STATE OF NEW HAMPSHIRE

MERRIMACK, SS. SUPERIOR COURT

PATRICIA BEDFORD,
Plaintiff

v.

NEW HAMPSHIRE COMMUNITY TECHNICAL COLLEGE SYSTEM,
and
STATE OF NEW HAMPSHIRE DIVISION OF PERSONNEL,
Defendants

Docket No. 04-E-0229

ANNE BREEN,
Plaintiff

v.

NEW HAMPSHIRE COMMUNITY TECHNICAL COLLEGE SYSTEM,
and
STATE OF NEW HAMPSHIRE DIVISION OF PERSONNEL,
Defendants

Docket No. 04-E-0230

MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' MOTION TO REVERSE FINDINGS OF COMMISSION FOR HUMAN RIGHTS

Plaintiffs Patricia Bedford and Anne Breen appeal from the New Hampshire Commission for Human Rights' findings of "No Probable Cause" in connection with their respective complaints that the Defendants' refusal to provide them equal employment benefits constitutes unlawful employment discrimination under R.S.A. 354-A:7. Plaintiffs are long-term employees of Defendant New Hampshire Community Technical College System ("the College"). When the Plaintiffs sought employment benefits for their families, Defendants denied their request because

Defendants condition eligibility for such benefits upon marriage, a legal status unavailable to Plaintiffs. Defendants' decision to use marriage as the defining criteria for granting employment benefits while knowing that lesbian employees are ineligible for that status constitutes impermissible sexual orientation discrimination because it denies gay and lesbian employees the same economic benefits of employment that heterosexual employees receive for the same work. Conditioning benefits upon marriage results in the adverse treatment of gay and lesbian employees as compared to heterosexual employees, and has a severely adverse impact on gay and lesbian employees, thus violating the mandates of R.S.A. 354-A:7. The findings of "No Probable Cause" by the Commission are unlawful and unreasonable by a clear preponderance of the evidence and, accordingly, should be reversed by this Court.

FACTUAL BACKGROUND

Plaintiff Patricia Bedford has been in a committed relationship with her partner, Vivian Knezevich, for fourteen years, and Plaintiff Anne Breen has been in a committed relationship with her partner, Kathleen Doyle, for twenty-six years. Exhibit A (Investigation Report in Bedford v. State of NH et al.), p. 3, ¶2; Exhibit B (Investigation Report in Breen v. State of NH et al.), p. 3, ¶2. Each couple shares a deep devotion to one another, a common home, a child, and lives entwined with emotional and financial interdependence. Ex. A, pp. 3-4, ¶¶ 1-5; Ex. B, pp. 3-4, ¶¶1-6. Neither couple is married because New Hampshire statutes do not currently allow same-sex couples to marry. Ex. A, p. 3, ¶2, p. 6, ¶16; Ex. B, p. 3, ¶2, p. 7, ¶18.

Ms. Bedford has been an employee of the College for the past nine years as a department director overseeing the administration of federal grants and assisting students with disabilities. Ex. A, p. 3, ¶1. Ms. Breen has been an employee of the College for the past sixteen years as

Director of Security. Ex. B, p. 3, ¶1. Both are qualified to receive employee benefits as full-time classified employees. Ex. A, p. 7, ¶2; Ex. B, p. 8, ¶2.

Nonetheless, the College has refused to enroll Ms. Breen's and Ms. Bedford's domestic partners in its health and dental plans and has indicated its intent to deny leave to either Plaintiff in the event of her respective partner's death or illness.[1] Ex. A, p. 7, ¶3.; Ex. B, p. 8, ¶3. Moreover, Ms. Breen is being denied the right to use sick leave to care for her partner's biological child who lives in their home and for whom she shares parenting responsibilities. Ex. B, p. 3, ¶3, p. 8, ¶3.

On October 16, 2002 and September 5, 2002, respectively, Ms. Bedford and Ms. Breen filed complaints with the Commission for Human Rights ("Commission") alleging sexual orientation discrimination by the Defendants. On September 9, 2003, Investigator Randal Fritz issued reports of his complaint investigations, concluding that while Ms. Bedford and Ms. Breen are lesbians and therefore members of a protected class, they were not treated differently than similarly situated employees. Ex. A and B. The Commission's investigator also concluded that the Commission lacked authority to find probable cause based upon administrative rules and statutes which he read to preclude the extension of domestic partnership benefits. Ex. A and B. On September 29, 2003, Commissioner Laura Simoes made findings of "No Probable Cause" in each matter based upon the investigative reports. Id. Following the filing of motions for reconsideration, Commissioner Simoes reaffirmed the Commission's findings of "No Probable Cause" with respect to Ms. Bedford's and Ms. Breen's complaints and, in doing so, made further

[1] On account of the College's refusal to provide health insurance coverage for the Plaintiffs' domestic partners, Ms. Bedford and Ms. Breen have each incurred significant personal expense in obtaining substitute health care coverage for them. Ex. A, p. 4, ¶6 (estimating Ms. Bedford's costs of coverage for her partner from 2000 to 2002 alone at over $10,000); Ex. B, p. 4, ¶8 (estimating Ms. Breen's cost at $275 per month).

findings of fact and law. *See* Bedford Order dated May 3, 2004, attached as Ex. C and Breen Order dated May 3, 2004, attached as Ex. D.

