THE STATE OF NEW HAMPSHIRE
SUPREME COURT

Docket No. 2006-0432

Patricia Bedford
v.
New Hampshire Community Technical College System
and
State of New Hampshire Division of Personnel

Anne Breen
v.
New Hampshire Community Technical College System
and
State of New Hampshire Division of Personnel

Appeal from Merrimack County Superior Court

BRIEF OF PATRICIA BEDFORD AND ANNE BREEN

Date: December 28, 2006

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ISSUE PRESENTED FOR REVIEW

Whether the Superior Court correctly reversed a finding of no probable cause made by the Commission for Human Rights, holding that the New Hampshire Community Technical College System may not condition benefits of employment on whether an employee is married because doing so unjustifiably discriminates against gay and lesbian employees on account of sexual orientation in violation of RSA 354-A:7.

STATEMENT OF THE CASE

Having been denied benefits that would enable them to care for their families on the same terms as heterosexual employees, Plaintiffs-Appellees Patricia Bedford and Anne Breen filed complaints of sexual orientation discrimination against the New Hampshire Community Technical College System and the New Hampshire Division of Personnel (collectively, "the State") at the New Hampshire Commission for Human Rights ("Commission"). The Commission found no probable cause, and denied Bedford's and Breen's requests to reconsider and reopen their claims. Both appealed the finding of no probable cause to the Merrimack County Superior Court pursuant to RSA 354-A:21 (II)(a).[1] The Superior Court reversed the Commission's findings, holding that the State's conditioning of eligibility for employment benefits on whether an employee is married unlawfully discriminated against Bedford and Breen, constituting both disparate treatment and disparate impact discrimination on the basis of sexual orientation, and that the State could not justify that discrimination. See S. App. at 54, 56.[2] The State filed this appeal.

[1] RSA 354-A:21(II)(a) governs appeals of a Commission's finding of no probable cause, not RSA 354-A:22, as the State has asserted. See Brief of New Hampshire Community Technical College System and Division of Personnel ("State's Br.") at 2.

[2] References to "S. App." refer to the appendix to the State's brief, which includes the Superior Court's opinion.

STATEMENT OF FACTS

The facts of this matter are undisputed. Patricia Bedford and Anne Breen are long time employees of Appellant-Respondent, the New Hampshire Community Technical College System ("NHCTCS"). S. App. at 40. Bedford has worked for NHCTCS for over eleven years, presently serving as a department director overseeing the administration of federal grants and assisting students with disabilities. Id. She is a lesbian, and has been in a committed relationship with her partner, Vivian Knezevich, for over fifteen years. Id. Bedford and Knezevich share parenting for Bedford's four-year-old biological son, a common home, and lives intertwined both emotionally and financially. Id.

Breen has served as director of security at New Hampshire Technical Institute in Concord, one of the colleges of the NHCTCS, for over seventeen years. Id. She is a lesbian, and has been in a committed relationship with her partner, Kathleen Doyle, for over twenty-years. Breen and Doyle share parenting for Doyle's ten-year-old biological son, a common home, and lives intertwined both emotionally and financially. Id.

As full time employees of Appellant-Respondent NHCTCS, a state agency with the purpose of providing higher education for youth and adults in New Hampshire, RSA 188-F:1, Bedford and Breen qualify to receive employment benefits, including health and dental insurance, sick time, dependent care, and bereavement leave. S. App. at 40. Bedford and Breen sought from NHCTCS, and from Appellant-Respondent New Hampshire Division of Personnel ("Division"), to use the benefits for which they qualify to care for their same-sex partners. Id. at 41. The Division is the state agency responsible for the negotiation and administration of benefits programs for active state employees, and for implementing the collective bargaining agreement ("CBA") between the State and the State Employees Association ("SEA"). RSA 21-

I:42. Id. at 40. Specifically, Bedford and Breen sought health and dental insurance for their committed partners, and entitlement to dependent care leave and bereavement leave in the event of their respective partner's illness or death. Id. at 42. Additionally, Breen sought dependent care leave benefits to care for her partner's biological son.[3] Id. The State denied their requests, claiming that applicable statutes, administrative rules, and the CBA prevent the extension of the requested benefits. Id.[4]

SUMMARY OF ARGUMENT

The Superior Court correctly reversed the Commission's findings of no probable cause. The State's denial of family benefits to Breen and Bedford based on an eligibility requirement of marriage discriminated against them on account of sexual orientation. As a threshold matter, Bedford and Breen have stated a claim of disparate treatment discrimination. As lesbians, they are protected by the terms of RSA 354-A:7 from employment discrimination, including in the provision of benefits. They qualify for the benefits they sought as full time employees of the State, but the State denied their requests to use those benefits to care for their families in the same way heterosexual employees are able to care for their families. The State's choice of marriage as the eligibility criterion for family benefits treats gay and lesbian employees differently from heterosexual employees because gay and lesbian employees are precluded by New Hampshire law from marrying. Thus, the State has chosen a criterion that gay and lesbian employees can never meet, but heterosexual employees can.

[3] Since filing her complaint, Breen has been named co-guardian of her son by the Probate Court -- she has not been able to adopt him, as the State suggests, State's Br. at 5, n.4 -- and has therefore been able to use her employment benefits for his care.

[4] Contrary to the State's assertion, Bedford and Breen do not concede that they "receive the same benefits similarly situated unmarried state employees receive," or that "[t]hese benefit limitations are applied equally to all unmarried state employees regardless of sexual orientation." State's Br. at 5. Bedford and Breen, as lesbians, are not similarly situation to all unmarried state employees, as heterosexual unmarried employees may choose to marry their partners and thereby obtain benefits. See § I(A)(2), infra.

Bedford's and Breen's statutory claims solely challenge their employer's choice to condition family benefits on a legal status from which they are precluded, despite the employer's ability to make such benefits available in a nondiscriminatory fashion. Bedford and Breen did not ask the Commission or the Superior Court, and they do not ask this Court, to address the constitutional implications of either their exclusion from marriage or their denial of benefits. This case solely addresses New Hampshire's stated commitment not to discriminate in employment on the basis of sexual orientation, as embodied in RSA 354-A.

The State cannot justify its discriminatory treatment of Bedford and Breen by relying on the CBA between the State and the SEA, the administrative rules of the Division, or the statutes relating to collective bargaining and provision of health insurance to state employees. The CBA and administrative rules merely restate the State's discriminatory policy, and can not undermine the State's obligation, as an employer, not to discriminate under RSA 354-A:7. Neither do the collective bargaining statutes trump those obligations, as the role of the Legislature in the collective bargaining process is limited, and does not amount to a determination of the legality of the State's discrimination. Finally, nothing in the terms of RSA 21-I:30 prevents the extension of family benefits to Bedford and Breen.

The State also cannot raise cost as a justification for its discrimination. First, having not made this argument to the Commission or the Superior Court, the State has waived its ability to do so to this Court. Second, concerns about preserving resources cannot justify the State's discriminatory method of apportioning those resources. As the State cannot provide a legitimate non-discriminatory reason for its discrimination, the Superior Court correctly found that the State committed discriminatory disparate treatment on account of sexual orientation under RSA 354-A:7.

Assuming arguendo, however, that this Court finds the State's choice of marriage as an eligibility criterion for family benefits to be facially neutral, the State's policy nonetheless has a discriminatory disparate impact on gay and lesbian employees in violation of RSA 354-A:7. As the Superior Court properly found, the State's conditioning of family benefits on marriage has an extreme disparate impact, as it prevents 100% of gay and lesbian employees, who cannot marry under state law, from ever accessing these benefits. While heterosexual employees may marry and thus access the benefits, the State's policy poses a total bar to benefits for gay and lesbian employees.

The State cannot demonstrate that its choice of the marriage eligibility criterion is consistent with business necessity, as it must in order to justify the discriminatory impact of its policy. Having failed to argue that any business necessity justified its discrimination below, the State cannot do so now. Even assuming this Court considers the State's allegations of business necessity, however, those assertions must fail. The provision of family benefits is designed to assist the employee, to whom the State has an obligation, in caring for her family, and having conceded that Bedford and Breen have intertwined their lives with their respective partners, the State cannot now excuse its discrimination by asserting a lack of connection between the employee and her partner. Further, bald assertions of cost do not suffice to justify a policy with a disparate impact. Finally, even assuming, arguendo, that the State can demonstrate that its discrimination is consistent with business necessity, alternative non-discriminatory means exist to address the State's concerns, as demonstrated by, among others, the University System of New Hampshire, which provides benefits to its employees for their same-sex partners.

ARGUMENT

The Superior Court correctly reversed the findings of no probable cause by the Commission. On appeal pursuant to RSA 354-A:21 (II)(a), the Superior Court considered whether the Commission's decision was "unlawful." While the Superior Court deems any fact finding by the Commission lawful and reasonable so long as credible evidence in the record sustains it, RSA 354-A:21(II)(a), no such deference applies when the Commission has committed an error of law. See E.D. Swett, Inc. v. N.H. Comm'n for Human Rights, 124 N.H. 404, 408 (1983) ("The commission's application of an incorrect legal standard would constitute an error of law permitting the court to set aside the commission's order notwithstanding any presumption of propriety which may be given its fact finding."). The Superior Court correctly concluded that the Commission erred, holding that the State committed impermissible disparate treatment and disparate impact discrimination on account of Bedford's and Breen's sexual orientation. This Court similarly will not set aside the Superior Court's ruling unless legally erroneous. See id.

