

Marriage equality comes to Arizona

by **Dinita L. James**
Gonzalez Saggio & Harlan LLP

On October 17, 2014, Arizona Attorney General Tom Horne issued a directive to the state's 15 county clerks that they could begin immediately issuing licenses for same-sex marriages. With that letter, Arizona became the 30th state to permit same-sex marriage and recognize same-sex marriages celebrated in other states and countries.

Waving the white flag

Horne's action came near the end of a dramatic two weeks that saw the number of states recognizing same-sex marriage rise from 19 to 32 by the end of the day on October 17, when Alaska and Wyoming also joined the parade.

The tally of states began increasing dramatically on October 6, when the U.S. Supreme Court denied review of same-sex marriage cases from five states. The next day, the U.S. Court of Appeals for the 9th Circuit (whose rulings apply to all Arizona employers) issued a decision in *Latta v. Otter*, holding that laws prohibiting same-sex marriage in Nevada and Idaho were unconstitutional.

Arizona voters in 2008 adopted a state constitutional provision that defined marriage exclusively as "a union of one man and one woman." After the U.S. Supreme Court's June 2013 decision in *United States v. Windsor*, which invalidated certain provisions of the federal Defense of Marriage Act (DOMA), several same-sex couples filed federal lawsuits challenging the Arizona constitutional provision and similar state statutes. The judge in the pending Arizona cases ordered briefing by October 16 addressing whether the *Latta* decision controlled the outcome of the Arizona cases.

On the October 16 deadline, the Arizona Attorney General's Office filed a brief asking the judge to refrain from issuing any ruling based on *Latta* until the decision became final under 9th Circuit procedure. The judge ruled anyway, holding the Arizona laws unconstitutional. Shortly after the ruling was issued,

Attorney General Horne held a press conference to announce his surrender.

"The probability of persuading the 9th Circuit to reverse today's decision is zero. The probability of the U.S. Supreme Court accepting review of the 9th Circuit decision is also zero," Horne said. "Therefore, the only purpose to be served by filing another appeal would be to waste the taxpayers' money. That is not a good conservative principle."

No time to waste

Arizona employers should waste no time reviewing company policies and benefit practices to ensure that you cover spouses equally whether they are the same or opposite sex. That includes the benefits you offer to your employees as well as those you administer under state or federal law, such as leave protected by the Family and Medical Leave Act (FMLA).

FMLA-covered Arizona employers already should have begun reviewing policies and practices to some extent because the U.S. Department of Labor (DOL) announced in June 2014 that it was changing its rules on the definition of "spouse" to adopt a "state of celebration" rule over the "state of residence" rule now in effect. It has been widely predicted that the state of celebration rules for FMLA purposes will be in effect by early 2015. The good news for Arizona employers is that marriage equality in Arizona simplifies things tremendously.

Is sexual orientation discrimination lawful?

One of the more poignant moments in all of the media coverage about the fast-moving marriage equality developments was an interview with a newly married man who requested anonymity for him and his husband. He bemoaned the fact that he couldn't celebrate his newly married status by putting his husband's photo on his desk at the office for fear of being fired because he is gay.

Arizona employers that might want to take action against LGBT employees on the basis of their sexual orientation should tread very cautiously. The *Latta* decision makes

it clear that public employers in Arizona and other states in the 9th Circuit cannot discriminate on the basis of sexual orientation or gender identity. The same constitutional principle of equal protection applied to same-sex couples in *Latta* applies with equal force to public employees in government workplaces.

Four of Arizona's largest cities—Flagstaff, Phoenix, Tempe, and Tucson—have enacted local ordinances prohibiting workplace discrimination on the basis of sexual orientation and gender identity. But even private employers outside those four Arizona cities could be violating the law by discriminating on the basis of sexual orientation and gender identity.

It's true that although Title VII of the Civil Rights Act of 1964 and Arizona's Civil Rights Act both prohibit discrimination in employment decisions, neither explicitly lists sexual orientation as a protected class. Congress has been trying to fix that with a bipartisan bill, the Employment Non-Discrimination Act (ENDA), which has passed the Senate. In addition to support from both Democrats and Republicans, ENDA has the support of labor and business interests. It's one piece of legislation that commentators speculate actually may pass the House after the November 2014 midterm elections. So ENDA could be the law of the land in 2015.

Even if ENDA is not enacted, the Equal Employment Opportunity Commission (EEOC) takes the position that the existing prohibition on sex discrimination "includes discrimination because an applicant or employee does not conform to traditional gender stereotypes." In its brochure "Facts About Discrimination Based on Gender Stereotyping," the EEOC lists as examples of sex discrimination an employer denying employment opportunities or permitting harassment because:

- A woman does not dress or talk in a feminine manner.
- A man dresses in an effeminate manner or enjoys a pastime (like crocheting) that is associated with women.
- A male employee plans to marry a man.
- An employee transitions from female to male or male to female.

One of the 9th Circuit judges who decided the *Latta* case wrote a special opinion to make the point that same-sex bars are based on gender stereotypes. While Judge Marsha Berzon included language in her concurring opinion recognizing that employment discrimination on

the basis of sexual orientation is not necessarily based on gender stereotypes, it is clear that at least one 9th Circuit judge would find it easy to categorize many acts of sexual orientation discrimination as sex discrimination.

Bottom line

Employers that believe they have a business or moral imperative to make employment decisions based on the sexual orientation or gender identity of employees and job applicants are standing on ever-shakier legal ground. It appears that public employers have no ground left to stand on. Private employers should carefully consider whether sexual orientation or gender identity truly is a basis on which they want to make employment decisions in today's economic and social climate.

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.