VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 99-76
WILLARD MILLER	)	

FINDINGS OF FACT, OPINION AND ORDER

On December 13, 1999, University of Vermont Assistant Professor Willard Miller ("Grievant") filed a grievance with the Labor Relations Board which alleged, among other things, that he was discriminated against based on sexual orientation, in violation of Sections 040.1 and 040.2 of the Officers' Handbook of the University and Section 961(6) of the State Employees Labor Relations Act, because the University denied full domestic partnership benefits to his female domestic/life partner of 18 years. The University of Vermont ("University") filed a motion to dismiss the grievance. On August 25, 2000, the Labor Relations Board issued a Memorandum and Order granting the University's motion to dismiss except that the Board denied the motion to dismiss with respect to Grievant's allegation that the denial of full domestic partnership benefits to his partner constituted the discriminatory application of a University rule or regulation prohibiting discrimination based on sexual orientation. 23 VLRB 205.

A hearing on the merits of Grievant's sexual orientation discrimination claim was held before Labor Relations Board Members Richard Park, Acting Chairperson; Carroll Comstock and John Zampieri on October 12, 2000, in the Board hearing room in Montpelier. Grievant represented himself. Attorney Nicholas DiGiovanni, Jr., represented the University. At the hearing, the parties filed a partial stipulation of facts. On November 13, 2000, the University filed a post-hearing brief. Grievant did not file a post-hearing brief.

FINDINGS OF FACT

1. The University is an educational corporation and instrumentality of the State of Vermont with its principal place of business in Burlington. Grievant is a faculty member of the University.

2. The University has a non-discrimination policy which provides in part:

> The University of Vermont and State Agricultural College is committed to a policy of equal employment opportunity and to a program of affirmative action in order to fulfill that policy. The University will accordingly recruit and hire into all positions qualified persons in light of job related requirements, and will not unlawfully discriminate against applicants and employees in employment matters on the basis of race, color, religion, national origin, sex, sexual orientation, disability, age or status as a disabled or Vietnam-Era Veteran, as these terms are defined under applicable law (Exhibit D).

3. The University provides certain of its faculty and other employees with certain benefits, including medical and dental plan benefits. The eligibility requirements and coverage limitations are set out in the terms of the University's Medical Plan and Dental Plan.

4. Prior to 1993, the University provided health benefit coverage to the spouses of its married employees but did not provide benefits to the same sex or different sex partners of unmarried employees. In 1993, the Labor Relations Board concluded that the University was in violation of its binding rule prohibiting discrimination based on sexual orientation by providing health benefit coverage to the spouses of its married employees, while denying the same coverage to the same sex domestic partners of its gay and lesbian employees. Grievance of B.M., et al, 16 VLRB 207 (1993). The Board made no judgment as to whether the University's medical benefits plan also should provide coverage for partners of unmarried heterosexual employees. Id. at 221.

5. As a result of the Board decision, the University changed its policy to provide insurance coverage and other benefits to partners of gay and lesbian employees. The University did not extend benefits to partners of unmarried heterosexual employees.

6. The University's Medical Plan makes benefits thereunder available to eligible University employees and their "dependents". The Medical Plan defines "dependent" to include the spouse of the employee (so long as not legally separated from the employee), the same sex spousal equivalent and certain unmarried children (Exhibit A).

7. The University's Dental Plan similarly makes benefits available to eligible University employees and their "dependents". The Dental Plan defines "dependent" to mean an employee's "lawful" spouse (so long as not divorced or legally separated), same sex spousal equivalent or unmarried children (Exhibits B and C).

