STATE OF RHODE ISLAND
PROVIDENCE, S.C.

SUPERIOR COURT
P.C.C.A. No. 06-5997

****

DEBRA M. D'AMICO,
Plaintiff

v.

CRANSTON SCHOOL COMMITTEE, and RICHARD SCHERZA, in his capacity as Superintendent of Schools, Cranston Public Schools,
Defendants

PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Introduction

Plaintiff Debra M. D'Amico has filed this action against her employer, the Cranston School Committee and the Superintendent of Schools, for unlawfully discriminating against her in employment benefits due to her sexual orientation, in violation of Rhode Island General Laws § 28-5-7, when they denied her family leave to care for her same-sex partner. They did so because Ms. D'Amico is not married to her partner, despite the fact that gay and lesbian employees like Ms. D'Amico are not allowed to marry in Rhode Island.

In denying Ms. D'Amico's request for family leave benefits to care for her partner, Defendants have committed illegal sexual orientation discrimination. Under a disparate treatment analysis, Defendants' marriage requirement for eligibility for family leave benefits facially discriminates against Ms. D'Amico based upon her sexual orientation, because gay and lesbian citizens are not allowed to marry in Rhode Island. Defendants have chosen a criterion (marriage) for benefits that is directly conditioned upon a

person's sexual orientation. Moreover, Defendants are unable to offer a legitimate, non-discriminatory reason for imposing a marriage requirement for family leave. Alternatively, under a disparate impact analysis, Defendants' decision to impose a marriage requirement effectively excludes 100% of their gay and lesbian employees from eligibility for family leave benefits, while 100% of their heterosexual employees, even if they are not married, have the possibility of qualifying for such benefits by marrying. Defendants are likewise unable to justify this discriminatory impact on their gay and lesbian employees as a legitimate business necessity. As such, Ms. D'Amico asks this Court to enforce her statutory right to be free of discrimination in employment based on her sexual orientation and grant her requested relief.

Statement of Facts

Ms. D'Amico is in a committed and loving relationship with her partner Heather V. Paschoal. (Affidavit of Debra M. D'Amico In Support Of Plaintiff's Motion For Summary Judgment (hereinafter "D'Amico Aff."), ¶ 4.) They met in March 2001 and have been an exclusive and committed couple for approximately seven years. (Id.)

Ms. D'Amico and her partner have lived together in Pawtucket, Rhode Island since August 2002. (D'Amico Aff., ¶ 5.) They share a common home, expenses and household responsibilities with each other and no one else. (D'Amico Aff., ¶ 6.) They attend each other's family celebrations and employment social functions together, take vacations together and take care of each other when they are sick. (Id.) In 2003, Ms. D'Amico and her partner exchanged rings with the Greek symbol for eternity to symbolize their commitment to each other. (D'Amico Aff., ¶ 7.) Ms. D'Amico has

named Heather in her will as her "life partner" and has designated Heather as the beneficiary of her life insurance and retirement proceeds. (D'Amico Aff., ¶ 8.)

If Ms. D'Amico and her partner could marry each other under Rhode Island law, they would. (D'Amico Aff., ¶ 10.) They are not related by blood or marriage; neither are they below the age of consent to marry or married to anyone else. (D'Amico Aff., ¶ 9.) Yet, even though Ms. D'Amico considers Heather her spouse for all intents and purposes, Rhode Island does not permit same-sex couples to marry. (D'Amico Aff., ¶ 10.)

Employment History and Family Leave Benefits

Ms. D'Amico began working for the Cranston Public Schools in November, 1994 as a substitute teacher and later held other teaching assignments. (D'Amico Aff., ¶ 11.) She is presently a full-time social studies teacher at the Hugh B. Bain Middle School in the Cranston Public Schools, a position she has held for 10 years. (D'Amico Aff., ¶ 12.) As a full-time teacher with the Cranston Public Schools, she is eligible for employment benefits, as set out by the "Master Agreement Between the Cranston School Committee and the Cranston Teachers' Alliance Local 1704, AFT, September 1, 2002 to August 31, 2005" (hereinafter the "Master Agreement"). (Master Agreement, D'Amico Aff., ¶ 13 & Exh. 1.)