I. The State's Exclusion Of Bedford And Breen From Certain Employment Benefits Constitutes Illegal Disparate Treatment On Account Of Sexual Orientation.

In choosing to condition benefits for an employee's family according to a criterion that only heterosexual employees may satisfy -- namely, marriage -- but gay and lesbian employees cannot, the State commits impermissible disparate treatment on the basis of sexual orientation in violation of RSA 354-A:7. As the Superior Court correctly found, the State's choice of this requirement forever bars Bedford and Breen from accessing employment benefits for which they qualify as full time employees in order to care for their families, while enabling heterosexual employees to do so. See S. App. at 48. Having subjected itself, as an employer, to this chapter's prohibition of sexual orientation discrimination, RSA 354-A:2 (employers prohibited from

engaging in sexual orientation discrimination include "the state and all political subdivisions, boards, departments and commissions thereof"), the State cannot engage in such discriminatory treatment.

To succeed on a disparate treatment discrimination claim under RSA 354-A:7, Bedford and Breen must demonstrate that 1) they are members of a class protected by the statute, 2) that they qualify for the benefits they sought, 3) that despite their qualifications, their employer denied the requested employment benefits, and 4) that their employer provided those benefits to similarly situated employees outside of their protected class. See E.D. Swett , Inc., 124 N.H. at 409 (applying criteria established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)).[5] Once Bedford and Breen establish their prima facie case, the State has the burden of articulating a legitimate nondiscriminatory reason for the policy. See id. As the Superior Court properly concluded, Bedford and Breen clearly meet their burden of establishing a prima facie case of disparate treatment discrimination on account of their sexual orientation, S. App. at 49, and the State did not and cannot provide a legitimate justification for its actions. S. App. at 54.

A. Bedford And Breen State A Claim Of Disparate Treatment Discrimination.

1. As lesbians, Bedford and Breen are members of a class protected under RSA 354-A:7, entitled to the full scope of its protections.

Under the plain terms of RSA 354-A, an employer may not discriminate on the basis of an employee's "having or being perceived as having an orientation for … homosexuality." RSA 354-A:2. Neither the Commission nor the Superior Court had any question that Bedford's and

[5] This Court has clearly stated the relevance of jurisprudence developed under Title VII and other anti-discrimination provisions in interpreting RSA 354-A. See Franklin Lodge of Elks v. Marcoux, 149 N.H. 581, 586-87 (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., 149 N.H. 371, 378 (2003) (When presented with "an issue of first impression under RSA chapter 354-A, we rely upon cases developed under Title VII to aid in our analysis."). While the scope of Title VII's protections differs from RSA 354-A in terms of categories of protected employees, that does not undermine the applicability of Title VII's analytical framework. See Goins v. West Group, 635 N.W.2d 717, 725 n.6 (Minn. 2001) (applying Title VII harassment analysis to sexual orientation-based claim under state law despite that Title VII does not prohibit sexual orientation discrimination).

Breen's status as lesbians placed them within the protections of RSA 354-A:7. See S. App. at 42, 44.[6]

In addition, though the State argues that the sexual orientation protections do not encompass a claim regarding employment benefits, State's Br. at 17-19, no real question exists that RSA 354-A:7 prohibits the State from providing employment benefits in a discriminatory manner. See Newport News Shipbuilding and Dry Dock Co. v. E.E.O.C., 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). Any suggestion that RSA 354-A:7's protections against sexual orientation discrimination do not extend to the provision of employment benefits or are in some way more limited than the same protections available on the basis of other protected classifications is belied by both its plain language and legislative history.

When presented with a question of statutory construction, where the provision's language is unambiguous, this Court's inquiry starts and ends with the plain language of the statute. See Woodview Dev. Corp. v. Town of Pelham, 152 N.H. 114, 116 (2005). RSA 354-A:7 is clear:

> It shall be an unlawful discriminatory practice: I. For an employer, … to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational

[6] Plaintiffs-Appellees do not fully understand the State's comments regarding RSA 354-A:2's inclusion of "heterosexuality, bisexuality, or homosexuality" within the definition of sexual orientation. See State's Br. at 9, 22. To the extent that, on appeal, the State argues that this definition means that RSA 354-A only applies when individuals of all sexual orientations face discrimination such argument must fail. Not only may the State not raise this claim for the first time before this Court, Appeal of Pelleteri, 152 N.H. 809, 811 (2005) (appellant precluded from raising legal claim not presented to administrative body), but even on its merits, the State's interpretation ignores plain meaning. This interpretation suggests that these protections do not apply when an individual's same-sex orientation -- or different-sex orientation -- serves as the basis for disparate impact. Basic tenets of statutory construction make clear, however, that the use of the word "or" means that the protections must be read in the disjunctive. See 1A Norman J. Singer, Sutherland Statutory Construction § 21:14 (6th ed. 2006) ("Generally, courts presume that 'or' is used in a statute disjunctively unless there is clear legislative intent to the contrary. … The use of the disjunctive usually indicates alternatives and requires that those alternatives be treated separately."); In re Hoyt, 143 N.H. 533, 535 (1999) (Legislature's use of "the disjunctive 'or,' establishes two alternative[s]"); Petition of Dunlap, 134 N.H. 533, 540-41 (1993) (reading handicap discrimination's categories of covered employees in the disjunctive). Plainly, RSA 354-A:7 protects an employee from discrimination on account of having any one of the defined sexual orientations. If the State's reasoning applied, an African American could not bring a discrimination claim because everyone has a race, and a woman could not bring a discrimination claim because everyone has a sex.

> qualification. In addition, no person shall be denied the benefit of the rights afforded by this paragraph on account of that person's sexual orientation.

The "rights afforded by this paragraph" manifestly include the right to be free from discrimination "in compensation or in terms, conditions, or privileges of employment." Whether denominated a form of compensation or a term, condition or privilege of employment, the right to equal employment benefits on account of sexual orientation falls squarely within this section's protections.

In amending RSA 354-A to include protections based on sexual orientation, the Legislature could have excluded the provision of benefits to an employee for his or her non-marital partner from the scope of its protections, but it did not. Other states have done so, and had done so when the Legislature was considering ch. 108 of the Laws of 1997. See, e.g., R.I. Gen. Laws §28-5-7(1)(ii) (enacted by R.I. Pub. Laws 1995, ch. 32, § 4) ("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."); Vt. Stat. Ann. 21 § 495 (f) (enacted by 1991 Vt. Acts, No. 135 (Adj. Sess.), § 15) ("The provisions of this section prohibiting discrimination on the basis of sexual orientation shall not be construed to change the definition of family or dependent in an employee benefit plan."); 1989 Mass. Acts, c. 516 §19 (adding sexual orientation protections to Mass. Gen. Laws c. 151B, §4; "Nothing in this act shall be construed so as … to provide health insurance or related employee benefits to a 'homosexual spouse', so-called."). As the Legislature did not incorporate a benefits exclusion, this Court should not accommodate the State's request to impose one by judicial fiat. See Woodview Dev. Corp., 152 N.H. at 116 ("[W]e will not consider what the legislature might have said or add language that the legislature did not see fit to include.").

Additionally, the statement of intent to the bill adding sexual orientation to the categories of prohibited discrimination in RSA 354-A does not change the scope of this chapter's protections. Laws of 1997, ch. 108, § 1 stated, "While the State of New Hampshire does not intend to promote or endorse any sexual lifestyle other than the traditional marriage-based family, the legislature recognizes the need to provide protections in certain areas to individuals on account of their sexual orientation." The "certain areas" in which the Legislature obviously deemed gay and lesbian individuals in need of protection included employment, as set forth in RSA 354-A:7, which includes "compensation or in terms, conditions and privileges of employment." Nothing in this statement of intent changes or diminishes the types of employment discrimination prohibited under RSA 354-A:7. With this language, the Legislature made clear that the non-discrimination mandate on the basis of sexual orientation could coexist with other state laws limiting marriage to different-sex couples only. In other words, while the state excludes same-sex couples from marriage, employers nonetheless may not discriminate in compensation, terms, conditions or privileges of employment on the basis of sexual orientation.

Given the clarity of the statutory language, this Court need not examine the legislative history of the sexual orientation protections in RSA 354-A. See Lamy v. N.H. Pub. Utils. Comm'n, 152 N.H. 106, 108 (2005) (court will "consider legislative history only if the statutory language is ambiguous.") (citation omitted). The State admits this point, State's Br. at 19, but nonetheless asks this Court to examine the history of the bill adding the sexual orientation protections, which this Court need not do. Regardless, the legislative history makes clear that the Legislature intended the sexual orientation protections to encompass all employment actions in which discrimination could occur, including with regard to benefits. While much testimony addressed the need for protections against discrimination in hiring and firing practices, the

legislators clearly understood that they were simply adding another category of protected employees to the existing statute, which provides redress for discrimination in compensation and the terms, conditions, and privileges of employment as well.[7]

For example, when Rep. William H. McCann, Jr., the prime sponsor of HB 421, addressed the Senate Committee on Internal Affairs, he stated the underlying need for the sexual orientation protections:

> The heart of the question is whether all of our citizens are going to be afforded equal rights and equal opportunity? … Are some of our fellow citizens going to be denied a job because of their real or perceived sexual orientation? Can some be denied health insurance or some other benefit because of their sexual orientation? The sad truth is "yes." However, if we pass House Bill 421 as amended, we could change that answer to a resounding "no."