8. To obtain dependent benefits, employees are required by the University to complete a Human Resources document entitled "Certification of Marriage or Spousal Equivalency for Those Unable to Marry Within the Provisions of Vermont State Law". A married employee has to certify that the person listed as husband or wife meets the definition of spouse. An employee with a same sex partner has to certify that the partner meets the definition of "same sex spousal equivalent", and the partner of the employee has to certify that the employee meets the spousal equivalent definition. The document provides that the "definition of spousal equivalent can be met only in the event that the spousal equivalent is of the same sex and marriage cannot be recognized within the State of Vermont or other governing state law." Included among the other conditions that have to be met for "same sex spousal equivalent" are "there must exist between the employee

and his/her same sex spousal equivalent a responsibility for each other's financial and general welfare equivalent to that established for married couples within the statutes of the State of Vermont or the state whose law otherwise applies", and the partners "would marry in the event that Vermont legislation were to be changed in such a way as to recognize marriage among same sex couples." (Exhibit E).

9. This policy remained unchanged until September 2000 when, as a result of the Vermont civil union bill, which went into effect July 1, 2000, the University announced a change in its policy. On September 25, 2000, University Human Resources Director Ron Frey issued a memorandum providing in pertinent part as follows:

> On July 1, 2000, Governor Howard Dean signed legislation which provides that same-sex couples may enter into civil unions which provide them with all of the legal benefits and responsibilities now afforded married couples.
>
> With the signing of this new legislation, same-sex couples now have a choice as to whether or not to enter into a legal agreement, which as does marriage (sic), obligate them for the financial debts and responsibilities of their life partner. Since health care related debts and responsibilities fall within this scope of responsibility, the University of Vermont and Board of Trustees have made the decision to address the circumstances of married couples and civil union couples consistently.
>
> Currently, married couples have or are required to certify that they are legally married. If they do not so certify, their partners may not receive spousal benefit entitlements. In developing equitable circumstances for same-sex partners all employees currently claiming spousal benefits for their same-sex partners will be asked to certify that they have entered into a civil union agreement as provided for within Vermont law.
>
> It is understandable that some same-sex couples need some time to consider their options. For this reason the University has decided to allow same-sex couples until December 31, 2001 to enter into a civil union agreement without loss of benefit coverage.
>
> This time period should allow couples to consider their alternatives in a meaningful way before entering into a civil union agreement or face the prospect of losing spousal and dependent coverage for their partner.

> In the meantime, all new employees are being required, at the time of hire, to certify that they are either married or have entered into civil union agreement in order to qualify for spousal and dependent benefit coverage.
>
> Exceptions will be granted for new employees coming to UVM from out-of-state, where civil union arrangements are not available. These employees will be afforded a period of 90 days after becoming employed by the University of Vermont or having qualified for residence in the State of Vermont, whichever comes first, in which to make a decision with respect to a civil union. If coverage for a same-sex partner is desired for this 90 day period, employees coming from out-of-state will be required to complete the same certification form that covers current employees with same-sex partner benefits.
> . . .
> (Exhibit 7)

10. Employees will be required to complete a different Human Resources document entitled "Certification of Marriage or Party to a Civil Union". The employee will have to certify that they are married or party to a civil union (Exhibit F).

11. Grievant requested, and was denied, the medical and dental insurance benefits for his different-sex domestic partner that are afforded spouses of employees and same-sex domestic partners under the terms and conditions of the University's Medical and Dental Plans.

12. For purposes of this case, the parties have agreed that Grievant is unmarried but is in a different-sex domestic partnership. The parties have agreed further that, if that partnership was a same sex domestic partnership, such partnership would otherwise meet the financial and other eligibility requirements for spousal equivalency.

13. The University has not extended benefits coverage to the partners of heterosexual unmarried employees because the University does not believe there is any legal obligation to do so, and due to cost considerations. If additional money is to go towards employee compensation, the University would prefer to dedicate the money to salaries rather than enhanced or expanded benefits.

14. Grievant has exhausted his internal University administrative remedies.

OPINION

Grievant contends that the University denial of full domestic partnership benefits to his female domestic/life partner of 18 years violates University rules prohibiting discrimination based on sexual orientation.