Article XX 8a of the Master Agreement provides for short term leaves of absences to care for a family member's illness as follows: "In case of illness in the immediate family (father, mother, spouse, son, daughter) or additional persons in the immediate household, a teacher may be allowed up to three (3) days with full pay." (Master Agreement, D'Amico Aff., Exh. 1.)

On Sunday, May 23, 2004, Ms. D'Amico's partner Heather experienced a severe and potentially life-threatening allergic reaction. (D'Amico Aff., ¶ 16.) Ms. D'Amico took Heather to the emergency room at Pawtucket Memorial Hospital at 11 p.m. that night. (D'Amico Aff., ¶ 17.) Heather was released from the emergency room at 6 a.m. the next morning. (Id.) However, Ms. D'Amico was unable to attend work that next day because she had stayed with Heather at the hospital the preceding night to provide her care and needed to continue doing so that next day. (D'Amico Aff., ¶ 18.) Specifically, there was still the dangerous risk that Heather's allergic symptoms could return, and Ms. D'Amico needed to watch over Heather in case that happened. (Id.)

However, when Ms. D'Amico asked to have her absence on May 24 designated as an absence due to illness in her family, under Article XX 8a, it was denied by the executive director for human resources. (D'Amico Aff., ¶ ¶ 19, 20, 21, & 22.) As a result, Ms. D'Amico and her union filed a grievance on June 2, 2004, over the denial of family leave to care for her partner, challenging Defendants' interpretation of the Master Agreement. (D'Amico Aff., ¶ 23.) Catherine M. Ciarlo, the Superintendent of the Cranston Public Schools, denied Ms. D'Amico's grievance on October 28, 2004, stating that "Article XX 8a of the Master Agreement addresses absences due to illness in the family and not non-related individuals living in the household." (D'Amico Aff., ¶ 24.)

The matter was then submitted to arbitration. (D'Amico Aff., ¶ 25.) On May 4, 2005, the Arbitrator issued her Decision and Award denying Ms. D'Amico's request for family leave after noting that the term "immediate family" was specifically limited in the Master Agreement to "father, mother, spouse, son, [or] daughter" and construing the term "additional persons in the immediate household" to include only persons related

"by blood or marriage." (Decision and Award, at 13, D'Amico Aff., Exh. 2.) Thus, the Arbitrator concluded that the Master Agreement did not provide Ms. D'Amico with leave to care for Heather, because they were not married. (Id. at 15.)

Complaint to the Rhode Island Commission for Human Rights and Present Action

Ms. D'Amico filed a Charge of Discrimination against the Cranston School Committee and the Superintendent of Schools (hereinafter the "Cranston Public Schools") with the Rhode Island Commission for Human Rights (hereinafter the "Commission") on May 19, 2005. (D'Amico Aff., ¶ 26.) In her Charge, she asserted that by conditioning leave on marriage in its interpretation of the Master Agreement, the Cranston Public Schools committed impermissible sexual orientation discrimination in violation of G.L. § 28-5-7. (Charge of Discrimination, D'Amico Aff., Exh. 3.) The Commission agreed with Ms. D'Amico and found that probable cause existed to believe that the Cranston Public Schools violated G.L. § 28-5-24.1(c) by denying family leave to Ms. D'Amico. (See Officer Gardner's Recommendation, D'Amico Aff., Exh. 4; August 1, 2006 Letter of Executive Director Michael D. Evora, D'Amico Aff., Exh. 5.)

Upon receiving the finding of probable cause, Defendants elected to terminate all proceedings before the Commission. (Notice of Election, D'Amico Aff., Exh. 6). After receiving the Notice of Right to Sue from the Commission, (Notice of Right to Sue, D'Amico Aff., Exh. 7), Ms. D'Amico filed a complaint with this Court on November 11, 2006, alleging that Defendants had discriminated against her in the terms and conditions of employment based on her sexual orientation in violation of G.L. § 28-5-7.