The present cases represent appeals pursuant to R.S.A. 354-A: 21, II (a) seeking the reversal of the findings of "No Probable Cause" by the Commissioner of the New Hampshire Commission for Human Rights on Ms. Bedford's and Ms. Breen's complaints of unlawful discrimination in employment benefits based on sexual orientation.

ARGUMENT

I. THIS COURT SHOULD REVERSE THE FINDINGS OF NO PROBABLE CAUSE BECAUSE THE DEFENDANTS' DENIAL OF EQUAL EMPLOYMENT BENEFITS CLEARLY VIOLATED NEW HAMPSHIRE'S PROTECTIONS AGAINST SEXUAL ORIENTATION DISCRIMINATION.

A. Standard of Review Governing Present Appeal

When the Commission for Human Rights "finds no probable cause to credit the allegations" in a complaint of discrimination before it, the complainant may appeal that finding to Superior Court. R.S.A. 354-A:21, II(a). The moving party is entitled to an order from the Superior Court reversing the Commission's finding upon a showing that the finding is "unlawful or unreasonable by a clear preponderance of the evidence." Id. The finding of the Commission upon questions of fact "shall be upheld as long as the record contains credible evidence to support them." Id. However, as to questions of law, when the finding is not made in compliance with applicable law, it shall be reversed. Cf. Appeal of New Hampshire Catholic Charities, 130 N.H. 822, 825 (1988) (interpreting analogous standard of review set forth in R.S.A. 541:13 for administrative appeals). Thus, errors of law underlying the Commission's finding require reversal. Id. (reversing administrative decision based on erroneous interpretations of state regulations); Appeal of Kevin Barry, 141 N.H. 170, 173 (1996) (reversing

decision of retirement board where board erroneously interpreted provision of city charter). These appeals primarily present questions of law.

Because the Commission erred as a matter of law in finding no probable cause to credit the Plaintiffs' allegations that they were denied equal employment benefits on account of their sexual orientation in violation of R.S.A. 354-A:7, this Court should reverse the erroneous findings by the Commission and proceed in accordance with R.S.A.354-A:21, II (a).

B. The Commission Has Authority to Adjudicate Complainant's Claims.

The Commission has erroneously concluded that it "lacks the authority to override various statutes and statutory schemes set in place by the Legislature," see Exs. C and D, p. 6, and further that "its enabling statute, R.S.A. 354-A, [can not be read] as granting the authority to find probable cause" in a case such as this where the State employing entity fails to provide equal employment benefits to gay and lesbian employees.[2] See Exs. A and B, p. 10. These conclusions are not tethered to specific laws or regulations and have no readily apparent rooting in law or fact.[3] Neither the Commission's authorizing statute nor any other state laws and administrative rules generally referenced in the Commission's reports prevent the State from providing the Plaintiffs with equal benefits. The Defendants are perfectly capable of providing gay and lesbian employees with the same economic benefits of employment that heterosexual

[2] The Commission has mischaracterized Plaintiffs' claims for equal benefits as claims for "spousal equivalency." As explained in Section I(B)(2), infra, Plaintiffs do not seek marriage rights or otherwise seek to qualify for these benefits as "spouses." Because the Commission's findings of "No Probable Cause" are built upon this mischaracterization, the Commission's findings are erroneous and should be reversed. See also Footnote 11, infra.

[3] The Commission has cited numerous statutes and regulations, in most instances without substantive analysis. Its conclusions reference only "applicable administrative rules," and R.S.A. 21-I:30 (see Exs. A and B, p. 10), and "various statutes and the statutory schemes" (see Exs. C and D, p.6). As none of the cited authorities support its conclusions, the authorities upon which the Commission relies are unclear. See cited authorities: R.S.A. 354-A:1 et seq.; R.S.A. 457:1,2; R.S.A. 21-I:30; R.S.A. 21-I:1 et seq., 42, 43, 52; R.S.A. 273-A:9; Defendant Division of Personnel's administrative rules (102.55, 1204.05(c), 102.21), and Acts of 1997, ch. 108, §§1, 17.

employees enjoy, and the Commission is empowered to adjudicate claims of discrimination arising from the unequal treatment of employees with respect to these benefits.

1. The Commission is Empowered to Review Employment Discrimination Claims Arising From the Unequal Provision of Employment Benefits.

