

Verdict

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Pediatrician Refuses to See Baby of Lesbian Couple

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Late last year, a married (in the State of Vermont) lesbian couple in Michigan reportedly went to visit a pediatrician with their six-day-old baby daughter, Bay Windsor Contreras. The couple—Krista and Jami Contreras—had selected the pediatrician, Dr. Vesna Roi, after meeting with her before their baby was born and concluding that she was a good fit. Upon their arrival at the doctor’s office, however, they were greeted by a different doctor who told them that Dr. Roi was refusing to see them after having “prayed on it.” For that day, they saw the other doctor but felt very unhappy about and humiliated by the whole experience.



Dr. Roi’s choice not to treat Bay, the baby of this lesbian couple, appears to have violated no law in the State of Michigan, which currently seems to permit discrimination against LGBT families. In this column, I will consider two notable features of the situation that the two mothers faced at the doctor’s office: (1) a “religious” decision that arguably had more to do with discomfort than with conscience; and (2) the incomplete victory that access to same-sex-marriage may represent for gay and lesbian families.

A Religious Objection?

Ordinarily, when we think about religious objections to providing particular types of medical care, a specific kind of situation comes to mind, a situation that calls for violation

of one's religious obligations. There are doctors and nurses and other healthcare providers, for instance, who believe that abortion is a grave sin and that participating in providing an abortion is accordingly religiously forbidden. In **Burwell v. Hobby Lobby Stores, Inc.** (<https://supreme.justia.com/cases/federal/us/573/13-354/opinion3.html>), the owners of a closely-held for-profit corporation successfully objected, under the Religious Freedom Restoration Act, to subsidizing (for their workers) the provision of forms of contraception that they regarded as abortifacients. Though Dr. Vesna Roi is not invoking (and need not invoke) a religious freedom law to defend her decision, she implicitly relies on the logic of this sort of law in refusing to treat the six-day-old patient at her office.

The situation in which Dr. Roi found herself, however, is quite distinct from that of the owners who objected to supporting the provision of what they viewed as abortifacient contraceptives to workers. What differentiates the two? First, the lesbian couple who had selected Dr. Roi to care for their baby did not in any way ask for or expect their pediatrician to participate in or endorse same-sex sexual conduct that the doctor might have found religiously or morally objectionable. They simply asked that she provide medical care—diagnosis and treatment—to their infant, just as she would do for any other infant or child in her care. It is difficult even to imagine how anything the doctor might do for the child—examine her, provide vaccinations, prescribe antibiotics or vitamins, or refer her to a specialist for extra care—could possibly be construed as participation in religiously prohibited same-sex intimacy. So why, then, might Dr. Roi have refused to see this family?

According to an apology letter that Dr. Roi is reported to have later handwritten to the family, “[a]fter much prayer following your prenatal, I felt that I would not be able to develop the personal patient doctor relationship that I normally do with my patients.” Though this does not squarely answer our question, it seems to suggest that Dr. Roi felt that because of Krista's and Jami's lesbian lifestyle, Dr. Roi would essentially have felt uncomfortable about their choices and would have found it challenging to treat them with the same respect and kindness with which she would ordinarily be inclined to treat her patients' families. To sum up, I would describe the doctor's objection in this way: “The life choices of my patient's (the baby's) moms make me feel ill-at-ease, and I would therefore prefer not to work with them.”

The reason I phrase my summary in this way is that the “religious” nature of the doctor's feelings about the lesbian couple whose child she is refusing to treat may be largely beside the point. The women's infant is not (so far as anyone can tell at this stage) a lesbian, and the care that the doctor would provide would in no way involve celebrating the couple's union generally or their sexual intimacy in particular. Yet the doctor would seemingly feel

better about interacting with the family of her patient if the family were straight rather than gay. She does not, it seems, like the fact that her patient's parents are gay and would therefore prefer not to deal with them professionally.

To put such an objection in context, let us consider some of the other sorts of characters who make their way into doctors' offices seeking care. Some parents of infants and children are unfriendly people who bicker amongst themselves and have nothing pleasant to say on their visits. Other parents brag endlessly about the breathtaking talents of their little bundle of joy and show little sensitivity for the children with disabilities and other challenges who populate the same waiting rooms as they do. Still other families are cold to their own children and do little to disguise the fact that they wish their child was more like some other family's child (or perhaps like some other child in the same family). And some families exhibit subtle (or not-so-subtle) bigotry during their visits to the doctor.