The Cranston Public Schools have refused and continue to refuse to provide Ms. D'Amico with leave to care for Heather because she is not married to Heather, even

though they cannot marry in Rhode Island because of their sexual orientation. (D'Amico Aff., ¶ 31.) As a result of the actions and policies of the Cranston Public Schools, Ms. D'Amico has suffered monetary damage in the amount of $336.21 in lost pay for the day she took to care for Heather and continues to suffer harm from being denied her statutory right to be free from employment discrimination. (D'Amico Aff., ¶ 33 & Exh. 2, at 8.)

Argument

I. Standard of Review

Summary judgment is required "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." R.I. Sup. Ct. R. Civ. P. 56(c). A non-moving party must demonstrate "by competent evidence the existence of a disputed material issue of fact and cannot rest on allegations or denials in the pleadings or on conclusions or legal opinions." Ritter v. Mantissa Inv. Corp., 864 A.2d 601, 604 (R.I. 2005) (quoting Taylor v. Mass. Flora Realty, Inc., 840 A.2d 1126, 1129 (R.I. 2004)).

Here, no material facts are in dispute, and as a matter of law, Defendants' conditioning of leave benefits on marriage violates Rhode Island's statutory prohibition against employment discrimination based upon sexual orientation where eligibility for marriage in Rhode Island is presently inextricably linked to sexual orientation. See G.L. § 28-5-7 (1956). As such, Ms. D'Amico is entitled to summary judgment.

II. By Conditioning Family Leave Benefits On Marriage, Defendants Unlawfully Discriminated Against Ms. D'Amico Based Upon Her Sexual Orientation In Violation Of G.L. § 28-5-7.

Defendants' use of marriage as an eligibility requirement for a benefit of employment is discriminatory, given that gay men and lesbians cannot presently marry in Rhode Island and that Defendants have refused to provide any alternative means by which employees in a same-sex relationship can also qualify for the benefit. Defendants have imposed a marriage requirement for leave benefits by both failing to include same-sex partners within the Master Agreement's enumeration of examples of "immediate family" and by construing the term "additional persons in the household" to exclude same-sex couples, simply because same-sex couples are not married. Defendants could have easily avoided this discriminatory treatment by recognizing the reality of modern family structures and construing the term "additional persons in the household" to include unmarried but committed domestic partners of employees, as proposed by Ms. D'Amico and her union at arbitration. (See Decision and Award, at 7, D'Amico Aff., Exh. 2.) Instead, Defendants insist that family leave be conditioned on marriage.

Under G.L. § 28-5-7, there are two ways an employer may commit unlawful discrimination. A disparate treatment claim arises when an employer treats an employee differently because of the employee's membership in a protected class. Russell v. Enterprise Rent-A-Car Co. of R.I., 160 F. Supp. 2d 239, 257 (D.R.I. 2001) (decided in context of Title VII of the Civil Rights Act).[1] Alternatively, a plaintiff

[1] When analyzing claims of discrimination under G.L. § 28-5-7, our state courts look for guidance under federal Title VII case law. See, e.g., Newport Shipyard, Inc. v. Rhode Island Commission for Human Rights, 484 A.2d 893, 897-98 (R.I. 1984)

establishes a disparate impact claim by pinpointing a specific employment practice that is seemingly neutral on its face but has a discriminatory effect on a protected class of people. Id. Under both analyses, Defendants have discriminated against Ms. D'Amico on account of her sexual orientation in violation of G.L. § 28-5-7. [2]

A. Defendants' Use Of A Marriage Prerequisite For Employment Benefits Constitutes Impermissible Disparate Treatment Of Gay And Lesbian Employees.

In order to prove disparate treatment, a plaintiff may either show direct evidence of discrimination or meet the burden-shifting test laid out in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (establishing standard for race-based claims under Title VII). Under either theory, Defendants have treated Ms. D'Amico differently because of her sexual orientation.