Contrary to the Commission's findings, the Commission is precisely the agency empowered to adjudicate Plaintiffs' claims. Chapter 354-A establishes and empowers the Commission to "exercise [its] authority to assure that no person be discriminated against on account of sexual orientation." R.S.A. 354-A:1. The Commission's mandate clearly applies to discrimination in employment. R.S.A. 354-A: 6,7; New Hampshire Administrative Rule [Hum] 102.01 (Commission established "for the purpose of eliminating discrimination in employment … because of … sexual orientation."). Moreover, within the employment context, the Commission is charged to protect persons discriminated against "in compensation or in terms, conditions or privileges of employment." R.S.A. 354-A:7. This protection applies when an employer fails to provide equal access to health insurance and fringe benefits, among other things. See, e.g., Newport News Shipbuilding and Dry Dock Company, 462 U.S. 669, 682 (1983) ("Health insurance and other fringe benefits are 'compensation, terms, conditions, or privileges of employment'" for purposes of Title VII). Further, the protections against employment discrimination that the Commission is charged with enforcing include "the state and all political subdivisions, boards, departments and commissions thereof" among those employers to whom the laws apply. R.S.A. 354-A:2. Plaintiffs' claims, which set forth unlawful discriminatory employment practices arising from the denial of equal benefits by their state employer, may thus proceed under the Commission's statutory and regulatory framework.

2. Plaintiffs Challenge Their Total Exclusion From Eligibility for Employment Benefits, Not Their Exclusion From Marriage.

The Commission erred to the extent it imposes the state's marriage statutes as an impediment to Plaintiffs' claims of unlawful employment discrimination. Plaintiffs are not asking the Defendants or the Commission to alter any laws regarding their ability to marry. They are not trying to qualify as spouses or "spousal equivalents." Rather, they are challenging their total exclusion from eligibility for employment benefits for their families. Regardless of Plaintiffs' ineligibility to marry, New Hampshire law still mandates that "compensation," i.e., the benefits and incidents of employment, be administered without regard to sexual orientation. See R.S.A. 354-A:7. Defendants have denied equal employment benefits to Plaintiffs in accordance with the CBA and their own employment regulations,[4] and these actions by an employer remain subject to the requirements of New Hampshire's anti-discrimination laws.

New Hampshire law restricting marriage to different-sex couples in no way obviates the employment protections provided by R.S.A. 354-A:7. When the Legislature added the protections against sexual orientation discrimination into R.S.A. 354-A, it made clear that employment protections for gay and lesbian employees can coexist with other state laws limiting marriage to different-sex couples only. See Statements of Intent and Applicability included in Acts of 1997, ch. 108, §1 (reflecting no intent on the part of the State to "promote or endorse any sexual lifestyle other than the traditional marriage-based family") and §17 (providing that sexual orientation non-discrimination provision shall not "be interpreted to … allow marriage of persons of the same sex"). On its face, the purpose of the legislation which added sexual orientation protections into the Law against Discrimination was "to provide protection in certain

[4] The Commission details the Defendants' administrative rules, policies, and agreements evidencing the denial of equal benefits to the Plaintiffs. Yet, it cannot be an answer to a complaint of discrimination that the Defendants are steadfast in their refusal to provide them.

areas to individuals on account of their sexual orientation," and to the extent the Commission has construed this legislation to deprive the Commission of authority to adjudicate claims of employment benefit discrimination when such claims are brought by gay or lesbian employees, it has erred as a matter of law.

State policies aimed at excluding same-sex couples from marriage do not undercut the policies of fairness and equality of opportunity manifested in the anti-discrimination laws.

> [I]t is immaterial that State law permits only heterosexual marriage. The City Human Rights Law specifically bans housing discrimination on the basis of sexual orientation. The State marriage law merely defines who can and cannot marry; it was not intended to permit landlords to violate New York City's laws against housing discrimination.

Levin v. Yeshiva University, 754 N.E.2d 1099, 1111 (N.Y. 2001) (Kaye, C.J., concurring in part) (reinstating lesbian student's claim that housing policy favoring married couples constituted sexual orientation discrimination).

Notably, courts have recognized that a state's policies regarding marriage do not weaken or undermine the state's commitments to ending discrimination. See, e.g., Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 918 (Cal. 1996) ("One can still recognize marriage as laudable, or even as favored, while still extending protection against housing discrimination to persons who do not enjoy that status."), cert. denied, 521 U.S. 1129, reh'g denied, 521 U.S. 1144 (1997); McCready v. Hoffius, 586 N.W.2d 723, 727 (Mich. 1998) (quoting Smith), vacated in part, 593 N.W.2d 545 (1999).

Further, requiring the State to end its discrimination against gay and lesbian employees in the employee benefits arena in no way forces the State to promote or endorse anyone's "lifestyle." Rather, it serves the purpose set forth by the Legislature of ending sexual orientation discrimination in employment, the accomplishment of which is intended to be attained through

the liberal construction of the protections the Legislature set forth. See R.S.A. 354-A:25 ("The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof."); Franklin Lodge of Elks v. Marcoux, 825 A.2d 480, 485 (N.H. 2003) ("[W]e are mindful of the legislative directive to broadly interpret the statutory scheme to effectuate its purpose."). Thus, regardless of New Hampshire's marriage statutes, the Defendants have an obligation to treat their employees equally regardless of sexual orientation, and the Commission erred by holding otherwise.

