field conducting research, advocacy, and writing projects. She worked as a researcher in the Office of Population Research at Princeton University for 14 years, focusing on medication abortion and emergency contraception.

PROGRESS ANTICIPATED

We look forward to spending the final quarter of the year continuing to prepare for trial, which is currently scheduled for January 18, 2022.

Support from the Foundation has been crucial to our progress on this case and making it financially feasible, especially because we do not have co-counsel from the private bar for this case. Additionally, the Foundation's support helped us to provide the needed preparation and support of our client and her therapist as they were both deposed by opposing counsel.

We are grateful to the Foundation's generous support of this case as it has made it possible for us to cover expert costs and attorney time that would have otherwise needed to be covered by limited general operating funds. We look forward to updating you again in the future with a positive and successful outcome.

POTENTIAL IMPACT

A successful outcome establishing contraception denial as *per se* sex discrimination would be extremely meaningful for our client but also for reproductive rights more broadly. In light of SCOTUS's anticipated unraveling of 50 years of federal court precedent protecting the right to abortion based on the right to privacy, legal advocates are looking for alternative paths to securing abortion – and other reproductive health care – rights. This case has the potential to provide one step in the direction towards establishing a new lane of protections for reproductive rights via our state's human and civil rights protections regarding sex.

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