1. Conditioning benefits on marriage, on its face, directly discriminates based upon sexual orientation.

Given that same-sex couples cannot marry in Rhode Island, a marriage eligibility requirement, on its face, extends family leave benefits only to heterosexual employees, who are eligible for marriage, and not to gay and lesbian employees, who are ineligible for marriage. Such facial discrimination places sexual orientation at the heart of the distinction between Defendants' employees. In other words, extending benefits to employees based on whether the employee is married automatically forecloses benefits

[2] Whether Ms. D'Amico should be able to marry her same-sex partner in Rhode Island is a separate question from whether she should receive equal compensation to heterosexual employees under G.L. § 28-5-7 and is not presented here. She only argues that given the fact that state law does not allow her to marry her same-sex partner, her employer cannot then condition an employment benefit based upon being married without violating G.L. § 28-5-7.

to all gay and lesbian employees like Ms. D'Amico but does not automatically deny benefits to heterosexual employees.

Other courts have held that conditioning a benefit on marriage facially discriminates against gay men and lesbians. In Alaska Civil Liberties Union v. Alaska, 122 P.3d 781 (Alaska 2005), the Alaska Supreme Court ruled that providing employment benefits to different-sex spouses of public employees but not to same-sex domestic partners of plaintiffs violated the equal protection guarantees of the state constitution under rational basis review. Id. at 794. Even though the state argued that the benefit system classified employees based solely on marital status, the court instead found that such a classification was "facially discriminatory" based upon sexual orientation. Id. at 789. The court reasoned that "by restricting the availability of benefits to 'spouses,' the benefits programs 'by [their] own terms classif[y]' same-sex couples 'for different treatment.'" Id. at 789. Because gay men and lesbians could not marry, "the partner of a homosexual employee can never be legally considered as that employee's 'spouse' and, hence, can never become eligible for benefits." Id. at 789.

Similarly, in Bedford, et al. v. New Hampshire Community Technical College System, Nos. 04-E-229, 04-E-230, 2006 WL 1217283 at *10 (N.H. Super. Ct. May 3, 2006), a New Hampshire Superior Court found that two lesbian state employees had met their burden under a disparate treatment analysis of establishing that a similar benefit policy impermissibly discriminated on the basis of sexual orientation in violation of New Hampshire's anti-discrimination law. Similar to this case, the state in Bedford refused to provide health insurance and other family employment benefits to same-sex domestic partners because they were not married. Quoting Alaska, the court in Bedford

reasoned: "Same-sex unmarried couples . . . have no way of obtaining these benefits, whereas opposite-sex unmarried couples may become eligible for them by marrying. These programs consequently treat same-sex couples differently from opposite-sex couples." Id. at *7 (quoting Alaska, 122 P.3d at 788).[3]

Any contrary argument that the critical determinant of eligibility is not sexual orientation but rather marital status is simply disingenuous, when the ability to marry in Rhode Island is a perfect proxy for sexual orientation.[4] No gay or lesbian employee in a same-sex relationship can marry his or her partner under present Rhode Island law and, thus, no gay or lesbian employee can ever satisfy Defendants' eligibility requirement of marriage. Meanwhile, all heterosexual individuals in a different-sex relationship may obtain the family leave benefit to care for his or her sick partner by being married or by marrying. Such differential treatment therefore discriminates entirely based upon a person's sexual orientation. See Smith v. Knoller, No. 319532, Order Overruling Demurrer and Denying Motion to Strike, at *3, San Francisco County Superior Court (August 9, 2001) (finding that conditioning the right to bring an action under California's wrongful death statute upon marriage, when same-sex couples are absolutely precluded from marrying in California, presented an "insurmountable barrier

[3] In Bedford, the state had appealed to the New Hampshire Supreme Court but then withdrew its appeal and provided the required benefits to the plaintiffs and all other gay and lesbian employees in committed same-sex relationships. See Sarah Liebowitz, State drops fight over benefits for same-sex couples, Concord Monitor, May 08, 2007, http://www.concordmonitor.com/apps/pbcs.dll/article?AID=/20070508/REPOSITORY/705080336.