3. That Plaintiffs Are Subject to a Collective Bargaining Agreement In No Way Bars Their Claims.

Plaintiffs' membership in a union that participated in the creation of the Collective Bargaining Agreement (CBA) that serves as part of the rationale for the Defendants' discriminatory actions does not in any way bar their complaints from proceeding because collective bargaining agreements must comply with the governing anti-discrimination law. See, e.g., Fowler v. Town of Seabrook, 145 N.H. 536, 539 (2000) (provision of collective bargaining agreement that conflicts with an employee's rights under other laws would be unenforceable and void as a matter of law). The CBA itself recognizes this possibility, as it contains a severability provision allowing the rest of the CBA to stand if some portion of it is found to conflict with the law. See CBA § 15.1. In this instance, the CBA's terms regarding employment benefits conflict with R.S.A. 354-A:7's prohibitions against sexual orientation discrimination in employment. It was an error of law to suggest that the fact that the union and Defendants agreed to these discriminatory terms relieves Defendants of their obligations not to discriminate. It is the Commission that is charged with enforcing these obligations regardless of the contractual source of the Defendants' discriminatory policies.

4. No State Law Bars Equal Benefits for Domestic Partners or Deprives the Commission of Its Authority to Rectify the Deprivation of Equal Benefits.

The Commission's findings are also erroneous as a matter of law to the extent they are based upon the conclusion that state law governing public employment and the collective bargaining process precludes the benefits Plaintiffs seek or otherwise limits the Commission's authority to act in this area. It does not.

Insurance benefits and employee leave policies are mandated items for negotiation in the collective bargaining process. See R.S.A. 273-A:3 (obligating State to negotiate with its public employees through the collective bargaining process); R.S.A. 273-A:9 ("All cost items[5] and terms and conditions of employment affecting state employees in the classified system shall be negotiated by the state …") (emphasis added); State Employees Association v. New Hampshire Public Employee Relations Board, 118 N.H. 885, 889 (1978) (recognizing that leave policies are subject to collective bargaining), reversed on other grounds, Appeal of the State of New Hampshire, 138 N.H. 716, 720 (1994) (stating that compensation is a term and condition of employment subject to collective bargaining).[6]

The Legislature's role in the collective bargaining process is one of ratification: to approve or reject cost items in any collective bargaining agreement entered into by the State and its employees. R.S.A. 273-A:3, II (b). That the Legislature has the authority to ratify the benefits provided under a collective bargaining agreement for financing purposes, however, does not transform its funding authority into an exemption for the State from liability for violations of

[5] For purposes of R.S.A. 273-A:9, a "cost item" means "any benefit acquired through collective bargaining whose implementation requires an appropriation by the legislative body of the public employer with which negotiations are being conducted." R.S.A. 273-A:1.

[6] The State's obligation to bargain is limited by only two exceptions: the "managerial policy" exception included with the definition of the phrase "terms and conditions of employment," R.S.A. 273-A:1, XI, and the "merit system" exception contained in R.S.A. 273-A:3, III. See State Employees Association, 118 N.H. at 886. Neither of these exceptions is applicable here.

the Law Against Discrimination.[7] The Legislature's actions in this process do not reflect a legislative determination of the legality or illegality of the terms of the collective bargaining agreement itself. Moreover, nothing in the general process by which the Legislature undertakes to fund the cost-items in a collective bargaining agreement evinces an intent to abrogate the broad non-discrimination commitments of R.S.A. 354-A or the Commission's authority.

In addition, nothing in New Hampshire law precludes the Defendants (or the State) from providing domestic partner benefits through the collective bargaining process. In 2000, for example, the university system of New Hampshire obtained domestic partnership benefits for its faculty and staff employees through collective bargaining with the State. See Statement of Domestic Partner Benefit Eligibility, Human Resources for University of New Hampshire at http://www.unh.edu/hr/dom-part.htm. The negotiated domestic partnership benefits include medical, dental, and tuition waiver plans that provide coverage for the employees' same-sex partners and their dependents.[8] Id.

The Commission mistakenly points to the rules of the Defendant Division of Personnel and R.S.A. 21-I:30 as constraints on its authority. Neither these regulations nor R.S.A. 21-I:30 confers upon the Defendants an exemption from liability for failing to provide equal employment benefits to the Plaintiffs. First, with respect to the regulations, the fact that the Defendant Division of Personnel has promulgated rules on some of the same topics at issue here does not

[7] The Legislature's role in ratifying collective bargaining agreements is analogous to that of a private employer who must appropriate funds for the benefits offered to its own employees. A private employer's refusal to finance non-discriminatory employment benefits does not exempt the employer from liability for the discrimination associated with the unequal provision of employment benefits.