This case unfolds over two time periods. The first, when the grievance was filed, was during a time when the University provided benefits to the same sex domestic partners of its gay and lesbian employees if certain "spousal equivalency" tests were met. The second time period commenced in September 2000 when the University announced that, after a transition period, it will extend benefits to partners of employees only if employees certify either that they are married or have entered into a legal civil union under Vermont's recently-enacted civil union legislation. In this decision, we will analyze both time periods to determine whether the University discriminated against Grievant based on sexual orientation. We also will analyze Grievant's contention under both disparate treatment and disparate impact theories in discrimination cases.

Disparate Treatment

The central focus of inquiry in a disparate treatment case is always whether the employer is treating "some people less favorably than others because of" a characteristic such as sex, race, age, national origin or sexual orientation. Furnco Construction Corp. v. Waters, 438 U.S. 567, 577 (1978). Grievances of Choudhary, 15 VLRB 118 (1992). Grievance of Day, 14 VLRB 229, 286 (1991). Gamez v. Brandon Training School, 12 VLRB 160 (1989). To establish a disparate treatment claim, it is the aggrieved

employee's "task to demonstrate that similarly situated employees were not treated equally." Grievance of Butler, 166 Vt. 423, 431 (1997); *citing* Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 258 (1981).

In examining the time period prior to the enactment of the civil union legislation, the record is devoid of any evidence that the University treated Grievant less favorably than gay and lesbian employees because of his heterosexual sexual orientation. Grievant has not demonstrated that he was treated differently than similarly situated gay and lesbian employees. Prior to the enactment of the civil union legislation, Grievant was not similarly situated to gay and lesbian employees whose partners were extended health insurance and other benefits because they, unlike Grievant, were unable to marry their partner. Foray v. Bell Atlantic, 56 F.Supp.2d 327, 330 (S.D.N.Y. 1999).

The inability of gay and lesbian employees to marry their partners, unlike heterosexual employees, was a key component of the Labor Relations Board decision in Grievance of B.M., et al, 16 VLRB 207 (1993), issued at a time that the University was not extending benefits to partners of gay and lesbian employees. In concluding that the University was discriminating against gay and lesbian employees by not extending benefits to their domestic partners, the Board stated:

> . . . (H)eterosexual employees can marry their partners, and many obviously do, and thereby obtain benefits coverage for them. Meanwhile, gay and lesbian employees are unable to legally marry their domestic partners and, thus, inevitably suffer disproportionately to their heterosexual colleagues with respect to the terms of benefits coverage. Id. at 218.

Subsequent to the Board decision, the University began to extend benefits to partners of gay and lesbian employees who were in committed domestic partnerships that met certain standards. In so doing, the University established a criterion whereby

domestic partners certified that they "would marry in the event that Vermont legislation were to be changed in such a way as to recognize marriage among same sex couples."

Underlying the Board decision and the subsequent University policy was the fundamental difference between gay and lesbian employees and heterosexual employees, in the context of extension of benefit to domestic partners, of the inability of gay and lesbian employees to marry. While heterosexual employees such as Grievant could make a choice whether to marry their partners, gay and lesbian employees were unable to enter into a legal union with their partners. Under such circumstances, Grievant was not similarly situated to the gay and lesbian employees. The policy on extension of health insurance benefits to partners reflected and remedied differences between gay and lesbian employees and heterosexual employees, and does not discriminate between similarly situated employees. Foray v. Bell Atlantic, 56 F.Supp.2d at 330.

Similarly, Grievant was not subject to disparate treatment by the University after civil union legislation was enacted and the University policy changed as a result. Once the legislation was enacted, there no longer was a need for the detailed criteria for qualifying spousal equivalencies which had been developed after the Grievance of B.M., et al, case. Now, gay and lesbian employees can enter into a state-sanctioned civil union, and University policy has changed to ultimately allow extension of benefits to partners of gay and lesbian employees only if they enter into a civil union. Under this policy change, Grievant cannot sustain a claim he is being treated unequally to similarly situated gay and lesbian employees. Neither Grievant nor gay and lesbian employees can receive benefits for their partners pursuant to the new policy unless they are in a state-sanctioned union (i.e., marriage or civil union).

