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

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO UPHOLD THE COMMISSION'S FINDING OF NO PROBABLE CAUSE

Plaintiffs Patricia Bedford and Anne Breen oppose Defendants' "Motion to Uphold the Commission's Finding of No Probable Cause" because Defendants' denial of equal employment benefits to gay and lesbian employees constitutes unlawful employment discrimination under R.S.A. 354-A:7, and the Commission's findings to the contrary are unlawful and unreasonable. Rather than uphold the Commission's findings, this Court should reverse them, as Plaintiffs urge in their competing, dispositive motion captioned "Plaintiffs' Motion to Reverse Findings of Commission for Human Rights" (hereinafter, "Motion to Reverse").[1]

[1] For sake of brevity, this Opposition incorporates the arguments set forth in Plaintiffs' Memorandum in Support of Plaintiffs' Motion to Reverse (hereinafter "Plaintiffs Memo").

ARGUMENT

A. Defendants' Factual Presentation is Riddled with Flawed Legal Commentary.

The material facts underlying Plaintiffs' complaints of discrimination are not in dispute:[2] Defendants provide certain employment benefits (e.g., health and dental benefits; tuition assistance; sick leave and bereavement leave) to the marital partners of their employees but not to the partners of their gay and lesbian employees, even though Defendants know that their gay and lesbian employees cannot presently marry under state law.

Despite this common ground, Plaintiffs cannot endorse Defendants' factual presentation because it is ladened with misleading and inaccurate legal commentary, especially with respect to Defendants' statements about the treatment of unmarried employees and the scope of benefits allowable under New Hampshire law.[3] For example, Defendants claim that they treat their unmarried employees with same-sex partners just like their unmarried employees with different-sex partners, even though they know that their unmarried employees with same-sex partners cannot presently marry under state law and, thus, can never satisfy Defendants' self-selected criteria for family benefits. For the reasons set forth in Plaintiffs' Memo at pages 16-17, Plaintiffs are not similarly situated with unmarried heterosexual employees. Thus, to the extent Defendants assert or imply that Plaintiffs are similarly situated with unmarried heterosexual employee, Plaintiffs contest Paragraphs 11 and 21-28 of Defendants' Memorandum.

Similarly, Defendants' recitation of the laws, regulations and contracts governing the Plaintiffs' benefits are misleading in that they assert or imply that New Hampshire law requires Defendants to self-select marriage as the defining criteria for family benefits. For the reasons set

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[2] Plaintiffs do not contest the following numbered paragraphs of Defendants' Memorandum: 1-4, 7-10, and 12-19. Plaintiffs' augment and amend the allegations in Defendants' paragraphs 5 and 6 because the statutory basis for Plaintiffs' appeal is R.S.A. 354-A: 21, II (a), though R.S.A. 354-A:22 also governs judicial proceedings arising from orders of the Commission.

[3] Plaintiffs also contest Defendants' self-serving statements that Defendants do not discriminate and that Plaintiffs are not entitled to the benefits sought here. See, e.g., Defendants' Memorandum, ¶¶ 20-21.

forth in Plaintiffs' Memo at pages 6-13, New Hampshire law does not require Defendants to deny family benefits to their gay and lesbian employees because they are not married. Thus, to the extent Defendants assert or imply that New Hampshire law requires Defendants to use marriage as the defining criteria for partner benefits, Plaintiffs contest Paragraphs 21-23 and 25-27 of Defendants' Memorandum.

B. R.S.A. 354-A:7 Requires Equal Treatment in Benefits -- Even for Gay and Lesbian Employees -- and No Other Statute, Regulation or Contract Prevents Defendants from Complying with R.S.A. 354-A:7.