[8] Eligibility for domestic partner coverage requires the university employee to attest that: (1) the partners are of the same gender; (2) the partners have been each other's sole partner for at least six months and plan to remain so indefinitely; (3) the partners are not legally married, not related by blood to a degree that would prohibit marriage, nor able to marry each other in New Hampshire; (4) the partners are at least eighteen years of age and mentally competent to consent to contract; and (5) the partners are responsible for each other's common welfare and financial obligations. See Affidavit of Domestic Partnership for University of New Hampshire at http://www.unh.edu/hr/pdfs/dp-affid.pdf.

reserve to the State -- as public employer -- exclusive authority to regulate in this area, much less place these subjects beyond the Commission's authority. Cf. Appeal of the State of New Hampshire, 138 N.H. at 722 ("The mere existence of personnel rules does not require that the subject matter of the rules be excluded from negotiation."). The Defendants' rules only control where the subject matter is "reserved to the sole prerogative of the public employer by statute." Id. at 723 ("While [R.S.A. 21-I:42 and :43] establish a division of personnel and mandate the director of personnel to adopt rules, they do not state that the listed functions of the division or the subject of the rules are reserved exclusively for the State."). Given that the insurance benefits and leave policies are properly the subject of collective bargaining, they are not controlled by the administrative rules of the Defendants. Id. As the rules do not even preempt the CBA, there certainly is no basis to conclude that they somehow preclude the Commission from addressing the legality of the benefit structure set forth in the CBA. Simply put, the Defendants' administrative rules provide no basis for the Commission's conclusion that it lacks authority to review the Defendants' discriminatory actions here.

Second, as a matter of law, R.S.A. 21-I:30[9] does not preclude domestic partnership benefits or limit the Commission's authority in the benefits arena. Cf. State v. Farrow, 140 N.H. 473, 474-75 (1995) (recognizing that statutes are not to be read "in isolation but in the context of the overall statutory scheme). This statute reflects the Legislature's consideration of how to allocate funding for the cost items associated with any medical and surgical benefits ratified in a collective bargaining agreement pursuant to R.S.A. 273-A:9. That R.S.A. 21-I:30 expressly

[9] R.S.A. 21-I:30 provides: "The state shall pay a premium for each state employee and permanent temporary or permanent seasonal employee as defined in R.S.A. 98-A:3 including spouse and minor, fully dependent children, if any, and each retired employee, as defined in paragraph II of this section, and his or her spouse, or retired employee's beneficiary, only if an option was taken at the time of retirement and the employee is not now living, toward group hospitalization, hospital medical care, surgical care and other medical benefits plan or a self-funded alternative within the limits of the funds appropriated at each legislative session and providing any change in plan or vendor is approved by the fiscal committee of the general court prior to its adoption. Funds appropriated for this purpose shall not be transferred or used for any other purpose."

identifies “spouses and minor, fully dependent children” as falling within the State’s premium obligations does not preclude the coverage of other family members; in fact, the statute’s use of the term “including” immediately preceding “spouse” makes clear that the list of persons identified in the statute is not exhaustive. See, e.g., Conservation Law Foundation v. New Hampshire Wetlands Council, 150 N.H. 1, 5-6 (2003) (holding that the term “including” in a statute “indicates the factors listed are not exhaustive” but merely “limit[] the items intended to be covered by the rule to those of the same type as the items specifically listed”).

Moreover, R.S.A. 21-I:23, which sets forth the purposes and policies animating R.S.A. 21-I:30, makes clear the State’s commitment to providing these types of insurance benefits to “New Hampshire state employees and their families, and retired state employees and their spouses.” R.S.A. 21-I:23’s use of the more expansive term “families” rather than “spouses” with respect to state employees confirms the view that a preclusive reading of R.S.A. 21-I:30 is unwarranted. See Appeal of Mascoma Valley Reg. School Dist., 141 N.H. 98, 100 (1996) ("Our goal is to apply statutes in light of the legislature's intent in enacting them and in light of the policy sought to be advanced by the entire statutory scheme.") (citations omitted); Kalloch v. Board of Trustees, 116 N.H. 443, 445 (1976) (noting presumption that legislature would not enact legislation that nullifies to an appreciable extent the purpose of a statute). In any event, when the Legislature amended the collective bargaining statute in 1997 to make “all cost items” the subject of collective bargaining, it furthered closed the door on any argument that R.S.A. 21-I:30 implicitly narrows the scope of insurance benefits subject to collective bargaining. Cf. Board of Selectman v. Planning Board, 118 N.H. 150, 152 (1978) (noting general rule that later-enacted and more specific statute will control when two statutes conflict). Further evidence that R.S.A. 21-I:30 has no preclusive effect here is actual practice. As noted above, the university

system of New Hampshire provides domestic partnership benefits notwithstanding the fact that the university system's benefits are subject to the same negotiating process, regulations, and statutory framework at issue here. Thus, state law neither justifies the discrimination in the underlying CBA nor negates the Defendants' obligation to treat gay and lesbian employees equally with respect to the subject employment benefits.

C. Conditioning Employment Benefits on Marriage Violates R.S.A. 354-A:7.

The Commission on Human Rights erred in concluding "that there would be no probable cause to believe that [the Defendants] have discriminated against [the Plaintiffs] on the basis of [their] sexual orientation under N.H. Rev. Stat. 354-A:7," see Exs. C and D, p. 6, and in its subsidiary conclusion that the Plaintiffs are "similarly situated to unmarried heterosexual employees" and are "not treated differently than single or unmarried heterosexual state employees." See Exs. A and B, p. 10. Whether reviewed under a disparate treatment or a disparate impact analysis, in failing to provide Plaintiffs with equal pay for equal work, the Defendants have discriminated against the Plaintiffs on account of their sexual orientation in violation of R.S.A. 354-A:7.