For many pediatricians, working with one or more of these sorts of families can be challenging, and the pediatricians might prefer to have a different set of patients, patients whose families are warm, friendly, humble, supportive of their own children, and sensitive to the needs of other children and adults in their vicinity. To my knowledge, though, pediatricians do not generally get to assemble a group of ideal patient families and thereby assure the pediatricians' total comfort and ease at every doctor's visit.

In life and in work, we all must encounter a variety of people, some of whom are sweet and fun and wonderful, and others of whom can try our patience. If we are deciding whom to befriend or whom to marry, of course, it is perfectly legitimate to take such personal characteristics into account. Thus, if Dr. Roi would prefer not to be close friends with Krista and Jami Contreras, she has that right, and no one would deny her that option. But my general understanding of what doctors do does not contemplate an entitlement to treating only those patients whose families are most conducive to their (the doctors') comfort level. If I am right about this, then it would seem that Dr. Roi is violating a norm about taking patients without regard to how "comfortable" the doctor feels in the patients' presence (assuming that the discomfort is not occasioned by a threat to her physical safety). And indeed, the AMA Code of Ethics appears to prohibit discrimination on the basis of sexual orientation.

By invoking religion, then, Dr. Roi makes a kind of category error. She invokes a norm about allowing people to opt out of participating in what they consider immoral conduct (e.g., by providing an abortion if one is morally opposed to abortion) as a means of opting out of an uncomfortable situation that in no way requires her participation in something she would regard as immoral or religiously prohibited behavior. I know of no religious principle that holds that providing health care to an infant is permissible only if the infant's parents are heterosexual. It would be unfortunate if this doctor's category error

were to become a precedent for doctors and other kinds of providers to refuse to serve gay and lesbian families on account of some vague “religious discomfort,” a type of discomfort that I would call bigotry masquerading as conscience.

The Work Left to Be Done

A second feature of this case that is noteworthy is the fact that a same-sex couple, married in another state and raising their own baby—people who appear to be living the dream and benefiting from one of the most salient achievements of the gay rights movement—is nonetheless in the humiliating position of confronting anti-gay bias where they probably least expected it, at the pediatrician’s office. Less than thirty years ago, in 1986, the U.S. Supreme Court lent its imprimatur to laws that criminalized sodomy and did so partly on the very ground that such laws, though written neutrally as to sexual orientation, were in fact selectively enforced against same-sex couples. Who would have imagined then that in 2015, marriage equality for gay men and lesbians would be sweeping the nation, and the U.S. Supreme Court would be, on many accounts, poised to announce a constitutional right to such equality as a matter of the Fourteenth Amendment’s Due Process Clause?

These developments are extremely exciting and have been and rightly should be celebrated by both same-sex couples and anyone who cares about justice and equality. Yet it remains important to recognize that governments are not the only parties that threaten the civil rights and civil liberties of oppressed minorities. Private parties are capable of doing so as well, as the story of the pediatrician in this case effectively illustrates. So long as employers, places of public accommodation, and other private venues are empowered by law to discriminate on the basis of sexual orientation (and other invidious categories), people who may marry and parent their children will nonetheless continue to encounter unwelcome experiences of discrimination that apparently violate no legal rule.

When Anti-Discrimination Law and Religious Exemptions Meet

Even when anti-discrimination law catches up with where it ought to be, there will likely continue to be religious and conscience-based exceptions to anti-discrimination principles, as there are now. An Orthodox synagogue may not be required by anti-discrimination law to hire a woman rabbi, since Orthodox Jews reject the legitimacy of female rabbis. And even secular employees may retain conscience- and religious-based rights to refrain from participating in practices that they regard as sinful or immoral, as might a Catholic doctor or nurse who refuses to play a role in performing an abortion or in assisting a dying patient in ending his life.

In recognizing a continuing role for religious- and conscience-based exemptions,

however, it is crucial to cabin their scope so that they do not have the effect of nullifying the anti-discrimination principle altogether. People have all sorts of reasons for feeling “uncomfortable” around others who seek protection in anti-discrimination law, and some of those reasons may include activities and qualities that are connected with religiously taboo activities. So Dr. Roi may well have felt uneasy about working with lesbian parents because of her own religious objections to same-sex intimacy. Yet if it is to be at all effective, a law prohibiting discrimination must not allow such discomfort to qualify as a legitimate conscience-based objection to treating the daughter of a lesbian couple (or indeed, to treating the lesbian couple itself). To do so would risk elevating bigotry to the status of a religion, an elevation that not only would serve to gut the anti-discrimination law but would also insult the very idea of religion as a set of sober ethical commitments that stand apart from one’s personal comfort level around those who are different from oneself.



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