For the reasons set forth on pages 5-14 of Plaintiffs' Memo, Defendants have no excuse for failing to provide equal benefits to their gay and lesbian employees. Notwithstanding their numerous citations, Defendants have not pointed to any statute, regulation or contract that excuses their non-compliance with R.S.A. 354-A:7:

- That the disputed benefits are subject to negotiation in collective bargaining (and ratification by the Legislature) does not excuse the Defendants from the obligation to provide equal employment benefits pursuant to R.S.A. 354-A:7, see Plaintiffs' Memo, pp. 9-11;
- That the Defendants' administrative rules evidence Defendants' policy of denying equal employment benefits to their gay and lesbian employees does not exempt Defendants from liability for failing to comply with R.S.A. 354-A:7, see Plaintiffs' Memo, pp. 11-12; and
- That the Legislature bears the financial responsibility for paying the premiums for family health insurance does not preclude the State from providing health insurance benefits to the families of their gay and lesbian employees, see Plaintiffs' Memo, pp. 11-14.
- That New Hampshire law presently restricts marriage to different-sex couples in no way obviates the employment protections extended to gay and lesbian employees by R.S.A. 354-A:7[4] or deprives the Commission of authority to entertain Plaintiffs' statutory claims, see Plaintiffs' Memo, pp. 6-9.

[4] The State provides domestic partnership benefits to the public employees of the university system of New Hampshire (see Plaintiffs' Memo, p. 11), and this fact alone undermines Defendants' argument that the State's present marriage laws definitively preclude Defendants from providing employment benefits on a non-discriminatory basis. Instructively, courts have consistently held that the extension of health insurance and other benefits to the domestic partners of public employees does not undermine a state's policy against the marriage of same-sex couples. See, e.g., Devlin v. City of Philadelphia, 862 A.2d 1234, 1244 (Pa. 2004) (upholding municipal domestic partnership benefits in the face of state prohibition on marriage for same-sex couples because these limited benefits are not the equivalent of creating marriage for same-sex couples); Tyma v. Montgomery County, 801 A.2d 148, 158 (Md. 2002) (holding that domestic partnership act "does not create a legal equivalency between lawful

Critically, Defendants point to no exclusion in the "Law Against Discrimination," R.S.A. 354-A: 1 *et seq*., that precludes Plaintiffs' claims to equal employment benefits. Although the non-discrimination statutes of some states expressly preclude same-sex couples from seeking equal employment insurance benefits for their non-marital partners (or expressly exclude claims for insurance benefits under bona fide plans), New Hampshire's non-discrimination law does not. Compare Rhode Island General Laws Annotated §28-5-7 (providing express exemption in non-discrimination law for benefit claims for domestic partners: "if an insurer or employer extends insurance related benefits to persons other than or in addition to the named employee, nothing in this subdivision shall require those benefits to be offered to unmarried partners of named employees.")[5] with R.S.A. 354-A:1 et seq. Moreover, the legislation that added sexual orientation as a protected category under the Law Against Discrimination cannot be read to preclude gay and lesbian employees from seeking equal treatment with respect to employment benefits. See Plaintiffs' Memo, pp. 7-9.

Rather than focus on the plain terms of the Law Against Discrimination, Defendants repetitively argue that the State does not want to provide equal benefits to gay and lesbian state employees. Yet, this approach provides them no legal defense to Plaintiffs' claims. Definitive proof of the Defendants' refusal to provide equal benefits to their gay and lesbian employees is

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spouses and same-sex domestic partners' or otherwise impinge upon the State's interest in marriage."); Heinsma v. City of Vancouver, 29 P.3d 709, 713 (Wash. 2001) (concluding "city's recognition of domestic partnership is limited in scope and does not affect the legislature's ability to regulate familial relationships on a statewide basis" and that "fundamental differences exist between marriage and domestic partnership."); Lowe v. Broward County, 766 So.2d 1199, 1208 (Fla. Dist. Ct. App. 2000) (upholding county's domestic partnership plan after concluding that plan "does not rise to the level of marriage or a relationship treated as a marriage."); Crawford v. City of Chicago, 710 N.E.2d 91, 99 (Ill. App. Ct. 1999) (finding that domestic partnership ordinance "merely creates an option for a City employee to purchase health insurance for a domestic partner, without establishing legal status competing with marriage."); Slattery v. City of New York, 266 A.D.2d 24 (N.Y. App. Div. 1999) (recognizing the "enormous differences between marriage and domestic partnership" in ruling that domestic partnership legislation "cannot reasonably be construed as impinging upon the State's exclusive right to regulate the institution of marriage.")