Under R.S.A. 354-A:7, it is an "unlawful discriminatory practice" for an employer to discriminate "in the compensation or in terms, conditions or privileges of employment" on account of an employee's sexual orientation. First, the Defendants' conditioning the receipt of employment benefits on marriage constitutes impermissible disparate treatment of gay and lesbian employees by denying benefits to all coupled employees in same-sex relationships but not all employees in different-sex relationships. Second, even if this Court were to find that Plaintiffs did not face disparate treatment at the hands of the Defendants, the Defendants' eligibility criteria for employment benefits has an impermissible adverse impact on gay and lesbian employees.

1. Defendants' Use of a Marriage Requirement Constitutes Impermissible Disparate Treatment of Gay and Lesbian Employees.

Gay and lesbian employees are not treated the same as heterosexual employees because the Defendants have chosen to condition benefits according to criteria that gay and lesbian employees cannot satisfy because they are not heterosexual. This constitutes unlawful disparate treatment based upon sexual orientation.

The Legislature has recognized that in certain instances, distinctions based on a certain trait are a proxy for discrimination against a protected class. Acknowledging that discrimination based on pregnancy is based on essential differences between women and men, the Legislature included pregnancy discrimination within the ambit of the Law Against Discrimination's prohibitions against sex discrimination. See R.S.A. 354-A:7 (VI); see also Planchet v. New Hampshire Hosp., 115 N.H. 361, 362 (1975) ("Clearly a policy that prefers one sex over another based upon immutable characteristics of the sexes is forbidden.").[10] Indeed, forms of discrimination that themselves may not be expressly prohibited may nevertheless be illegal if they are merely devices employed to accomplish prohibited discrimination by proxy. See Erie County Retirees Assn. V. County of Erie, 220 F.3d 193, 215 (3rd Cir. 2000) (holding that employers cannot discriminate against employees based on proxies for age such as Medicare eligibility); McWright v. Alexander, 982 F.2d 222, 228 (7th Cir. 1992) (finding that policy denying equal treatment to those with gray hair would form the basis of an invidious age classification).

[10] The Commission has also recognized that discrimination based on a particular religious practice, observance or belief constitutes religious discrimination. See New Hampshire Administrative Rule [Hum] 404.01. This regulation recognizes that a requirement or exclusion based upon an essential characteristic of a particular faith (i.e., a prohibition on jewelry displaying a crucifix) discriminates against a person of that faith (i.e., Christian). See also Hartmann v. Stone, 68 F.3d 973, 985 (6th Cir. 1995) (proposing that, under the Free Exercise Clause of the federal constitution, an explicit prohibition on yarmulkes discriminates based on religion on its face).

The same type of disparate treatment by proxy is present here: conditioning benefits on marriage prefers people with a heterosexual sexual orientation over those with a same-sex sexual orientation. By choosing to adopt criteria for accessing benefits (being married) that New Hampshire law put off-limits to same-sex couples, Defendants are engaging in discrimination based on the prohibited grounds of sexual orientation.[11] Given that same-sex couples cannot presently marry in New Hampshire, a benefit classification that requires a legal marriage discriminates between heterosexual employees eligible for marriage on the one hand and gay or lesbian employees who are ineligible for legal marriage on the other -- putting sexual orientation at the heart of the distinction between the coupled employees. Extending various benefits to employees based on whether the employee is married automatically denies benefits to coupled gay and lesbian employees like the Plaintiffs but does not automatically deny benefits to coupled non-gay or non-lesbian employees. Whether coupled employees are married or not reflects their sexual orientation, pure and simple. Because a classification defined by marriage is a classification defined by whether a couple is same-sex or different-sex, such a classification constitutes unlawful disparate treatment based on sexual orientation on its face.

The Commission has erred as a matter of law in concluding that the disparate treatment analysis here should turn on whether Plaintiffs are treated the same as unmarried heterosexual employees. See Ex. A, p. 8 (finding that unmarried heterosexual employees provide a

[11] Plaintiffs do not challenge New Hampshire's marriage laws which restrict marriage to different-sex couples. Moreover, they do not ask this Court to address whether New Hampshire's marriage statutes discriminate against same-sex couples by denying them the right to marry, or to interpret the non-discrimination laws to allow them to marry their partners. Instead, Plaintiffs claim only the right to be free from discrimination in employment with respect to obtaining the same economic benefits of employment that heterosexual employees receive for the same work. The Defendants did not have to choose to limit benefits to couples who are married. Defendants could have provided all couples the same benefits, following the lead of the university system of New Hampshire. It was the Defendants' choice of criteria that intentionally and necessarily treats same-sex couples worse than different-sex couples (who are married or could marry) that is the primary object of Plaintiffs' complaints. Thus, Plaintiffs ask this Court to determine whether gay and lesbian employees are entitled under R.S.A. 354-A:7 to the same economic benefits of employment that heterosexuals receive, and whether that statutory right to equal treatment is being denied by the Defendants' use of marriage as its criteria for the provision of benefits.