The fact that the new policy will not become effective until December 31, 2001, for current employees does not constitute discrimination against Grievant based on sexual orientation. We recognize that some partners of gay and lesbian employees will continue to be extended benefits for a period of time they have not entered into a civil union. However, it was reasonable for the University to provide time for same-sex couples to consider their options before entering into a civil union or face the prospect of the non-employee partner losing benefits coverage. This flexibility should not create additional, but transitory, obligations to expand benefits to heterosexual unmarried employees.

Disparate Impact

The Board has concluded that disparate impact theory is applicable to evaluating a sexual orientation discrimination claim. Grievance of B.M., et al, 16 VLRB at 216. Non-discrimination requirements prohibit "not only overt discrimination but also practices that are fair in form but discriminatory in practice." Id. Under the disparate impact theory, a facially neutral policy may be deemed in violation of non-discrimination requirements, without evidence of the employer's subjective intent to discriminate that is required in a "disparate treatment" case, if it has an adverse impact on a protected group. Id. Grievances of Scott, 22 VLRB 286, 303-04 (1999). A conclusion of disparate impact does not require that an employer practice has no impact on individuals other than the group claiming protection against discrimination for a prohibited reason, but requires only a disproportionate impact on a protected class as compared to other individuals. Grievance of B.M., et al, 16 VLRB at 217.

Once the employee demonstrates that the employer practice causes a disparate impact on a protected class, the practice is prohibited unless the employer can demonstrate that the practice is related to job performance and consistent with business necessity. Id. at 216. Generally, the expense of changing employment practices is not a business purpose that will validate the effects of an otherwise unlawful employment practice. Id. at 220.

In claiming discrimination based on sexual orientation discrimination, Grievant is a member of the protected class of heterosexual employees. Thus, to prevail on his discrimination claim, he must demonstrate the Employer's policy concerning extension of health, dental and other benefits eligibility to domestic partners of employees has a disproportionate impact on heterosexual employees compared to other individuals.

In examining the periods both prior to the enactment of the civil union legislation and after enactment when the University announced a policy change, the record is devoid of evidence that the University's policy has had a significant adverse impact on heterosexual employees as a group. In Grievance of B.M., et al, the Board concluded that the University's failure to extend benefits to partners of unmarried employees had a disproportionate impact on gay and lesbian employees compared to heterosexual employees. This was because heterosexual employees could marry their partners, which many did and thereby obtained benefits for them, while gay and lesbian employees were unable to marry their partners and thus had no partner coverage. 16 VLRB at 218. Unlike the gay and lesbian employees in Grievance of B.M., et al who could never marry and obtain partner benefits, many heterosexual employees have obtained benefits for their partners through being married. Under the circumstances, Grievant would have to present

evidence to demonstrate that heterosexual employees nonetheless have been adversely impacted by the University's policy on extension of benefits to partners of employees. This he has failed to do.

The fact University policy has resulted in benefits not being extended to domestic partners of unmarried heterosexual employees is insufficient to support a conclusion of disparate impact on a protected class determined by sexual orientation. This is because unmarried heterosexual employees are not a protected class by themselves. They are only part of the protected class of heterosexual employees.

In sum, under either a disparate treatment or disparate impact analysis, Grievant has not demonstrated that the University policy of providing health insurance and other benefits to the partners of gay and lesbian employees, but not to the partners of unmarried heterosexual employees like himself, violates University rules prohibiting discrimination based on sexual orientation.

ORDER

Based on the foregoing findings of fact and for the foregoing reasons, it is hereby ordered that the Grievance of Willard Miller is dismissed.

Dated this 24th day of January, 2001, at Montpelier, Vermont

VERMONT LABOR RELATIONS BOARD

_____
Richard W. Park, Acting Chairperson

_____
Carroll P. Comstock

_____
John J. Zampieri