[5] Defendants also provide other examples of state non-discrimination laws that have expressly precluded claims for same-sex partner benefits. See Defendants' Memo, p. 27, citing Alaska Stat. §18.80.220(c)(1) and Massachusetts Acts and Resolves 1989, c. 516 §19 (which Defendants erroneously cite as Mass. Gen. Laws c. 151B, §4. Though the Massachusetts statute does not contain the exclusionary language cited by the Defendants, the cited language was included in the bill that added sexual orientation protections to the non-discrimination law). With respect to statutory exemptions for bona fide insurance plans, see page 8 of this Opposition.

not a defense to liability under R.S.A. 354-A:7. Notwithstanding Defendants' emphasis on the Defendants' and the Legislature's present refusal to provide equal employment benefits to gay and lesbian employees, this refusal is not cognizable evidence of a purported legislative intent to exempt from R.S.A. 354-A:7 employment benefit challenges from gay and lesbian employees. In light of the plain and unambiguous terms of R.S.A. 354-A:7, Defendants' present refusal to comply with R.S.A. 354-A:7 is not appropriate to consider in determining legislative intent. *See, e.g., Woodview Development Corporation v. Town of* Pelham, __ N.H. __, 871 A.2d 58, 59-60 (2005) ("When a statute's language is plain and unambiguous, we need not look beyond it for further indication of legislative intent, and we will not consider what the legislature might have said or add language that the legislature did not see fit to include.")

Notably, the State did not exempt itself from liability for the unlawful employment practices set forth in R.S.A. 354-A:7. See, e.g., R.S.A. 354-A:2 (defining "employer" to expressly include "the state and all political subdivisions, boards, departments, and commissions thereof"). This fact alone exposes the tenuous, circular argument upon which Defendants' defense rests: if the State does not wish to comply with R.S.A. 354-A:7 in any one respect -- whether for sexual orientation discrimination or otherwise -- then the challenged employment practice, ipso facto, cannot be unlawful under R.S.A. 354-A:7. This argument, if accepted, however, would inappropriately write into the non-discrimination law a statutory defense for state entities that the Legislature itself did not create.

Similarly, Defendants cannot seek refuge in the legislative history of the non-discrimination law, despite their efforts to do so, for two reasons. First, where, as here, the statute is unambiguous, resort to legislative history is inappropriate. *See, e.g., Union Leader Corp. v. Fenniman,* 136 N.H. 624, 626 (1993) (recognizing interpretative rule that resort to legislative history is appropriate only if the statutory language is ambiguous). The Defendants themselves have admitted that legislative history should not be considered by this Court. See

Defendants' Memo, p. 20. Second, even if it were appropriate to look to the legislative history of R.S.A. 354-A:7, the legislative history weakens Defendants' arguments. Even the Defendants admit that equal benefits were a topic of legislative discussion and that the denial of benefits to a heterosexual employee based on his sexual orientation was an argument advanced in the Legislature in support of adding sexual orientation to the statute's protections. See Defendants' Memo, p. 19, footnote 3. That the bulk of legislative testimony may have focused on the most commonly understood aspects of the state's non-discrimination law (e.g., hiring and firing) does not establish that the Legislature intended to prevent gay and lesbian employees from invoking the Law Against Discrimination's protections against discriminatory treatment in the provision of employment benefits. Simply put, the legislative history does not support Defendants' position that claims for equal health insurance benefits by gay and lesbian employees are not actionable.

Defendants also cannot insulate themselves from liability by purportedly applying their discriminatory employment policies equally to all unmarried employees. For the reasons set forth on Pages 16-17 of Plaintiffs' Memo, Plaintiffs are not similarly situated with unmarried employees who have different-sex partners. Defendants' selection of marriage as the criteria for partner benefits does not pose the same absolute barrier to unmarried heterosexual employees as to unmarried gay and lesbian employees, no matter how many times the Defendants self-servingly state that they have been even-handed in their approach to partner benefits. Moreover, equal application is not a defense to Plaintiffs' claim of disparate impact. See Plaintiffs' Memo, pp. 17-20.