"comparator that is similarly situated in all relevant respects and a fair congener"); Ex. B, p. 9 (same). Yet, Plaintiffs are not similarly situated to unmarried heterosexual employees because, unlike heterosexual employees, 100% of gay and lesbian employees cannot marry under present law and, thus, can never satisfy the Defendants' criteria. See Foray v. Bell Atlantic, 56 F. Supp.2d 327, 330 (1999) (dismissing claim challenging same-sex only benefit plan under Title VII on grounds that unmarried same-sex and unmarried different-sex couples are not similarly situated). Whether employees can access full benefits depends entirely on whether they are in a same-sex or different-sex relationship. ***All*** unmarried individuals in same-sex relationships (who, by definition are not heterosexual) necessarily are precluded – as a result of Defendants' decision to condition benefits on being legally married when New Hampshire's statutes presently prohibit such marriages – from ever obtaining these benefits, while ***all*** unmarried individuals in different-sex relationships (who are heterosexual) may obtain the benefits by marrying.[12] Thus, contrary to the Commission's findings, unmarried heterosexual employees are not similarly situated in all relevant respects and do not provide a fair basis for comparison. This error on the comparator class led the Commission to conclude erroneously that there was no disparate treatment under R.S.A. 354-A:7.

2. Defendants' Use of a Marriage Requirement Has an Impermissible Adverse Impact on Gay and Lesbian Employees.

Further, Defendants' use of a marriage qualification has an obvious adverse impact on the Plaintiffs based on their sexual orientation and thus constitutes impermissible employment discrimination.[13] The Commission erred in its application of this alternate disparate impact

[12] Failing to appreciate this distinction ignores the U.S. Supreme Court's observation in Jeness v. Fortson, 403 U.S. 431, 442 (1971), that "sometimes the greatest discrimination can lie in treating things that are different as though they were exactly alike."

[13] Although the question of whether New Hampshire's anti-discrimination protections prohibit employment actions that have an adverse impact on an employee based on a protected trait is one of first impression, this concept is

theory by concluding that no facially neutral policy exists,[14] that the Legislature's decision not to provide the benefits somehow forecloses this theory and that persuasive authority from other jurisdictions is inapplicable here. See Exs. C and D, p. 5.

An employment policy or practice may be facially neutral but nevertheless unlawfully discriminates because its application creates harsher results for one group than for another. See E.E.O.C. v. Steamship Clerks Union, local 1066, 48 F.3d 594, 601 (1st Cir. 1995) ("Discrimination may also result from otherwise neutral policies and practices that, when actuated in real-life settings, operate to the distinct disadvantage of certain classes of individuals.") Even accepting, arguendo, the Commission's view that the conditioning of family benefits on marriage is facially neutral vis-à-vis sexual orientation, this in no way lessens or vitiates the discriminatory adverse impact of such a requirement on lesbian and gay employees.

Courts and human rights agencies considering nearly identical circumstances to those presented by Plaintiffs' complaints have recognized the severely adverse impact a marriage requirement poses on gay and lesbian people. In Levin v. Yeshiva University, 754 N.E.2d 1099

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clearly established under similar federal statutes and those of other states. See Franklin Lodge of Elks v. Marcoux, 825 A.2d 480, 485 (N.H. 2003) ("Because our [anti-discrimination] statute is sufficiently similar to those of many States and the federal civil rights statute, we look to foreign case law for guidance."); Madeja v. MPB Corp., 821 A.2d 1034, 1042 (N.H. 2003) (When presented with "an issue of first impression under R.S.A. chapter 354-A, we rely upon cases developed under Title VII to aid in our analysis.").

Further, the Commission has recognized in particular contexts that facially neutral policies or job requirements may have an impermissible adverse impact in its regulations. See New Hampshire Administrative Rule [Hum] 403.01 (use of height and weight requirements have an adverse impact on different sexes and thus use of such requirements may constitute sex discrimination); New Hampshire Administrative Rule [Hum] 405.03 (use of citizenship requirements, height and weight requirements, lack of arrest record requirements, English fluency requirement, requirement that only English be spoken on the job, or requirement or exclusion of foreign training or education may be unlawfully discriminatory because they have an adverse impact on certain racial or ethnic groups).

[14] Here, the Commission distorts the meaning of facial neutrality for purposes of its disparate impact analysis. Its conclusion on Plaintiffs' disparate treatment theory demonstrates that – at least in the Commission's view – the subject policies are facially neutral with respect to sexual orientation because they turn on marriage. Ex. A and B. Plaintiffs by no means concede that conditioning benefits on legal marriage is facially neutral, see supra, Part I(C)(1), but the Commission cannot have it both ways. If this Court were to accept the Commission's proposition that Defendants' benefit policies are not facially neutral vis-à-vis sexual orientation, then it would be compelled to acknowledge that Defendants' policies are facially discriminatory and, thus, in direct violation of R.S.A. 354-A:7 on the basis of disparate treatment, without the necessity of establishing disparate impact.