[4] Rhode Island law has recognized other areas where distinctions based upon a certain trait are simply a proxy for discrimination against a protected class. See, e.g., G.L. § 28-5-6(2) (inclusion of pregnancy discrimination within the ambit of prohibitions against sex discrimination); Crocker v. Peilch, No. CIV. A. PC 2000-1771, 2002 WL 1035424, at *4 (R.I. Super. May 9, 2002) (26-year mandatory retirement term is a proxy for age discrimination – "a thinly veiled attempt . . . to circumvent the prohibitions of [the anti-discrimination laws]").

to the right of a homosexual to bring an action for the wrongful death of his or her partner" and violated state equal protection guarantees); Tanner v. Oregon Health Sciences Univ., 971 P.2d 435, 448 (Or. Ct. App. 1998) (reasoning that so long as "[h]omosexual couples may not marry," conditioning employment benefits on marriage make it a "a legal impossibility" for gay men and lesbians to qualify for such benefits and finding violation of state constitutional equality protections).

Because Ms. D'Amico can show that Defendants' marriage requirement for family leave benefits directly and facially discriminates against her based upon her sexual orientation, this Court should find Defendants' in violation of G.L. § 28-5-7.

2. Ms. D'Amico can also show disparate treatment under the McDonnell Douglas burden-shifting test.

Under the McDonnell Douglas burden-shifting test, Ms. D'Amico may also prove disparate treatment under G.L. § 28-5-7 through indirect evidence. In order to make a *prima facie* showing of disparate treatment, Ms. D'Amico must show that: (1) she is a member of a class protected by the statute, (2) she is qualified for the benefit she sought, (3) despite her qualifications, her employer denied the requested employment benefits, and (4) her employer provided those benefits to similarly-situated employees outside of her protected class. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973) (establishing standard for race-based claims under Title VII). Ms. D'Amico easily meets these requirements for a *prima facie* case. Defendants then have the burden of articulating a legitimate nondiscriminatory reason for the policy – a burden they cannot meet.

Under the plain language of G.L. § 28-5-7, it is "an unlawful employment practice" to discriminate against an employee "with respect to . . . compensation, terms,

conditions or privileges of employment, or any other matter directly or indirectly related to employment" because of the employee's sexual orientation. G.L. § 28-5-7(1)(ii). Ms. D'Amico, as a lesbian, clearly falls within a protected class under the definition of sexual orientation. See G.L. § 28-5-6(15) (defining sexual orientation as "having or being perceived as having an orientation for heterosexuality, bisexuality, or homosexuality"); D'Amico Aff., ¶ 4. It is also undisputed that Ms. D'Amico, as a full-time employee at the time she requested the leave, is qualified for employment benefits, including family leave benefits, which are a form of "compensation." (Master Agreement, D'Amico Aff., Exh. 1.) Defendants nonetheless denied her request to use that benefit upon Heather's illness because Ms. D'Amico was not married to her Heather, even though, "because of" her sexual orientation, Ms. D'Amico is not allowed to marry in Rhode Island. (D'Amico Aff., ¶ 24.) As such, Defendants do not treat their gay and lesbian employees, such as Ms. D'Amico, the same as similarly situated heterosexual employees who may marry and therefore qualify for family leave benefits.[5]

[5] At the Commission below, Defendants compared apples and oranges by arguing that they treated Ms. D'Amico the same as similarly-situated employees outside her protected class – namely unmarried, heterosexual employees in a different sex relationship. Such a limited comparison, however, is misplaced where heterosexual couples may choose to marry and same-sex couples cannot marry in the state. As such, she is not similarly situated to unmarried heterosexual employees in a different sex relationship. See Bedford, WL 1217283 at *6 ("unmarried, heterosexual employees are not similarly situated to unmarried, gay and lesbian employees for purposes of receiving employee benefits"); Tanner, 971 P.2d at 447-48 (rejecting argument that same-sex couples are similarly situated to unmarried heterosexual couples); Foray v. Bell Atlantic, 56 F. Supp. 2d 327, 330 (S.D.N.Y. 1999) (dismissing claim by heterosexual employee challenging same-sex only benefit plan under Title VII on grounds that unmarried same-sex and unmarried different-sex couples are not similarly situated).