C. Defendants Have Discriminated Against The Plaintiffs On Account Of Their Sexual Orientation In Violation Of R.S.A. 354-A:7.

Whether viewed under a disparate treatment or a disparate impact analysis, the Defendants' refusal to provide equal employment benefits to Plaintiffs on account of their sexual

orientation violates R.S.A. 354-A:7. See Plaintiffs' Memo, pp. 14-20. Plaintiffs' claims of sexual orientation discrimination in the provision of employment benefits present issues of first impression under New Hampshire law. Though Defendants criticize Plaintiffs for citing case law from other jurisdictions (see Defendants' Memo, p. 26), Defendants themselves have relied exclusively on authorities from other jurisdictions in their defense of Plaintiffs' statutory claims. See Defendants' Memo, pp. 20-29. In any event, the question for this Court in the absence of controlling New Hampshire authority is: which authorities from other jurisdictions are most persuasive and consistent with the liberal construction of the statutory scheme at issue here? See, e.g., R.S.A. 354-A:25 ("The provision of [the Law Against Discrimination] shall be construed liberally for the accomplishment of the purposes thereof.") Notwithstanding Defendants' misguided critique of Plaintiffs' legal analysis, the most persuasive authorities support Plaintiffs' position that Defendants' denial of equal employment benefits to Plaintiffs violates R.S.A. 354-A:7. See Plaintiffs' Memo, pp. 14-20. Moreover, Defendants' authorities do not withstand careful scrutiny.

1. Defendants ignore Plaintiffs' disparate impact theory.

None of the authorities relied upon by the Defendants analyzes the disparate impact of the marriage-related benefit policies on gay and lesbian employees. See Plaintiffs' Memo, p. 20, footnote 15; see also Beaty v. Truck Insurance Exchange, 6 Cal. App. 4th 1455, 1466 (1992) (addressing only disparate treatment theory of liability because disparate impact claims are not actionable under the Unruh Civil Rights Act pursuant to Harris v. Capital Growth Investors, 52 Cal. 3d 1142, 1170-75 (1991)); Rutgers Council of AAUP Chapter v. Rutgers, 689 A.2d 828, 830-31 (N.J. Super. Ct. App. Div. 1997) (addressing disparate treatment only). Defendants' failure to address Plaintiffs' disparate impact claim is perhaps not surprising given the Defendants' present refusal to recognize the obvious: Defendants' self-selected benefit criteria (i.e., marriage) operate to the distinct disadvantage of their gay and lesbian employees.

2. Defendants ignore statutory differences in state non-discrimination laws and employment benefit schemes.

Defendants are also misguided in relying upon cases that deny benefit claims under distinctly different non-discrimination statutes from R.S.A. 354-A:7.[6] Unlike R.S.A. 354-A:7, for example, some state non-discrimination laws contain express exceptions for insurance benefit claims under bona fide benefit plans. See, e.g., Tanner v. Oregon Health Sciences Univ., 971 P.2d 435, 441-444 (Or. Ct. App. 1998) (finding that denial of family benefits to gay and lesbian employees constituted disparate impact under state non-discrimination law but finding no statutory violation solely because of express statutory exception for bona fide benefit plans); Hinman v. Department of Personnel Admin., 167 Cal. App. 3d 516, 529-30 (1985) (noting existence of statutory exception for bona fide benefit plans and concluding that executive order prohibiting discrimination based on sexual orientation, by its own terms, did not cover differences in benefits); Rutgers, 689 A.2d at 832 (concluding that unambiguous statutory exception in the state non-discrimination law that exempted bona fide benefits and insurance programs from liability precluded claim that non-discrimination law should override a benefits statute which expressly limited coverage to "spouses"). In contrast, New Hampshire's Law Against Discrimination contains no exception for insurance benefit claims.