(N.Y. 2001), the New York Court of Appeals reinstated the sexual orientation discrimination claim of lesbian medical students challenging the school's housing policy, which restricted housing to medical students and their spouses and children. The lower court had failed to appropriately examine the policy in terms of those it benefited and those it excluded, and thus the court reinstated the claim to allow the plaintiffs to demonstrate that the policy disproportionately burdened gay and lesbian students, thus violating protections against sexual orientation discrimination. As Chief Judge Kaye stated in Levin,

> [The defendant's] policy of providing partner housing to married students is facially neutral with respect to sexual orientation. That policy, however, has a disparate impact on homosexual students, because they cannot marry, and thus cannot live with their partners in student housing. By contrast, heterosexual students have the option of marrying their life partners.

754 N.E.2d at 1111.

Specifically within the employment context, the Court of Appeals of Oregon ruled that denying insurance benefits to the same-sex partners of state employees constituted impermissible sexual orientation discrimination due to the discriminatory effect of the marital requirement for benefits. Tanner v. Oregon Health Sciences Univ., 971 P.2d 435, 448 (Ore. Ct. App. 1998). Faced with the university's argument that no discrimination occurred because health insurance was available on equal terms to all unmarried employees, the Tanner court stated: "That reasoning misses the point." Id. So long as "[h]omosexual couples may not marry," such policies mean that "the benefits are not made available" to lesbians and gay men on an absolute basis. In other words, "for gay and lesbian couples," obtaining benefits under such policies is "a legal impossibility." Id.

The Connecticut Commission for Human Rights and Opportunities (CHRO), that state's human rights agency, has also recognized that same-sex couples excluded from benefits

extended to married families state a viable claim of sexual orientation discrimination under Connecticut's public accommodations anti-discrimination laws. In Brett v. Town of West Hartford, Connecticut Commission on Human Rights and Opportunities, Complaint Nos. 9910041, 9910198, 9910199, 9910200, 9910201, 9910202, Finding of Reasonable Cause and Summary (Sept. 9, 1999) (attached as Ex. E), the CHRO found that same-sex couples had probable cause to proceed with a sexual orientation discrimination claim against a town pool that denied them the family membership rate based on a definition of family limited to married couples and married or single parents. The CHRO found that the gay and lesbian complainants were denied equal services, in part, because no same-sex couple could receive the family benefit rate and that "such a gross statistical disparity" created an inference of discrimination based on sexual orientation.

The same disparate impact analysis controls this case. A requirement for family-employment benefits that turns on legal marriage makes those benefits unavailable to 100% of gay and lesbian employees who, at present, cannot marry in New Hampshire. While the Defendants' eligibility requirements may prevent some heterosexual employees -- if they choose not to marry -- from obtaining family benefits that protect their committed partners, it completely precludes ***all*** gay and lesbian employees from doing so. Whereas heterosexual employees may marry and thus be able to access leave and insurance benefits for their families, the inability of gay and lesbian employees to marry under New Hampshire law poses a total bar to their receipt of family insurance benefits. A more disproportionate impact is not possible. Requiring an employee to be legally married in order to obtain benefits for his or her partner, therefore, constitutes classic adverse impact discrimination based on sexual orientation.[15]

[15] The Commissioner's erroneous conclusion that gay and lesbian employees are similarly situated with unmarried heterosexual employees teeters upon older case law that (i) engages in only a superficial, facial review of the

CONCLUSION

For the foregoing reasons, Defendants have engaged in impermissible sexual orientation discrimination in violation of R.S.A. 354-A:7 and the Commission for Human Rights' findings of "No Probable Cause" in the cases of Ms. Bedford and Ms. Breen are erroneous as a matter of law. Therefore, Plaintiffs request that this Court reverse the erroneous findings by the Commission and proceed in accordance with R.S.A.354-A:21, II (a).

Respectfully submitted,

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By their counsel,

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disputed benefit policy without examining whether the employer's choice to use marital status as a qualification for benefits functions as a "proxy" for the denial of equal treatment to those in same-sex relationships (see Part I(C)(1) supra); and (ii) fails to analyze the disparate impact of the marriage-related benefit policies on gay and lesbian employees, namely the exclusion of ***all*** gay and lesbian employees (see Part I(C)(2) supra). The simplistic, doctrinally flawed cases relied upon by the Commission are Ross v. Denver Dep't of Health and Hosps., 883 P.2d 516 (Colo. Ct. App.), reh'g denied, (Colo. Ct. App.), cert. denied, (Colo. 1994); Phillips v. Wis. Pers. Comm'n, 482 N.W.2d 121 (Wis. Ct. App. 1992); Hinman v. Dep't of Pers. Admin., 167 Cal. App. 3d 516 (1985). At bottom, both the Commission and these cases fail to confront the fact that reliance upon marriage as the justification for the differential in benefits does not cloak the defining element of the discrimination: sexual orientation.

CERTIFICATE OF SEVICE

I hereby certify that on this date, the foregoing document was mailed, first class postage prepaid, to counsel for the Defendants, Michael K. Brown, Senior Assistant Attorney General, Civil Bureau, 33 Capitol Street, Concord, NH 03301-6397.

Dated: May 13, 2005 _____