Instead, Ms. D'Amico more aptly compares to heterosexual employees who are married and are thus able to access family leave benefits to care for their spouses. Quite simply, Ms. D'Amico would marry Heather were she allowed to do so in Rhode

Because Ms. D'Amico is able to make a *prima facie* case of disparate treatment, Defendants must articulate a legitimate nondiscriminatory reason for their policy. McDonnell, 411 U.S. at 802. No adequate justification exists.

Defendants' desire to limit family leave benefits to married couples cannot serve as a nondiscriminatory reason because it simply restates the exclusion of same-sex couples without accounting for the fact that gay and lesbian employees are precluded from marrying. Such circular reasoning simply seeks to use discrimination to justify discrimination and cannot constitute a legitimate justification.

Nor can Defendants argue that they seek to limit the use of the benefit to care for close family members only. Defendants already provide leave to employees to care for family members related by blood who live in the household, no matter how distant the relation – e.g. even fourth cousins. (Master Agreement, D'Amico Aff., Exh. 1; Decision and Award, D'Amico Aff., Exh. 2.) The failure of Defendants to limit the category of family members related by blood in the household belies any potential justification Defendants have in ensuring that the leave is used for the benefit of sufficiently close family members.

However, even if Defendants are concerned about ensuring that employees use family leave benefits only for persons in sufficiently close relationships, the exclusion of committed and loving partners of gay and lesbian employees, such as Heather, defeats

---

Island. (D'Amico Aff., ¶ 10.) As such, she should be treated the same as heterosexual employees who have chosen to make the same marital commitment. She has not been treated the same because Defendants have chosen a qualification for benefit eligibility that is impossible for her to meet due to her sexual orientation.

rather than promotes that goal. Indeed, Rhode Island public policy has recognized the close and loving domestic relationships that same-sex couples form.[6]

Finally, Defendants cannot hide behind cost saving as a justification, when the leave is limited to three days a year for all employees, regardless for whom the employee takes the leave. (Master Agreement, D'Amico Aff., Exh. 1.) Rather than establishing a legitimate nondiscriminatory purpose for Defendants' unequal treatment of Ms. D'Amico, any justification discussing the additional cost of providing benefits to gay and lesbian employees only provides further evidence of discriminatory treatment of such employees.

B. Defendants' Use Of A Marriage Requirement Has An Impermissible Disparate Impact On Gay And Lesbian Employees.

Even if, arguendo, this Court were to find that Defendants' family leave benefit policy is facially neutral with regard to sexual orientation, Rhode Island law explicitly states that "[a]n unlawful employment practice prohibited by § 28-5-7 may be established by proof of disparate impact." G.L. § 28-5-7.2; see also E.E.O.C. v. Steamship Clerks, 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."). Good faith is not a defense to such a claim. Id. at 602.

[6] See, e.g., G.L. § 28-48-1 (mandating employers in Rhode to provide employees family leave to take care of their domestic partners); G.L. §§ 30-22-1, 3, & 6 (extending benefits to domestic partners of veterans); G.L. § 45-19-4.3 (providing death benefit to domestic partner of public safety officers); G.L. § 23-18.6.1-9 (allowing domestic partner to authorize anatomical gift of a decedent's body); G.L. §36-12-1(3) (defining domestic partner for purposes of state employment benefits).