Some non-New Hampshire statutory schemes for employment-related benefits also differ by expressly limiting family benefits to "spouses." Phillips v. Wis. Personnel Commission, 482 N.W.2d 121, 127 (Wis. Ct. App. 1992) (finding statute restricted benefits to spouses and thus constituted an insurance eligibility limitation); Rutgers, 689 A.2d at 830-31 (rejecting challenge where state law governing health benefits contained an exclusionary definition of "spouse"). Because of these statutory limitations, the plaintiffs in these cases had to establish that they were

[6] For example, the non-discrimination provision in Ross v. Denver Dept. of Health and Hosps., 883 P.2d 516 (Colo. Ct. App. 1994), was rooted in an administrative regulation, not in a comprehensive statutory scheme establishing a definitive state policy against sexual orientation discrimination that must be liberally construed.

"functional spouses" or challenge the constitutionality of these limiting definitions.[7] Plaintiffs here are under no such burden because New Hampshire law does not restrict benefits to spouses only. See Plaintiffs' Memo, p. 4-14. Plaintiffs here do not seek to qualify for benefits as "spouses"; rather, they challenge their total exclusion from benefit eligibility due to the Defendants' voluntary decision to select marriage as the defining benefit criteria.

3. Defendants misread Plaintiffs' case authorities.

Defendants' critique of the authorities relied upon by the Plaintiffs is not accurate or persuasive. Defendants incorrectly claim that the student in Levin v. Yeshiva University, 754 N.E.2d 1099, 1101 (N.Y. 2001) was completely denied any university housing benefit and thus could not be compared to the Plaintiffs who receive individual benefits but not family benefits. See Defendants' Memo, p. 26. Contrary to Defendants' factual recitation, the student in Levin was herself eligible for housing but could not obtain housing with her partner because the university required students to produce proof of marriage to live in university housing with a non-student. Id. (noting that plaintiff lived on-campus one year without her partner because of university's exclusionary policy). Thus, the plaintiff in Levin is just like the Plaintiffs here: each are eligible to receive the disputed benefit themselves as individuals but cannot obtain the disputed benefit for their partners because their partners are of the same-sex. If their partners were of a different sex, the student in Levin and the Plaintiffs here would each be able to obtain the disputed benefit for their respective partners. Contrary to Defendants' argument, Plaintiffs here do not receive access to the same benefits as their heterosexual colleagues, and Levin

[7] Defendants intentionally cloud the true legal issues in dispute by arguing state and federal constitutional claims that Plaintiffs have not raised. See Defendants' Memo, p. 25 and 29-32. From the beginning, Plaintiffs have pursued only the statutory claim that the denial of equal benefits violates R.S.A. 354-A:7, and this Court should not decide the constitutional issues advanced by the Defendants here. Cf. State v. Hodgkiss, 132 N.H. 376, 379 (1989) ("We follow a strong policy against reaching a constitutional issue in a case that can be decided on a non-constitutional ground.").

supports their claim that the Defendants' eligibility criteria discriminates against gay and lesbian employees because of its disparate impact upon them.[8]

Defendants also incorrectly assert that Tanner is inapplicable on the grounds that the Tanner court rejected a statutory claim for equal employment benefits and instead ruled on constitutional grounds. See Defendants' Memo, pp. 26-28. In Tanner, the Oregon Court of Appeals concluded that the state university's policy of restricting family benefits to employees with marital partners had an impermissible disparate impact on gay and lesbian employees under the state non-discrimination law. See Tanner, 971 P.2d at 443. Ultimately, the court decided the case on constitutional grounds because the state defendants were protected from liability under the non-discrimination law based upon a statutory exemption for bona fide employee benefit plans. Id. at 444. But for the statutory exemption for bona fide employee benefit plans in Oregon's non-discrimination law, Tanner provides a compelling parallel for Plaintiffs' claims under R.S.A. 354-A:7. Tanner demonstrates how the denial of family health benefits to non-married employees disparately impacts gay and lesbian employees. That the Tanner case ultimately turned on an interpretation of constitutional law does not affect its persuasiveness here, notwithstanding Defendants' unfounded objection to its applicability.