Senate Committee on Internal Affairs, Hearing on HB 421, April 29, 1997, B. App. at 12-13. As the State conceded, State's Br. at 19 n.6, Rep. McCann made clear that the bill would prohibit the unequal provision of benefits on the basis of sexual orientation, and provided a copy of correspondence between a NYNEX employee and the Commission regarding a denial of benefits that was not actionable given the lack of protections against sexual orientation discrimination. B. App. at 15, 18.

The legislative history also bolsters the plain language of the statute in contradicting the State's position that the placement of "sexual orientation" separate from the list of other protected categories of employees has any substantive significance. See State's Br. at 17-19. In fact, this amendment to the bill, along with the refocusing of the statement of intent, resulted

[7] Both the House and Senate Committees also heard a wide range of testimony about harassment on the job based on sexual orientation -- a matter that falls within the protections of RSA 354-A:7, but outside of the "hiring and firing" context. See, e.g., Senate Committee on Internal Affairs, Hearing on HB 421, April 29, 1997 (testimony of Judy), B. App. at 22; id. (testimony of Brendan Denehy), B. App. at 24-25.

References to "B.App." refer to the Appendix to the Brief of Patricia Bedford and Anne Breen, attached hereto.

from a compromise to gain the support of the Catholic Diocese of Manchester.[8] While the Diocese requested that sexual orientation be separated out, so that it would not be equated as the same type of status as the other protected categories, the Diocese's representative stated that the request was to "separate [it] out – while according the rights." See B. App. at 19-20 (testimony of Bradford E. Cook). Further, in reviewing the amended HB 421 before the Senate Committee, Senator Leo W. Fraser, asked Senator Burton J. Cohen, one of the sponsors, to clarify the bill's means of incorporating the sexual orientation protections. Senator Cohen confirmed that the bill simply adds protections based on sexual orientation to the existing provisions of RSA 354-A. See B. App. at 16-17. Thus, RSA 354-A:7 plainly encompasses claims regarding the discriminatory denial of employment benefits on the basis of sexual orientation.

2. Bedford and Breen are qualified for employee benefits, but the State denied them the ability to use those benefits to care for their families, though heterosexual employees may do so.

As the State concedes, State's Br. at 4, and as both the Commission and Superior Court found, S. App. at 42, 44, as full-time classified employees of the State, Bedford and Breen qualify for employee benefits, including health and dental insurance, sick time, dependent care and bereavement leave. The State nonetheless denied their requests to receive and use those benefits for the care of their families because Bedford and Breen are not married to their committed partners. Given New Hampshire's exclusion of same-sex couples from marriage, RSA 457:1, 2, however, Bedford and Breen cannot obtain these benefits. Heterosexual employees of the State, by contrast, can obtain these benefits by marrying their committed partners. The State's eligibility criterion of marriage therefore makes family benefits available to heterosexual employees, while keeping them off limits to gay and lesbian employees.

[8] See B. App. at 12-14, 15-16 (testimony of Rep. McCann); B. App. at 19-20 (testimony of Bradford E. Cook); House Judiciary and Family Committee, Committee Report on HB 421 (recommending "Ought to Pass with Amendment," noting "The Manchester Diocese supports this bill."), B. App. at 10.

Under RSA 354-A:7's prohibition of sexual orientation discrimination, the relevant inquiry is whether the State is treating gay and lesbian employees equally with heterosexual employees -- the class to whom they are similarly situated. The State seeks to ignore this key question, claiming that no discrimination has occurred, as all unmarried employees are being treated the same. As the Superior Court appropriately found, S. App. at 48, this defense ignores the reality that Bedford and Breen are not similarly situated to unmarried employees with different-sex partners, as those employees are legally able to marry. In a similar case, the Alaska Supreme Court rejected the public employer's argument that the proper comparison is between married persons and unmarried persons rather than "between same-sex couples and opposite sex couples[.]" Alaska Civil Liberties Union v. State of Alaska, 122 P.3d 781, 787 (Alaska 2005) (holding that spousal limitations in the provision of benefits to state employees to care for their families constituted disparate treatment discrimination). The Alaska Court further stated,

> The municipality correctly observes that no unmarried employees, whether they are members of same-sex or opposite-sex couples, can obtain the disputed benefits for their domestic partners. But this does not mean that these programs treat same-sex and opposite-sex couples the same. Unmarried public employees in opposite-sex domestic relationships have the opportunity to obtain these benefits, because employees are not prevented by law from marrying their opposite-sex domestic partners. In comparison, public employees in committed same-sex relationships are absolutely denied any opportunity to obtain these benefits, because these employees are barred by law from marrying their same-sex partners in Alaska or having any marriage performed elsewhere recognized in Alaska. Same-sex unmarried couples therefore have no way of obtaining these benefits, whereas opposite-sex unmarried couples may become eligible for them by marrying. The programs consequently treat same-sex couples differently from opposite-sex couples.

122 P.3d at 788.[9] See also Levin v. Yeshiva Univ., 754 N.E.2d 1099, 1111 (N.Y. 2002) (Kaye, C.J., concurring in part) (lower court "erred by holding that the appropriate comparison groups were unmarried heterosexual students versus unmarried homosexual students" in sexual orientation discrimination claim); Foray v. Bell Atlantic, 56 F. Supp. 2d 327, 330 (S.D.N.Y. 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 because the former may not marry). The State's failure to acknowledge that unmarried gay and lesbian employees are differently situated from unmarried heterosexual employees lies at the heart of its discrimination. See Jeness v. Fortson, 403 U.S. 431, 442 (1971) ("sometimes the grossest discrimination can lie in treating things that are different as though they were exactly alike[.]"). The proper classification and comparison is between same-sex or gay and lesbian couples and different-sex or heterosexual couples.

Focusing on the proper inquiry, the State's conditioning of family benefits on marriage facially discriminates against gay and lesbian employees.

> By restricting the availability of benefits to "spouses," the benefits programs "by [their] own terms classif[y]" same-sex couples "for different treatment." Heterosexual couples in legal relationships have the opportunity to marry and become eligible for benefits. In comparison, because of the legal definition of "marriage," the partner of a homosexual employee can never be legally considered as that employee's "spouse" and, hence, can never become eligible for benefits. We therefore conclude that the benefits programs are facially discriminatory.

[9] That the Alaska Court considered the employees' discrimination complaints in a constitutional context does not undermine the applicability of its analysis to this Court's consideration of RSA 354-A:7. See Lipsett v. Univ. of P.R., 864 F.2d 881, 896 (1st Cir. 1988) (Title VII and constitutional claims relevant to each other's analysis). Just as the Alaska Court had to "reconcile [the Alaska Constitution's "so-called Marriage Amendment"] with their equal protection clause," State's Br. at 30, this Court must reconcile the State's exclusion of same-sex couples from marriage with its obligation, as an employer, to treat its gay and lesbian employees equally under the anti-discrimination laws.

Alaska Civil Liberties Union, 122 P.3d at 789 (quoting Pers. Adm'r v. Feeney, 442 U.S. 256 (1979)).

In conditioning eligibility for family benefits on a criterion that gay and lesbian employees cannot attain, the State's policy is facially discriminatory, because the marriage eligibility criterion serves as a proxy for heterosexuality. As the Legislature has noted, distinctions based on certain traits may be a proxy for discrimination against a class of employees protected by the statute. 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 anti-discrimination law's prohibitions against sex discrimination. See R.S.A. 354-A:7 (VI); see also Planchet v. N.H. Hosp., 115 N.H. 361, 362 (1975) ("Clearly a policy that prefers one sex over another based upon the immutable characteristics of the sexes is forbidden."). The Commission has also recognized that discrimination based on a particular religious practice, observance or belief constitutes religious discrimination. See N.H. Admin. Code R. [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); Erie County Retirees Ass'n 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). This case provides another example of using a

proxy -- marriage -- to discriminate against a category of employees protected by RSA 354-A:7. The Superior Court therefore correctly concluded that Bedford and Breen stated a prima facie case of disparate treatment discrimination on account of sexual orientation.[10]

B. Bedford And Breen Challenge Their Exclusion From Benefits, Not Marriage.

As the Superior Court correctly found, the Commission misconstrued the relief Bedford and Breen seek when the Commission ruled that it lacked the authority to rule on the validity of the marriage laws. See S. App. at 54. Bedford's and Breen's statutory claims center on the choice of their employer to condition the extension of certain types of employment benefits on a legal status from which they are definitionally precluded. They did not ask the Commission or the Superior Court, and they do not ask this Court to address the constitutionality of their exclusion from marriage or any constitutional implications of the denial of benefits to them.[11]

New Hampshire's exclusion of same-sex couples from marriage does not undercut the policies of fairness and equal opportunity manifested in the anti-discrimination laws. As discussed supra, § I(A)(1), the Statement of Intent in Laws of 1997, c. 108, § 1 recognized that

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[10] In the context of its disparate impact argument, the State discusses cases relating to disparate treatment claims. See State's Br. at 24-27 (citing Lilly v. City of Minneapolis, 527 N.W.2d 107 (Minn. Ct. App. 1995)); Ross v. Denver Dep't of Health and Hosps., 883 P.2d 516 (Colo. Ct. App. 1994); Hinman v. Dep't of Personnel Admin., 167 Cal. App. 3d 516 (1985); Phillips v. Wis. Personnel Comm'n, 482 N.W.2d 121 (Wis. Ct. App. 1992); Beaty v. Truck Insurance Exchange, 6 Cal. App. 4th 1455 (1992); Rutgers Council of AAUP Chapters v. Rutgers, 689 A.2d 828 (N.J. Super. Ct. App. Div. 1997); Miller v. C.A. Muer Corp., 362 N.W.2d 650 (Mich. 1984)). These cases are both irrelevant in that context and distinguishable from the present matter for a variety of reasons, as discussed infra, at § II(A). Additionally, later authorities have undermined the reasoning of these cases, which fail to analyze the relevant inquiry under a sexual orientation discrimination statute -- namely, whether the State is setting standards for benefits that treat gay and lesbian employees and heterosexual employees differently. See, e.g., Alaska Civil Liberties Union, 122 P.3d at 787-88. The State's reliance on unpersuasive, doctrinally flawed cases reveals a misunderstanding of the essential facts at the heart of Bedford's and Breen's 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) the State has the ability to select other, less discriminatory eligibility criteria.