In order to make out a *prima facie* disparate impact claim, Ms. D'Amico must demonstrate that the challenged employment policy results in a disparate impact on the basis of sexual orientation. See G.L. § 28-5-7.2(a)(1) (stating elements of a *prima facie* showing). As discussed below, Ms. D'Amico easily meets this *prima facie* showing. Defendants next have the burden to show that the challenged policy is required by business necessity, which is defined by statute as "essential to effective job performance." See id. This they cannot do. However, even assuming arguendo that Defendants can make such a showing, Ms. D'Amico nonetheless can still demonstrate that Defendants' professed rationale is merely pretext by showing "other practice[s], without a similarly undesirable side effect, [are] available and would . . . serve[] the defendant's legitimate interest equally well." Steamship Clerks, 48 F.3d at 602; see also 42 U.S.C. §2000e-2(k) (establishing burden of proof in disparate impact cases under Title VII).

1. Ms. D'Amico Is Able To Make A *Prima Facie* Showing That Defendants' Conditioning Of Family Leave Benefits On Being Married Disparately And Adversely Impacts Gay And Lesbian Employees.

Conditioning access to family leave benefits on marriage makes that benefit completely unavailable to 100% of gay and lesbian employees who cannot marry in Rhode Island. At the same time, all heterosexual employees may marry and thus take advantage of leave benefits. This blatant disparate impact is directly caused by Defendants' choice of a criterion that turns on marriage. Requiring an employee to be married in order to obtain benefits for his or her partner, therefore, constitutes classic disparate impact discrimination based on sexual orientation.

Courts and human rights agencies considering nearly identical circumstances to those presented by Ms. D'Amico's complaint have recognized the severely adverse impact a marriage requirement poses on gay and lesbian people. In Levin v. Yeshiva Univ., 754 N.E.2d 1099 (N.Y. 2001), the highest court of appeal in New York reinstated the sexual orientation discrimination claim of lesbian medical students challenging the school's housing policy, which restricted housing to medical students and their spouses and children. The lower court had failed to appropriately examine the policy in terms of those it benefited and those it excluded. On appeal, the high court reinstated the claim to allow the plaintiffs to demonstrate that the policy disproportionately burdened gay and lesbian students, thus violating protections against sexual orientation discrimination. As Chief Judge Kaye stated in Levin,

> [The defendant's] policy of providing partner housing to married students … 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 (concurrence). See also Amos et al. v. Town of West Hartford, Connecticut CHRO, Complaint Nos. 9910041, 9910198, 9910199, 9910200, 9910201, 9910202, Finding of Reasonable Cause and Summary, at 7 (Sept. 9, 1999) (ruling that same-sex couples excluded from family membership rate extended to married, heterosexual couples at town pool stated a viable claim of sexual orientation discrimination under Connecticut's public accommodations anti-discrimination laws because no same-sex couple could receive the family benefit rate and because "such a gross statistical disparity" created an inference of discrimination based on sexual orientation).

Specifically within the employment context, the court in Bedford held that "even if the petitioners had been unsuccessful in proving the policy to be facially discriminatory under a disparate treatment analysis, the petitioners have sufficiently demonstrated that the policy adversely affects gays and lesbians under a disparate impact analysis." Bedford at *10. The court reasoned that "the policy adversely impacted lesbians and gay men by using a criterion [marriage] which is predicated upon heterosexuality." Id. at *11; see also Tanner, 971 P.2d at 448 (holding that denial of 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).

Because all heterosexual employees have the ability to marry another person and receive family leave benefits to take care of that person should that person get sick, and because no gay or lesbian employees have the ability to marry their partners in Rhode Island and therefore receive leave to take care of them when in need, the disparate impact is stark. As such, Ms. D'Amico has met her burden of making a *prima facie* case of sexual orientation discrimination under a disparate impact analysis.

2. Defendants Cannot Demonstrate That This Choice of Eligibility Criteria Is Consistent With Business Necessity.

In order to overcome the discriminatory impact of using a marriage criterion for eligibility to care for an employee's committed partner, Defendants must demonstrate that this requirement is consistent with business necessity – i.e. "essential to effective job performance." G.L. § 28-5-7.2(c)(4). This they cannot do.