Defendants further attempt to discredit Tanner as being "before an administrative body whose jurisdiction and remedies are limited by statute." See Defendants' Memo, p. 26.

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[8] Defendants inappropriately criticize Plaintiffs' reliance upon Levin on the basis that Levin addresses discrimination in public accommodations rather than employment. See Defendants' Memo, pp 28-29. This obvious factual distinction is inconsequential given that the case otherwise provides instructive parallels for this Court to consider. Defendants have not demonstrated, and cannot demonstrate, why the application of non-discrimination laws in other factual contexts should not be considered by this Court, especially where the underlying theories of liability are similar to the ones presented here. In fact, Defendants themselves rely upon a case in the public accommodation/business services context. See Defendants Memo, p. 24-25 (citing Beaty v. Truck Insurance Exchange, 6 Cal. App. 4th 1455 (1992) (concerning refusal of business to offer joint umbrella policy to non-marital couple)).

Defendants also criticize Plaintiffs' reliance upon Levin because it deals with a private university. See Defendants' Memo, p. 28-29. This criticism is misplaced where the State has subjected itself to the very same Law Against Discrimination that governs private entities (R.S.A. 354-A:2) and the principles annunciated in Levin provide instructive guidance in the present case.

Plaintiffs can find no basis for, or relevance in, Defendants' assertion. 971 P.2d at 437-38. The university's policy was tried on appeal before a non-administrative trial court on a de novo basis and later decided by the Oregon Court of Appeals. Id. Tanner's reach is simply not cabined by any notable jurisdictional or procedural limitations.

Defendants' third meritless attempt to limit Tanner's applicability rests in Defendants' assertion that the Oregon Supreme Court rejected a statutory challenge similar to Plaintiffs'. See Defendants Memo, p. 26. Plaintiffs can find no reported authority to this effect, and the Defendants themselves have cited none.[9]

4. Defendants cite wholly inapposite authorities.

Curiously, Defendants have cited, and seemingly rely upon, two cases concerning municipal home rule authority that can have nothing to do with the statutory scheme at issue here, adopted state-wide by the Legislature. See Defendants' Memo, p. 20 (citing Lilly v. City of Minneapolis, 527 N.W.2d 107 (Minn. Ct. App. 1995))[10] and p. 27 (citing Connors v. City of Boston, 430 Mass. 31 (1999)). These courts found that the subject municipalities could not provide domestic partnership benefits because controlling state statutes defined "dependents" in a manner that prevented the extension of benefits to domestic partners. Unlike the statutes at issue in these cases, New Hampshire's statutes do not contain a limiting definition that constrains the Defendants' ability to provide equal benefits to domestic partners. See Plaintiffs' Memo, pp. 4-14. Defendants' authorities simply do not address Defendants' situation: Defendants are

[9] The Oregon Supreme Court is the highest appellate court in the state. The state's intermediate appellate court, the Oregon Court of Appeals, decided Tanner. 971 P.2d 435.

[10] Although Defendants identified a case by the name "Lilly v. City of Minneapolis," the actual citation provided corresponds to a different case, Schaefer v. City & County of Denver, 973 P.2d 717 (Colo. Ct. App. 1998). Notably, Schaefer declares Lilly to be unpersuasive and undermines Defendants' arguments here. Id. at 720 ("The [domestic partnership] ordinance qualifies a separate and distinct group of people who are not eligible to contract a state-sanctioned marriage to receive health and dental benefits from the City. Therefore, the ordinance does not adversely impact the integrity and importance of the institution of marriage.")

obligated to abide by a statewide non-discrimination law and the applicable state benefit scheme permits Defendants to provide non-discriminatory benefits.