[11] Contrary to the State's assertion that Bedford and Breen "have abandoned their constitutional challenge," State's Br. at 31, no such challenge ever existed to abandon, as Bedford and Breen have pursued only the statutory claim that the denial of equal benefits violates R.S.A. 354-A:7. This case presents no reason to address the state and federal constitutional issues advanced by the State here. State's Br. at 32-34. 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 nonconstitutional ground.").

RSA 354-A prohibited sexual orientation discrimination in employment even in a regime that restricts marriage to different-sex couples only. Requiring the State to treat its gay and lesbian employees equally with regard to the provision of family benefits does not "promote or endorse" any particular sexual orientation or undermine the State's ability to promote marriage. Additionally, the benefits system adopted by the University System of New Hampshire, which provides domestic partnership benefits to its public employees, B. App. at 29-30, further demonstrates that nothing about the State's exclusion of same-sex couples from marriage prevents the State from providing employment benefits on a nondiscriminatory basis.[12]

Ample authority from other jurisdictions also supports the notion that a state's policies regarding marriage do not vitiate its separate commitments to ending sexual orientation discrimination. See, e.g., Smith v. Fair Employment & Hous. Comm'n, 913 P.2d 909, 918 (Cal. 1996) ("One can recognize marriage as laudable, or even as favored, while still extending protection against housing discrimination to persons who do not enjoy that status."); McCready v. Hoffius, 586 N.W.2d 723, 727 (Mich. 1998) (quoting Smith), vacated in part, 593 N.W.2d 545 (1999). As Chief Judge Kaye of the New York Court of Appeals stated in Levin,

> [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, 754 N.E.2d at 1111 (N.Y. 2001) (Kaye, C.J., concurring in part). The same principles apply here.

Instructively, courts have consistently held that the extension of health insurance and other benefits to the same-sex partners of public employees does not undermine a state's policy

[12] The State University System is subject to different bargaining and funding mandates, see, e.g., RSA 187-A:16 (establishing authority of trustees of the University System), but the same principles apply. Nothing in New Hampshire law prevents a public employer from providing family benefits to gay and lesbian employees.

against the marriage of same-sex couples. See, e.g., Alaska Civil Liberties Union, 122 P.3d at 793 (denying employment benefits to same-sex couples has "no demonstrated relationship" to state interest in promoting marriage); 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 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, 713 n.3 (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 a '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, 697 N.Y.S.2d 603, 605 (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").

C. The State Cannot Justify Its Discriminatory Treatment Of Bedford And Breen.

With Bedford and Breen having made their prima facie case, the State must articulate a legitimate nondiscriminatory reason for the policy. See E.D. Swett, Inc., 124 N.H. at 409 (applying criteria established in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973)). The State cannot do so, as the Superior Court correctly concluded. See S. App. at 54. Neither the State's reliance upon the CBA, personnel rules and statutes relating to bargaining and health benefits, nor its late in the game assertions of cost can justify the discriminatory treatment of its gay and lesbian employees.

1. The provisions of the collective bargaining agreement and administrative personnel rules requiring marriage to qualify for family benefits reiterate the State's discrimination, rather than justify it.

The State's reliance upon the CBA and the administrative rules of the Division of Personnel as a legitimate basis for its refusal to provide Bedford and Breen with the benefits they seek must fail. Neither undermines the State's obligations as an employer under RSA 354-A:7.

While the State must engage in collective bargaining pursuant to RSA 273-A:9 ("All cost items and terms and conditions of employment affecting state employees in the classified system generally shall be negotiated by the state …"), the results of that collective bargaining process must comport with existing legal rights and obligations, including the mandates of non-discrimination. See 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 its subordination to State law, 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 2001-2003 Collective Bargaining Agreement State Employees Association of New Hampshire Local 1984 Service Employees International

Union AFL-CIO, CLC and State of New Hampshire (July 1, 2001) § 15.1, B. App. at 26. Furthermore, the State cannot rely upon statements by those engaged in the bargaining process refusing to grant employees benefits to care for their same-sex partners as a way to overcome the State's obligations as an employer under RSA 354-A:7, see State's Br. at 15-16; S. App. 58-65, because those statements actually highlight the State's intent to discriminate.

Similarly, the State's attempt to rely on the administrative rules promulgated by the Division of Personnel must fail. See State's Br. at 13-15. The State points to N.H. Administrative Rule [Per] 1204.05 (governing use of sick leave for dependent care and for bereavement leave for a death in the immediate family), B. App. at 8, and N.H. Administrative Rules [Per] 102.21, 102.32 (setting forth definitions of "dependent care" and "immediate family"), B. App. at 8, as preventing the leave Bedford and Breen seek, but those rules simply set forth the State's discriminatory policy. They do not justify it. First, while the Division is authorized to adopt rules relating to compensation and benefits, RSA 21-I:43, it may not do so in contravention of RSA 354-A:7. See Appeal of N.H. Dep't of Transp., 152 N.H. 565, 571 (2005) ("Administrative officials … do not possess the power to contravene a statute,") (quotation omitted); Kimball v. N.H. Bd. of Accountancy, 118 N.H. 567, 568 (1978) ("Rules adopted by State boards and agencies may not add to, detract from, or in any way modify statutory law."). Second, the Division's ability to promulgate rules relating to compensation and benefits is limited by the fact that those areas are also the subject of mandated collective bargaining, discussed supra. Cf. Appeal of the State, 138 N.H. 716, 722, 723 (1994) (personnel rules only control when the subject matter is "reserved to the sole prerogative of the public employer by statute;" "[R.S.A. 21-I:42 and :43] … do not state that the listed functions of the division or the

subjects of the rules are reserved exclusively for the State."). As the rules do not even preempt the CBA, there certainly is no basis to conclude that they somehow preempt RSA 354-A:7.

2. The statutes relating to collective bargaining and health benefits do not trump the State's obligation, as an employer, not to discriminate.

In addition, nothing in the statutes governing the collective bargaining process regarding state employment or the payment for health benefits for state employees exempt the State from its obligations under RSA 354-A. Though the State must engage in a good faith collective bargaining process regarding all cost items, RSA 273-A:3, 9, the Legislature has a limited role in reviewing the results of that process. Under RSA 21-I:30, the Legislature must appropriate funds to pay the premiums for state employee health benefits agreed to in the collective bargaining process:

> I. The state shall pay a premium for each state employee … including spouse and minor, fully dependent children, if any, and each retired employee, … and his or her spouse, … 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.

RSA 21-I:30. The Legislature's role in this process is confined to approval of the results of the bargaining process and related appropriations. As the Superior Court properly determined, such legislative approval of the CBA cannot be viewed as a ratification of discrimination:

> The legislature's actions in approving the CBA do not translate into a determination of the legality of the terms of the CBA as it relates to sexual orientation discrimination. Although the legislative committee stated its wish not to extend benefits to domestic partners, commentary in the legislative history of the most recent CBA does not amount to a legislative overruling of a statute, nor does this allow either the State or the legislative committee to circumvent statutory law.

S. App. at 52. The Superior Court's construction of the Legislature's obligations under RSA 21-I:30 comports with the tenet that the Court should construe statutes so as not to conflict. See State v. Henderson, ---N.H.---, 907 A.2d 968, 970 (2006) ("When asked to interpret two statutes that deal with similar subject matter, we construe them so that they do not contradict each other and so that they lead to a reasonable result and effectuate the legislative purpose of the statute.").

Further, nothing in the terms of RSA 21-I:30 prevents the State from providing benefits to Bedford's and Breen's families. The statutory language makes clear that the State must provide health benefits "for each state employee," "including spouse and minor, fully dependent children." Id. Though specifically requiring payment of premiums for spouses and children, the statute's use of the word "including" indicates that the statute does not limit provision of benefits to only spouses and children. See Conservation Law Found. v. N.H. Wetlands Council, 150 N.H. 1, 5-6 (2003) ("including" indicates that factors listed are not an exhaustive list, but "limits the items intended to be covered by the rule to those of the same type as the items specifically listed"). Rather, the Legislature has made clear its purpose of providing health benefits "for New Hampshire state employees and their families." RSA 21-I:26. Thus nothing prevents the inclusion of employees' same-sex partners within that mandate.

