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Dinita L. James, Editor — Gonzalez Saggio & Harlan LLP

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LITIGATION

Same-sex partners of state employees will keep benefits

by Dinita L. James

*The last weeks of June 2013 were blockbuster ones for U.S. Supreme Court cases of interest to Arizona employers, and much of this issue is devoted to covering those decisions. The final two days of the Court's term produced action on same-sex marriage. The most publicized decisions came on Wednesday, June 26, in the twin decisions of *United States v. Windsor* and *Hollingsworth v. Perry*. In this month's "Words on Wise Management" on page 3, Maria Reed explains several of the 1,138 federal benefits, rights, and privileges employers must extend to same-sex couples when they can lawfully marry, thanks to the invalidation of Section 3 of the federal Defense of Marriage Act (DOMA) in the *Windsor* case.*

In a bit of housecleaning the day after those landmark rulings in the same-sex marriage cases, the Supreme Court decided not to hear an Arizona case raising similar issues that was one of about 10 others awaiting action. The Court's decision not to hear the case is significant for employees of state agencies, who will continue to be able to include their same-sex (but not opposite-sex) domestic partners on their state-provided health insurance.

Brewer v. Diaz

We have covered the Arizona case, *Brewer v. Diaz*, extensively in *Arizona Employment Law Letter*, with articles appearing in our September 2010, April 2011, August 2012, and January 2013 issues. The controversy started back in 2008, when then-Governor Janet Napolitano's administration began offering healthcare coverage to both opposite- and same-sex domestic partners of state employees. After the November 2008 election, Governor Napolitano went to Washington to become secretary of homeland security, and Jan Brewer succeeded her.

In September 2009, Governor Brewer signed legislation that eliminated coverage for all unmarried domestic

partners of state employees, and a federal lawsuit soon followed. The federal trial court in Phoenix blocked enforcement of the law for same-sex domestic partners until the case could be tried, finding it violated the right of gay and lesbian state employees to equal protection under the law because they couldn't marry to maintain benefits, while their peers with opposite-sex domestic partners could.

The state appealed the district court's ruling to the U.S. Court of Appeals for the 9th Circuit (whose rulings apply to all Arizona employers) but lost there as well. The state's petition asking the U.S. Supreme Court to reverse the lower courts and allow the law to be implemented was denied on June 27, along with nine other petitions raising same-sex marriage issues that the Court had been sitting on while briefing and arguments proceeded in the two cases decided the day before.

Governor Brewer issued a statement on the day *Brewer v. Diaz* was rejected, expressing disappointment that the Court won't hear the case. "In terminating domestic-partner benefits for state employees of every sexual orientation, the action I took with the legislature was driven by financial necessity rather than a social agenda," she said in the statement. "This case has never been about domestic partners, same-sex or otherwise. It [has] always been about the authority of elected state officials to make decisions with which we have been entrusted by the voters. I'm disappointed the high court has eroded that authority with its decision today."

The Arizona federal court lifted the stay on the lawsuit on July 2. The order allowing proceedings in the case to recommence required the parties to report before July 9 whether they were in settlement negotiations, and that date came and went without any such report being made. Thus, it appears the state is going to take the case to trial.

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Lambda Legal, a national nonprofit legal organization, is representing the state employees, and its lead counsel, Tara Borelli, said in a statement that she was eager for trial. "Arizona has tried everything it can to eliminate this coverage," she said. The state "has no more cards to play in this round. It's time to go back to the trial court so that we can get a final ruling to assure these employees they will not be denied the equal pay for equal work they deserve."

Marriage equality issue looms

The Supreme Court decided the other same-sex marriage case, *Hollingsworth v. Perry*, on procedural grounds and avoided ruling on the constitutional questions presented by the California case. By declining to take up the Arizona case and one from neighboring Nevada that also raised constitutional questions, the Court postponed to another day having to determine whether marriage equality is a constitutional right.

Section 2 of DOMA, which remains in effect, says that Arizona and other states don't have to recognize same-sex marriages lawfully performed in other states, despite the Full Faith and Credit Clause of the U.S. Constitution. Whether Congress can do that is another open constitutional question, and one federal judge already has ruled that Ohio must recognize a same-sex marriage performed in Maryland. Employers are going to have to keep up with courthouse news on marriage equality and their rights and duties to workers and their same-sex spouses for a few years to come.

Dinita L. James, the partner in charge of the Phoenix office of Gonzalez Saggio & Harlan LLP, is the editor of Arizona Employment Law Letter. You can reach her at dinita_james@gshllp.com or 602-840-3301.

➔ *You can research same-sex marriage and domestic partnerships or any other employment law topic in the subscribers' area of www.HRHero.com, the website for Arizona Employment Law Letter. Access to this online library is included in your newsletter subscription at no additional charge. ♣*