Similarly inapposite is Defendants' assertion that lawsuits under state non-discrimination laws against private employers for domestic partner employment benefits are infrequent or non-existent. See Defendants' Memo, p. 28 (citing law review article on ERISA pre-emption). Defendants make this assertion to bolster their specious argument that claims of sexual orientation discrimination in employment benefits are non-actionable under state non-discrimination laws like R.S.A. 354-A:7. Yet, the frequency of such lawsuits against private employers has no bearing on the legal principles at stake here. The dearth of state discrimination lawsuits involving private benefits plans is attributable to prevailing federal preemption principles under the Employee Retirement Income Security Act (ERISA).[11] Notably, benefit plans of state and local government employers are not subject to ERISA (see 29 U.S.C.A. §1003) and, thus, cannot escape the reach of state non-discrimination laws absent a statutory exemption. There is no such statutory exemption in New Hampshire's Law Against Discrimination. See R.S.A. 354-A:1 et seq. Consequently, Defendants' plan is not exempt from R.S.A. 354-A:7, and Defendants' extraneous reference to the infrequency of lawsuits challenging discriminatory ERISA benefit plans under state non-discrimination laws does not support their defense.

5. Time has undermined the persuasiveness of Defendants' authorities.

Finally, Defendants primarily rely on case law from over a decade ago despite the obvious fact that legal and societal approaches to the treatment of gay men and lesbians have

[11] Most employee benefit plans of private employers are governed by ERISA, which, under prevailing interpretations of that federal law, provides for the preemption of state laws relating to benefit plans (other than insurance laws). See, e.g., Shaw v. Delta Air Lines, 463 U.S. 85, 96 (1983) (finding that ERISA pre-empts New York non-discrimination law forbidding discrimination in employee benefit plans on the basis of pregnancy). For this reason, private employers with ERISA benefit plans are widely believed to be outside the reach of state non-discrimination laws when it comes to discrimination in these ERISA plans.

undergone a sea change in the last decade.[12] This shift is evidenced, in part, by the inclusion of sexual orientation protections in the Law Against Discrimination in 1997 and the extension of domestic partnership benefits to the employees of the university system of New Hampshire in 2000. Defendants seemingly ignore the reality that older case law speaks less clearly to present day realities. For example, Defendants rely on precedents that resist extending benefits to domestic partners based upon a purported, paternalistic concern for the domestic partner's own privacy,[13] and Defendants' constitutional analysis may even hinge on Bowers v. Hardwick, 478 U.S. 186 (1986), a case that has been expressly overruled by the United States Supreme Court. See Defendants' Memo, p. 32 (citing Bowers as doctrinal underpinning for In re Opinion of the Justices, 129 N.H. 290 (1987) which held that gay men and lesbians can be denied the right to adopt or foster parent)). Defendants' reliance on older, doctrinally flawed cases reveals, at bottom, a desire to hide from the essential facts at the heart of Plaintiffs' claims: reliance upon marriage as the justification for the differential in benefits rings hollow when (i) gay men and lesbians cannot presently marry and (ii) Defendants have the ability to select other, less discriminatory eligibility criteria.

For these reasons and the reasons set forth on pages 14-21 of Plaintiffs' Memo, Plaintiffs urge this Court to follow Tanner, Levin, and their other authorities in holding that the Defendants' use of marriage as the touchstone for family benefits unlawfully discriminates against Plaintiffs in violation of R.S.A. 354-A:7.

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[12] See, e.g., Lawrence v. Texas, 539 U.S. 558 (2003) (recognizing that government may not intrude into matters of personal autonomy affecting gay men and lesbians, including the choice of one's intimate partner, and overruling Bowers v. Hardwick as unwise and unsound); Goodridge v. Department of Public Health, 440 Mass. 309 (2003) (extending right to marry to gay men and lesbians under Massachusetts state constitution); Snetsinger v. Montana University System, 104 P.3d 445, 462 (Mont. 2004) (invalidating university policy conditioning family employment benefits for gay and lesbian employees upon marriage).

[13] See, e.g., Hinman, 167 Cal. App. 3d at 528.

CONCLUSION

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 (1) deny Defendants' Motion to Uphold the Commission's Finding of No Probable Cause and (2) allow Plaintiffs' Motion to Reverse Findings of Commission for Human Rights.

Respectfully submitted,

Plaintiffs Patricia Bedford and Anne Breen

By their counsel,

Date: June 3, 2005

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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: June 3, 2005 _____