3. The State cannot rely on cost as a justification for its discrimination.

For the first time, on appeal, the State has claimed that the additional costs of providing equal family benefits to gay and lesbian employees justifies the State's discrimination. Having not previously raised this justification to either the Commission or the Superior Court, the State has waived its ability to make this argument. See RSA 354-A:22 ("No objection that has not been urged before the commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances."); Appeal of

Pelleteri, 152 N.H. at 811 (appellant precluded from raising legal claim not presented to administrative body); Town of Nottingham v. Newman, 147 N.H. 131, 137 (2001) (defendant who lost below barred from raising new argument on appeal); McKenzie v. City of Berlin, 145 N.H. 467, 471-72 (2000) (barring defendant from raising new defense on appeal it had not raised below).

Even if the Court does consider this justification, the State's reliance on the supposed cost of equal treatment cannot justify discrimination. See Los Angeles Dep't of Water & Power v. Manhart, 435 U.S. 702, 716-17 (1978) (cost not available as a defense to federal discrimination claims); E.E.O.C. v. Ind. Bell Tel. Co., Inc., 256 F.3d 516, 523 (7th Cir. 2001) ("arguments that expense justifies discriminatory conduct met their Waterloo in [Manhart]"); see also Plyler v. Doe, 457 U.S. 202, 227 (1982) (citations omitted) ("[A] concern for the preservation of resources standing alone can hardly justify the classification used in allocating those resources. The State must do more than justify its classification with a concise expression of an intention to discriminate."); id. at 249 (dissenting opinion)("fiscal concerns alone could not justify ... an arbitrary and irrational denial of benefits to a particular group of persons"). Rather than establishing a legitimate non-discriminatory purpose for the State's unequal treatment of Bedford and Breen, the State's reference to the discussions of cost by those involved in the collective bargaining process provide evidence of the State's intent to exclude and discriminate. State's Br. at 15-16; S. App. at 58-65.

Because Bedford and Breen have established that the State's denial of family benefits discriminated against them on account of sexual orientation, and because the State cannot justify its disparate treatment, this Court should affirm the Superior Court's reversal of the Commission's finding of no probable cause.

II. The State's Choice Of Marriage As An Eligibility Criterion For Employment Benefits Has A Severe Disparate Impact On Gay And Lesbian Employees.

Even if, arguendo, the Court views the State's denial of benefits to Bedford and Breen as facially neutral, the State nonetheless violated RSA 354-A:7 because its conditioning of benefits on marriage has a discriminatory disparate impact on gay and lesbian employees. 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."). Although this Court has not previously considered a disparate impact claim under RSA 354-A:7, both the Commission and the Superior Court evidently recognized and applied this clearly established framework of the anti-discrimination paradigm. See S. App. at 55.[13] Further, similar federal statues and those of other states clearly establish this concept. See Franklin Lodge of Elks v. Marcoux, 149 N.H. 581, 586-87 (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., 149 N.H. 371, 378 (2003) (When presented with "an issue of first impression under RSA chapter 354-A, we rely upon cases developed under Title VII to aid in our analysis.").

To succeed on a disparate impact claim, Bedford and Breen must identify the challenged employment policy, and must demonstrate the State's use of the policy, the disparate impact on a protected status, and a causal relationship between the identified practice and the disparate

[13] In other contexts, the Commission has recognized that facially neutral policies or job requirements may have an impermissible adverse impact in its regulations. See N.H. Code Admin. R. [Hum] 403.01, B. App. at 7 (use of height and weight requirements have an adverse impact on different sexes and thus use of such requirements may constitute sex discrimination); N.H. Code Admin. R. [Hum] 405.03, B. App. at 7 (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).

impact. Steamship Clerks, 48 F.3d at 601. Once Bedford and Breen have done so, the State faces the burden of demonstrating that the challenged policy is consistent with business necessity. See id. at 602. Assuming, arguendo, the State can make that showing, Bedford and Breen may nonetheless prevail by establishing "that some other practice, without a similarly undesirable side effect, was available and would have served the defendant's legitimate interest equally well." Id. See also 42 USC § 2000e-2(k) (establishing burden of proof in disparate impact cases under Title VII). Applying these shifting burdens, Bedford and Breen plainly demonstrate the State's disparate impact discrimination on account of their sexual orientation.

A. Bedford And Breen State A Claim Of Disparate Impact Discrimination.

As the Superior Court correctly concluded, S. App. at 56, Bedford and Breen straightforwardly meet the burden of setting forth a prima facie claim of disparate impact discrimination. 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 State's eligibility requirement 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, and the cause of that disparate impact is the State's choice of criterion for extending benefits.

Courts across the country have recognized that conditioning benefits discriminates on the basis of sexual orientation. In Levin, the New York Court of Appeals reinstated a claim of

housing discrimination by gay and lesbian medical students precluded from living in student housing with their committed same-sex partners because they were not married. See Levin, 754 N.E.2d at 1103-06. As Chief Judge Kaye explained,

> [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. Just as that Court concluded that the university denied gay and lesbian students equal access to family student housing, so, too, does the State here deny gay and lesbian employees equal access to family employment benefits.[14]

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. See Tanner v. Oregon Health Scis. Univ., 971 P.2d 435, 448 (Or. 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 State's attack on Tanner, State's Br. at 30, misconstrues the Oregon Court of Appeals's analysis[15] and ignores a crucial difference between the relevant statutory schemes in

[14] The State's assertion that RSA 354-A:7 is not "clearly directed at sexual orientation protections," State's Br. at 30, so as to distinguish it from the nondiscrimination provision at issue in Levin, flies in the face of both the statutory text and legislative history of RSA 354-A. See § I(A)(1), supra.

[15] The State misattributes this decision to the Oregon Supreme Court. See State's Br. at 30.

New Hampshire and Oregon. That court's constitutional analysis turned on a determination that, despite finding a lack of intent to discriminate, the university's limitation of family benefits to married employees had "the undeniable effect of doing just that." Id. at 447.[16] This analysis applies directly to this Court's consideration of the State's policies. While the Oregon Court did deny a statutory claim, it did so because, despite having concluded that "there can be no question but that the effect of [the University's] practice of denying insurance benefits to unmarried domestic partners, while facially neutral as to homosexual couples, effectively screens out 100 percent of them from obtaining full coverage for both partners," id. at 443, that statute contained an exemption from liability for bona fide employee benefits plans. Id. at 444. No such exemption exists in RSA 354-A:7.

The State's reliance on other cases that deny benefit claims under distinctly different non-discrimination statutes from RSA 354-A:7 is similarly unpersuasive.[17] See State's Br. at 24-27. Unlike RSA 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., Hinman v. Dep't of Pers. 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 Council of AAUP Chapters v. Rutgers, 689 A.2d 828, 832 (N.J. Super. Ct. App. Div. 1997) (concluding that unambiguous statutory exception in the state non-discrimination law that exempted bona

[16] The Plaintiffs-Appellees were unable to verify the State's reference to pre-existing Oregon constitutional case law finding "no unlawful employment practice where the insurance policy at issue excluded unmarried couples without regard to sexual orientation," State's Br. at 30, in the Tanner decision. Such a statement would seemingly undermine that Court's ultimate conclusion in the case.

[17] For example, the non-discrimination provision in Ross v. Denver Dep't 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. RSA 354-A:25 ("The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof.").

fide benefits and insurance programs from liability precluded claim that non-discrimination law should override a benefits statute which expressly limited coverage to "spouses").

Other cases considered statutory schemes for employment-related benefits that differ from New Hampshire's by expressly limiting family benefits to "spouses." See Phillips v. Wis. Pers. Comm'n, 482 N.W.2d 121, 127 (Wis. Ct. App. 1992) (finding insurance statute restricted benefits to spouses, thus precluding sexual orientation discrimination claim); 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 "functional spouses" or challenge the constitutionality of these limiting definitions. Bedford and Breen face no such burden because New Hampshire law does not restrict benefits to spouses only. See § I(C)(2), supra. Bedford and Breen do not seek to qualify for benefits as "spouses"; rather, they challenge their total exclusion from benefit eligibility due to the State's voluntary decision to select marriage as the defining benefit criterion.

Further, none of the authorities relied upon by the State, State's Br. at 24-27, analyzes the disparate impact of the marriage-related benefit policies on gay and lesbian employees. See Ross v. Denver Dep't of Health and Hosps., 883 P.2d 516, 519-20 (Colo. Ct. App. 1994) (addressing disparate treatment only); Phillips, 482 N.W.2d at 126 (same); Beaty v. Truck Ins. 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 XIV, 52 Cal. 3d 1142, 1170-75 (1991)); Hinman, 167 Cal. App. 3d at 523 (addressing disparate treatment only); Rutgers, 689 A.2d at 830-31 (same); Miller v. C.A. Muer Corp., 362 N.W.2d 650 (Mich. 1984) (holding that anti-nepotism

policies do not classify based on whether a person is married in violation of marital status discrimination prohibition).

Finally, the State curiously relies on wholly inapposite authorities in an effort to excuse its discrimination. The State has cited two cases concerning municipal home rule authority that have nothing to do with the statutory scheme at issue here, adopted state-wide by the Legislature. See State's Br. at 24 (citing Lilly v. City of Minneapolis, 527 N.W.2d 107 (Minn. Ct. App. 1995))[18] and at 31 (citing Connors v. City of Boston, 430 Mass. 31 (1999)). These courts found that the subject municipalities could not provide family benefits to gay and lesbian employees because controlling state statutes defined "dependents" in a manner that prevented the extension of benefits to unmarried partners. Unlike the statutes at issue in these cases, New Hampshire's statutes do not contain a limiting definition that constrains the State's ability to provide equal benefits to gay and lesbian employees for their families. See § I(C)(2), supra. The State's authorities simply do not address the present situation: The State has obligated itself to abide by a statewide non-discrimination law and the applicable state benefit scheme is capacious enough to allow the State to provide family benefits on a non-discriminatory basis.