Defendants can make no showing that granting paid leave to Ms. D'Amico to care for her partner would render her unable to perform duties that are essential to effective job performance. Defendants already provide such leave to all employees to

care for household members related by blood and to heterosexual employees only to care for their spouses. By doing so, they have already determined that providing family leave benefits does not inhibit effective job performance of their employees. Defendants cannot now turn around and assert that effective job performance would be compromised by providing the same benefits to Ms. D'Amico to care for her partner, particularly when leave is capped at three days per year for all employees. (Master Agreement, D'Amico Aff., Exh. 1.)

Even assuming that Defendants could somehow argue that, as an initial matter, they were not required to provide family leave benefits to employees at all, as a matter of business necessity, once they did so, Defendants cannot justify their policy of unequal access to those benefits. Surely Defendants could not suggest that granting leave to gay and lesbian employees to care for their committed partners would render them unable to successfully carry out the duties of her job, while granting such leave to heterosexual employees to care for their spouses has no such effect.

Accordingly, Defendants must fail in their burden of proving the business necessity of excluding gay and lesbian employees from taking family leave to care for their committed partners.

3. Assuming arguendo that Defendants have proved that the denial of benefits is consistent with business necessity, alternative non-discriminatory means exist to meet any such needs.

Even assuming arguendo that Defendants can articulate a legitimate business necessity, the burden then shifts to Ms. D'Amico to demonstrate that alternative non-discriminatory means exist to meet Defendants' concerns. See Donnelly v. Rhode Island Board of Governors For Higher Education, 929 F. Supp. 583, 589 (D.R.I. 1996),

aff'd, 110 F.3d 2 (1st Cir. 1997) (citing 42 U.S.C. § 2000e-2(k)(1)(A)(ii)). Ms. D'Amico points to the availability of other means to ensure sufficient commitment and economic entanglement between an employee and her same-sex partner to approximate the status of marriage, including the system of domestic partner benefits provided by other state governments and school systems nationwide, including Rhode Island's state government system.[7] Such a remedy would not even require a revision of the Master Agreement language; Defendants could simply construe the contract to include same-sex partners within the definition of "addition person in the household," as Ms. D'Amico and her union proposed during arbitration. In light of these alternative ways of addressing any possibly legitimate and nondiscriminatory concerns, Defendants cannot sustain its discriminatory denial of benefits to gay and lesbian employees.

Conclusion

For the foregoing reasons, Plaintiff Debra M. D'Amico respectfully requests that the Court grant her Motion for Summary Judgment and grant the relief requested herein.

[7] See G.L. § 36-12-1(3) (defining domestic partner criteria for purposes of state employment benefits); see also http://www.vermontpersonnel.org/employee/pdf/dompartner.pdf (Vermont state government's domestic partnership application and policy for health and dental insurance); http://www.osc.state.ct.us/memoarchives3/2000memos/200013.htm (Connecticut's state government's domestic partnership policy for health and pension benefits); http://www.nh.gov/hr/documents/same_sex_domestic_partnership_affidavit.pdf (New Hampshire state government's domestic partnership affidavit for health insurance benefits); http://www.maine.edu/system/hr/benedp.php (University of Maine's domestic partnership policy for various employment benefits).

DATED: October 24, 2008

Respectfully submitted,

PLAINTIFF DEBRA M. D'AMICO
By her attorneys,

Lynette Labinger, Esq. / Bar No. 1645
Roney & Labinger, LLP
344 Wickenden Street
Providence, RI 02903
Phone: (401) 421-9794
Fax: (401) 421-0132
Labinger@Roney-Labinger.com

Janson Wu, Esq.
Karen Loewy, Esq.
Gay & Lesbian Advocates & Defenders
30 Winter Street, Suite 800
Boston, MA 02108
Phone: (617) 426-1350
Fax: (617) 426-3594

Admitted Pro Hac Vice