Similarly inapposite is the State's assertion that lawsuits under state non-discrimination laws against private employers for family benefits are infrequent or nonexistent. See State's Br. at 31 (citing law review article on ERISA pre-emption). The State makes this assertion to bolster its claim that claims of sexual orientation discrimination concerning employment benefits do not lie under state nondiscrimination laws like RSA. 354-A:7. Yet, the frequency of such lawsuits

[18] Although the State 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 the State's arguments here. Id. at 721 ("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.")

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).[19] 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. No such statutory exemption exists in New Hampshire's Law Against Discrimination. See RSA. 354-A:1 et seq. Consequently, the State's benefits plan is not exempt from RSA. 354-A:7, and the State's extraneous reference to the infrequency of lawsuits challenging discriminatory ERISA benefit plans under state non-discrimination laws does not support their defense.

The State cannot avoid confronting the discriminatory impact of its choice of eligibility criterion for family benefits on its gay and lesbian employees, who are completely precluded from meeting that condition.

B. The State Cannot Demonstrate That This Choice Of Eligibility Criteria Is Consistent With Business Necessity.

With Bedford and Breen having established their prima facie case of disparate impact discrimination, the burden shifts to the State of demonstrating that the challenged policy is consistent with business necessity. See Steamship Clerks, 48 F.3d at 602. To meet this standard, the State must show that its choice of marriage as the eligibility requirement for family benefits "is reasonably necessary to achieve an important business objective." Donnelly v. R.I. Bd. of

[19] 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, 96-97 (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 nondiscrimination laws when it comes to discrimination in these ERISA plans. See Foray v. Bell Atlantic, 56 F. Supp. 2d 327, 329 (S.D.N.Y. 1999) (noting dismissal of sexual orientation discrimination claim relating to benefits based on ERISA preemption).

Governors for Higher Educ., 929 F.Supp. 583, 593 (D.R.I. 1996) (noting that "consistent with business necessity" burden "requires something less than a showing that the challenged practice is essential to the conduct of the employer's business but something more than a showing that it serves a legitimate business purpose,"), aff'd 110 F.3d 2 (1st Cir. 1997). The State cannot meet this burden. Though the State claims that the Superior Court failed to fully analyze the business necessity prong of the disparate impact analysis, State's Br. at 27, 29, in fact, the Superior Court concluded that the only justifications advanced by the State below could not sustain the discrimination. See S. App. at 56. These justifications related to the collective bargaining process and administrative rules, which, as discussed at § I(C)(1), (2), supra, do not suffice to justify the State's discrimination. Having failed to present any other justification to the Commission or the Superior Court, the State has waived its ability to claim any other business necessity as motivating the challenged practice. See RSA 354-A:22; authorities cited, § I(C)(3), supra.

Even if the State may suggest new business related reasons for the discriminatory policy, the State's claim that "the sought-after benefits in this case would advantage someone … who neither the State nor the Petitioners are legally obligated to benefit," State's Br. at 28, is neither true nor sufficient to justify the disparate impact.[20] As RSA 21-I:30 implicitly recognizes, the State provides benefits to the employee to enable her to care for her family. See id. ("The state shall pay a premium for each state employee … including spouse and minor, fully dependent children") (emphasis added). The Legislature made this purpose clear in RSA 21-I:26, which states that the purpose of these benefits is to "provide permanent group life insurance and group hospitalization, hospital medical care, surgical care and other medical and surgical benefits for

[20] Notably, the State has not even argued that these policies are "consistent with business necessity," as required under the disparate impact test, see Steamship Clerks, 48 F.3d at 602, but merely states that "the State has a legitimate business purpose for its policy." State's Br. at 28.

New Hampshire state employees and their families, … [i]n view of the accepted value of group insurance to the well-being and efficiency of employees." Id. The State has conceded that Bedford and her partner and Breen and her partner each share a common home, a child, and a life entwined with emotional and financial interdependence. See State's Br. at 4; S. App. at 40. Having done so, the State cannot ignore that the provision of health insurance for Bedford's and Breen's committed partners amounts to a benefit for the employee.[21] Defending a marriage-based limitation on family benefits as serving the purpose of excluding those who have no legal relationship to one another is the definition of circular reasoning.

Further, the State's belated assertions of cost cannot justify the policy's discriminatory disparate impact. As discussed in § I(C)(3), supra, an employer cannot rely on cost alone as a defense to discrimination.

Moreover, the State has offered no evidence to support its contention that conditioning benefits on marriage is consistent with a cost-related business necessity. Yet the State must do more than ask this Court "to undertake a leap of faith. … If courts were to accept an employer's arbitrary ipse dixit as a satisfactory justification for retaining a policy that produces an invidiously discriminatory impact, [anti-discrimination laws] would be reduced to no more than a toothless tiger." Steamship Clerks, 48 F.3d at 607. See also Banks v. City of Albany, 953 F. Supp. 28, 36 (N.D.N.Y. 1997) ("merely asserting a business necessity rationale does not suffice to prove the defense. … An employer's subjective belief that a practice is necessary, without any supporting evidence, is insufficient to justify a discriminatory practice.") (citations omitted). The State has offered no more than the statements of State and union negotiators, which evince no actual cost analysis, as proof that the limitation of family benefits would cost the State money,

[21] Nor does this justification in any way relate to the denial of leave benefits to Bedford and Breen, which more directly precludes them from exercising directly granted time to care for or mourn with their families.

which statements essentially boil down to their desire not to spend any money at all to provide family benefits to gay and lesbian employees. Thus, the State has not met its burden of proving "that the challenged practice is reasonably necessary to achieve an important business objective." Donnelly, 929 F.Supp. at 593.

C. Assuming, *Arguendo*, The State Has Proved That The Denial Of Benefits Is Consistent With Business Necessity, Alternative Non-Discriminatory Means Exist To Meet Any Such Needs.

Assuming, arguendo, that the State has not waived its ability to state a business necessity justification and that the State has articulated a legitimate business purpose, the burden shifts to Bedford and Breen to demonstrate that alternative non-discriminatory means exist to meet the State's concerns. See Donnelly, 929 F. Supp. at 589 (citing 42 U.S.C. § 2000e-2(k)(1)(A)(ii)). Because the State did not argue either of these supposed business necessities below, Bedford and Breen did not specifically offer examples of alternative non-discriminatory means in the context of this analytical framework. Regardless, Bedford and Breen made clear, and the Superior Court recognized, the availability of other means to ensure sufficient commitment and economic entanglement between an employee and her same-sex partner, including the system of domestic partner benefits provided by the University System of New Hampshire. See S. App. at 57, n.1 (noting UNH qualifications for domestic partner benefits); B. App. at 29-30.[22] In light of these alternative ways of addressing the State's concerns about benefits extending only to persons to whom the employee is obligated, the State cannot sustain its discriminatory denial of benefits to gay and lesbian employees.

[22] It bears mentioning that the State can also look to the examples provided by the thirteen other states, and the District of Columbia, which provide family benefits to their gay and lesbian employees. See Human Rights Campaign, Government Sector Domestic Partner Health Benefits Database, http://www.hrc.org/Template.cfm?Section=Search_the_Database&Template=/CustomSource/WorkNet/srch_list.cfm (listing California, Connecticut, Illinois, Iowa, Maine, Montana, New Jersey, New Mexico, New York, Oregon, Vermont and Washington, and the District of Columbia).

CONCLUSION

For the aforementioned reasons, Petitioners-Appellees respectfully request that this Court:

1. Affirm the decision of the Superior Court reversing the Commission's findings of no probable cause;
2. Remand to the Superior Court for determination of remedy; and
3. Provide such other relief as is just and proper.

The Plaintiffs-Appellees, by Attorney Karen L. Loewy, desire to be heard orally.

Respectfully submitted,

Petitioners-Appellees
Patricia Bedford and Anne Breen

By their counsel,

Date: December 28, 2006

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CERTIFICATE OF SERVICE

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

Dated: December 28, 2006

_____

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N.H. Rev. Stat. § 354-A:1- Title and Purposes of Chapter.

… A state agency is hereby created with power to eliminate and prevent discrimination in employment … because of age, sex, race, creed, color, marital status, familial status, physical or mental disability or national origin as herein provided; and the commission established hereunder is hereby given general jurisdiction and power for such purposes. In addition, the agencies and councils so created shall exercise their authority to assure that no person be discriminated against on account of sexual orientation.

N.H. Rev. Stat. § 354-A:2- Definitions.

In this chapter:
…

VII. "Employer" … shall include the state and all political subdivisions, boards, departments and commissions thereof.
…

XIV-a. "Sexual orientation" means having or being perceived as having an orientation for heterosexuality, bisexuality, or homosexuality. This definition is intended to describe the status of persons and does not render lawful any conduct prohibited by the criminal laws of this state or impose any duty on a religious organization. This definition does not confer legislative approval of such status, but is intended to assure basic rights afforded under this chapter.
…

N.H. Rev. Stat. § 354-A:7- Unlawful Discriminatory Practices.

It shall be an unlawful discriminatory practice:

I. For an employer, because of the age, sex, race, color, marital status, physical or mental disability, religious creed, or national origin of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification. In addition, no person shall be denied the benefit of the rights afforded by this paragraph on account of that person's sexual orientation.
…
VI. (a) For the purposes of this chapter, the word "sex" includes pregnancy and medical conditions which result from pregnancy.
…

N.H. Rev. Stat. § 354-A:21- Procedure on Complaints.

…

II. (a) … When the investigating commissioner finds no probable cause to credit the allegations in the complaint, the complaint shall be dismissed, subject to a right of appeal to superior court. To prevail on appeal, the moving party shall establish that the commission decision is unlawful or unreasonable by a clear preponderance of the evidence. The findings of the investigating commissioner upon questions of fact shall be upheld as long as the record contains credible evidence to support them. If it reverses the finding of the investigating commissioner, the superior court shall remand the case for further proceedings in accordance with RSA 354-A:21, II, unless the complainant or respondent elects to proceed with a hearing in superior court pursuant to RSA 354-A:21-a.
…

N.H. Rev. Stat. § 352-A:22 Judicial Review and Enforcement

I. Any complainant, respondent or other person aggrieved by such order of the commission may obtain judicial review of the order, and the commission or any interested person may obtain an order of court for its enforcement, in a proceeding as provided in this section. Such proceeding shall be brought in the superior court of the state within any county in which the unlawful practice which is the subject of the commission's order occurs or in which any person required in the order to cease and desist from an unlawful practice or to take other affirmative action resides or transacts business.

II. Such proceeding shall be initiated by the filing of a petition in such court, together with a written transcript of the record upon the hearing before the commission in the case of a petition for judicial review, and issuance and service of an order of notice as in proceedings in equity. The court shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony and proceedings set forth in such transcript an order or decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the commission, with full power to issue injunctions against any respondent and to punish for contempt of court. No objection that has not been urged before the commission shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. In petitions to enforce commission orders, the court may, in its discretion, award the complaining party reasonable attorney's fees and costs.

III. Any party may move the court to remit the case to the commission in the interests of justice for the purpose of adducing additional specified and material evidence and seeking findings thereon, or in the alternative to move the court to accept such additional evidence itself, provided he shows reasonable grounds for the failure to adduce such evidence before the commission. The superior court shall have the authority to make all rulings of law, findings of fact and determinations of damages and fines, if any, notwithstanding any such rulings, findings or determinations made by the commission. All such proceedings shall be heard and determined by

the court as expeditiously as possible and shall take precedence over all other matters before it, except matters of like nature. The jurisdiction of the superior court shall be exclusive and its final order or decree shall be subject to review by the supreme court in the same manner and form and with the same effect as in appeals from a final order or decree in proceedings in equity.

…

N.H. Rev. Stat. § 354-A:25 Construction

…The provisions of this chapter shall be construed liberally for the accomplishment of the purposes thereof…

N.H. Rev. Stat. § 457:1- Marriages Prohibited; Men.

No man shall marry his mother, his father's sister, mother's sister, daughter, sister, son's daughter, daughter's daughter, brother's daughter, sister's daughter, father's brother's daughter, mother's brother's daughter, father's sister's daughter, mother's sister's daughter, or any other man.

N.H. Rev. Stat. § 457:2- Marriages Prohibited; Women.

No woman shall marry her father, her father's brother, mother's brother, son, brother, son's son, daughter's son, brother's son, sister's son, father's brother's son, mother's brother's son, father's sister's son, mother's sister's son, or any other woman.

N.H. Rev. Stat. § 21-I:26- Purpose and Policy.

This subdivision is to provide permanent group life insurance and group hospitalization, hospital medical care, surgical care and other medical and surgical benefits for New Hampshire state employees and their families, and retired state employees and their spouses. In view of the accepted value of group insurance to the well-being and efficiency of employees on the part of small and large private employers and the other 5 New England states in obtaining benefits of this type of insurance for their employees, the state of New Hampshire implements this subdivision in order that the state shall compare favorably to the standards now commonly accepted by private employers and the state employees in the other 5 New England states by making available to state employees and their families and retired state employees and their spouses permanent group life insurance and group hospitalization, hospital medical care, surgical care and other medical and surgical insurance benefits.

N.H. Rev. Stat. § 21-I:30- Medical and Surgical Benefits.

I. The state shall pay a premium for each state employee and permanent temporary or permanent seasonal employee as defined in RSA 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.

…

N.H. Rev. Stat. § 21-I:42- Division of Personnel.

There is hereby established within the department of administrative services the division of personnel, under the supervision of an unclassified director of personnel appointed under RSA 21-I:2, who shall be responsible for the following functions in accordance with applicable laws:

I. Managing a centralized personnel operation which shall provide for the recruitment, appointment, compensation, promotion, transfer, layoff, removal and discipline of state employees.
…

VIII. Overseeing administration of all employee benefit programs other than those related to the New Hampshire retirement system.
…

XI. Administering those provisions of RSA Title VI affecting classified state employees which require administrative action by a central personnel organization.
…

XVI. Developing and implementing an equal employment opportunity program that will ensure the employment of all qualified people regardless of age, sex, race, color, sexual orientation, ethnic background, marital status, or physical or mental disability. This program shall include a review and revision of the job classification process and testing process to ensure that they are free from either conscious or inadvertent bias.
…

N.H. Rev. Stat. § 21-I:43 Rulemaking

I. … It is the intent of the general court that the director of personnel shall have the sole authority to adopt and interpret, subject to the appeals process established under this chapter, the rules provided for in this section. The commissioner shall review all proposed rules of the director and may comment on them in writing.

II. The director of personnel shall adopt rules, pursuant to RSA 541-A, which shall apply to employees in the classified service of the state, relative to:
…
(b) Compensation and rates for employee maintenance reimbursement.
…
(m) Attendance and leave.
…

N.H. Rev. Stat. § 273-A:3- Obligation to Bargain.

I. It is the obligation of the public employer and the employee organization certified by the board as the exclusive representative of the bargaining unit to negotiate in good faith. "Good faith" negotiation involves meeting at reasonable times and places in an effort to reach agreement on the terms of employment, and to cooperate in mediation and fact-finding required by this chapter, but the obligation to negotiate in good faith shall not compel either party to agree to a proposal or to make a concession.

…

N.H. Rev. Stat. § 273-A:9- Bargaining by State Employees.

I. All cost items and terms and conditions of employment affecting state employees in the classified system generally shall be negotiated by the state, represented by the governor as chief executive, with a single employee bargaining committee comprised of exclusive representatives of all interested bargaining units. Negotiations regarding terms and conditions of employment unique to individual bargaining units shall be negotiated individually with the representatives of those units by the governor.
…

42 U.S.C.A. § 2000e-2(k) Unlawful employment practices
…
(k) Burden of proof in disparate impact cases

(1)(A) An unlawful employment practice based on disparate impact is established under this subchapter only if--

(i) a complaining party demonstrates that a respondent uses a particular employment practice that causes a disparate impact on the basis of race, color, religion, sex, or national origin and the respondent fails to demonstrate that the challenged practice is job related for the position in question and consistent with business necessity; or

(ii) the complaining party makes the demonstration described in subparagraph (C) with respect to an alternative employment practice and the respondent refuses to adopt such alternative employment practice.

(B)(i) With respect to demonstrating that a particular employment practice causes a disparate impact as described in subparagraph (A)(i), the complaining party shall demonstrate that each particular challenged employment practice causes a disparate impact, except that if the complaining party can demonstrate to the court that the elements of a respondent's decisionmaking process are not capable of separation for analysis, the decisionmaking process may be analyzed as one employment practice.

(ii) If the respondent demonstrates that a specific employment practice does not cause the disparate impact, the respondent shall not be required to demonstrate that such practice is required by business necessity.

(C) The demonstration referred to by subparagraph (A)(ii) shall be in accordance with the law as it existed on June 4, 1989, with respect to the concept of "alternative employment practice".

(2) A demonstration that an employment practice is required by business necessity may not be used as a defense against a claim of intentional discrimination under this subchapter.

(3) Notwithstanding any other provision of this subchapter, a rule barring the employment of an individual who currently and knowingly uses or possesses a controlled substance, as defined in schedules I and II of section 102(6) of the Controlled Substances Act (21 U.S.C. 802(6)), other than the use or possession of a drug taken under the supervision of a licensed health care professional, or any other use or possession authorized by the Controlled Substances Act [21 U.S.C.A. § 801 et seq.] or any other provision of Federal law, shall be considered an unlawful employment practice under this subchapter only if such rule is adopted or applied with an intent to discriminate because of race, color, religion, sex, or national origin.

…

N.H. Code Admin. R. Hum 403.01- Height and Weight Requirements.

Because facially neutral height and weight requirements have an adverse impact due to different average sizes between the genders, sex discrimination shall include discrimination in hiring based on height and/or weight requirements unless such requirements are justified by business necessity.

N.H. Code Admin. R. Hum 404.01- Coverage.

(a) Religious discrimination shall include discrimination based on religious beliefs, practices and/or observances.
…

N.H. Code Admin. R. Hum 405.03- Job Requirements.

(a) Because the following job requirements might have an adverse impact on certain racial and/or national origin groups, employers shall scrutinize such requirements to make sure they are required by business necessity:
(1) Citizenship requirements;
(2) Height and weight requirements;
(3) Requirement that applicant have no arrest record;
(4) Fluency in English requirements;
(5) A rule that employees must speak only English on the job;
(6) Requirement or exclusion of foreign training or education.
(b) An inquiry regarding the characteristics listed in (a) above shall not in itself be unlawful, but the use of the information elicited by such inquiry shall constitute unlawful discrimination unless justified by business necessity.
(c) An inquiry regarding the factors listed in (a) above shall be unlawful if it has the purpose or effect of discouraging members of a particular racial or national origin group from applying for employment.

N.H. Code Admin. R. Per 102.21- 'Dependent care'

'Dependent care' means sick leave used to care for a person residing in the employee's household who may be legally claimed as a dependent for tax purposes.

N.H. Code Admin. R. Per 102.32- 'Immediate family'

'Immediate family' means a designation used to administer bereavement leave.
The term includes wife, husband, children, mother-in-law, father-in-law, parents, step-parents, step-children, step-brothers, step-sisters, grandparents, grandchildren, brothers, sisters, legal guardians, daughters-in-law, sons-in-law and foster children.

N.H. Code Admin. R. Per 1204.05- Allowable Uses of Sick Leave.
…

(b) An employee shall be entitled to utilize sick leave deducted from the employee's sick leave allowance for absences due to:
…

(5) Death in the employee's immediate family.
(c) An employee shall be entitled to utilize up to 5 days of sick leave per fiscal year for the care of dependents residing in the employee's household.
(d) An employee shall be entitled to utilize up to 4 days of accumulated sick leave for a death in the employee's immediate family, which leave shall not be counted against bonus computations.
…

1997 New Hampshire Laws Ch. 108 (H.B. 421)- SEXUAL ORIENTATION--DISCRIMINATIONS--CIVIL RIGHTS

AN ACT amending the law against discrimination to prohibit discrimination on account of a person's sexual orientation.

Be it Enacted by the Senate and House of Representatives in General Court convened:

108:1 Statement of Intent. While the state of New Hampshire does not intend to promote or endorse any sexual lifestyle other than the traditional marriage-based family, the legislature recognizes the need to provide protection in certain areas to individuals on account of their sexual orientation.

http://seiu1984.org/docUploads/statecontracta.pdf

2001 - 2003 COLLECTIVE BARGAINING AGREEMENT
STATE EMPLOYEES ASSOCIATION of NEW HAMPSHIRE LOCAL 1984 Service Employees International Union AFL-CIO, CLC
and
STATE OF NEW HAMPSHIRE

July 1, 2001

Article XI

SICK LEAVE

…

11.2. Allowable Uses: An employee may utilize his/her sick leave allowance for absences due to illness, injury, or exposure to contagious diseases endangering the health of other employees when requested by the attending physician, medical and dental appointments with prior approval, or death in the employee's immediate family and shall be deducted from his/her allowance on the basis of work days and not calendar days.
An employee may utilize up to five (5) days of sick leave per fiscal year for the purpose of providing care to an ill or injured parent residing in the employee's household, dependent, child, or foster child, or to accompany such person(s) to healthcare provider visits..
Dependent shall be defined as a person residing in the employee's household who may legally be claimed as a dependent for tax purposes.

11.2.1. Bereavement Leave: An employee may utilize up to four (4) days sick leave for a death in the employee's immediate family, provided that use of such leave shall not be counted against time accumulation as provided in 11.1.1.

11.2.2. Immediate Family: For the purpose of administering this provision, immediate family shall be defined as: wife, husband, children, mother-in-law, father-in-law, parents, step-parent, step-children, step-brother, step-sister, foster child, grandparents, grandchildren, brothers, sisters, legal guardian, daughter-in-law, and son-in-law.

…

Article XV

SEPARABILITY

15.1 In the event that any provision of this Agreement at any time after execution shall be declared to be invalid by any court of competent jurisdiction, or abrogated by law, such decision or law shall not invalidate the entire Agreement, it being the expressed intention of the Parties hereto that all other provisions not thereby invalidated shall remain in full force and effect.

http://seiu1984.org/docUploads/statecontracta.pdf

Article XIX

WAGES and BENEFITS

19.1. Full-time employees shall be entitled to all the rights and benefits provided by this Agreement. Part-time employees who are employed on other than a seasonal, irregular or on-call basis, shall be entitled to all the rights and benefits provided by the Articles of this Agreement that specifically reference part-time employees.

…

19.8. **Health Insurance:**

19.8.1. **Health Plans:** The Employer agrees to provide to full-time employees and their dependents a Point-of-Service (POS) health insurance plan and a Health Maintenance Organization (HMO) health insurance plan. An employee's eligibility and opportunity to elect available health care options shall be in accordance with the enrollment conditions of the respective plans. Part-time employees shall receive health insurance benefits where applicable by statute.

The Association acknowledges that the POS and HMO provider(s) shall be chosen by the Employer, and that the election by any employee(s) to participate in either plan shall not entitle said employee(s) to any further benefits not expressly provided for by this Agreement.

…

19.13. **Dental Insurance:** Full-time employees and their dependents shall be provided with dental insurance which shall be paid in full by the Employer. The level of benefits shall be at least comparable to the benefits provided by Delta Insurance, as provided in Appendix D. Part-time employees shall receive dental insurance benefits where applicable by law.

…

http://www.usnhhr.unh.edu/LaborRelations/AAUPContract2003-06.pdf

COLLECTIVE BARGAINING AGREEMENT
USNH Board of Trustees
University of New Hampshire
&
University of New Hampshire Chapter of
The American Association of University Professors
July 1, 2003 - June 30, 2006

…

Article 3
NON-DISCRIMINATION
3.1 Members of the bargaining unit shall not be discriminated against on the basis of sex, race, age, religion, color, marital status, sexual orientation, political affiliation, political belief or lawful political activity, veteran's status, handicap, national origin, membership or non-membership in the AAUP, or involvement in AAUP activities as long as any such status or activity is lawful.

…

Article 17
BENEFITS
17.1 Unless otherwise qualified by this agreement, unit members shall receive the benefits approved and outlined in Board of Trustee or USNH policy, as of 7/01/02. Medical benefit coverage is effective 1/01/04. This includes policy governing eligibility for, and contribution levels to, benefits. UNH shall accord to the same-gender domestic partners of bargaining unit members all benefits that are accorded to spouses of employees of the University. As described in USY V.A.5.2.

…

USNH Online Policy Manual

USY Administrative Board
V. Personnel Policies

A. Employee Benefits

…

2. Benefits Eligibility Contribution Levels -- Status Employment. All status USNH employees are eligible to participate in the benefits program as described below. The percent time of appointment and/or salary determines the basis of eligibility and contribution.

…

2.5 Definition of eligibility for coverage of USNH family members. USNH definitions for coverage of spouses and/or dependents are defined in plan summary documents for each benefit. Those documents will include coverage for heterosexual partners of USNH employees if they are legally married and same gender partners of USNH employees if they meet the definition noted below.

2.5.1 A benefits-eligible USNH employee may register a same-sex domestic partner. A registered same-sex partner who meets the criteria authorized below is considered equivalent to a legally recognized spouse for the purposes of USNH policies.

2.5.2 Registration of a same-sex domestic partner requires filing an affidavit certifying that the partnership meets the following criteria:

2.5.2.1 The partners have been each other's sole partner for at least six (6) months and plan to remain so indefinitely;

2.5.2.2 The partners are of the same gender;

2.5.2.3 Neither partner is legally married, or related by blood to a degree that would prohibit marriage, nor allowed to legally marry each other in the State of New Hampshire;

2.5.2.4 The partners are each at least eighteen (18) years of age and are mentally competent to consent to contract;

2.5.2.5 The partners are responsible for each other's common welfare and financial obligations as defined in the section on procedural requirements.

2.5.3 The USNH Human Resources office shall establish a procedure to register eligible partnerships. This will include a partnership form requiring the signature of both partners which shall be notarized.

2.5.3.1 The affidavit must indicate two (2) forms of evidence of responsibility for each other's common welfare and financial obligations, from the following list (items a-e): a) a legally executed domestic partnership agreement or contract; b) joint mortgage or joint ownership of primary residence; c) two (2) items from the following: (c.1) joint title to a motor vehicle; (c.2) joint banking account; (c.3) joint credit account; (c.4) joint lease; d) designation of the same-sex domestic partner as primary beneficiary on the employee's will, retirement contract or life insurance; e) designation of partner in durable property or health care powers of attorney.

2.5.4 Submission of affidavit. The completed affidavit will be submitted at the campus Personnel/Human Resources Office or System Human Resources Office.

2.5.4.1 Upon submission, the affidavit will be reviewed for accuracy and completeness, compliance with policy, for notarization of the affidavit, and for indication of evidence of responsibility for common welfare and financial obligations.

2.5.5 Termination of Same-Sex Domestic Partnership

2.5.5.1 The employee will notify the campus Personnel/Human Resources Office or System Human Resources Office of the termination of a domestic partnership by completing the form "Termination of Same-Sex Domestic Partnership" within thirty (30) days of the termination of the partnership.

2.5.5.2 The written termination statement affirms that a copy of the termination statement has been mailed to the other partner.

2.5.5.3 The original is to be filed at the campus Personnel/Human Resources Office or System Human Resources Office.

2.5.5.4 A same-sex domestic partner is eligible for COBRA medical and dental options upon termination of the same-sex domestic partnership.

2.5.6 Taxation. The University System will comply with all state and federal laws regarding the taxation of employee benefits.