VERMONT LABOR RELATIONS BOARD

GRIEVANCE OF:	)	
	)	DOCKET NO. 92-32
B.M., S.S., C.M. AND J.R.	)	

FINDINGS OF FACT, OPINION AND ORDER

Statement Of Case

On July 9, 1992, Attorney Beth Danon filed a grievance on behalf of University of Vermont ("Employer") employees B.M., B.B., S.S., C.M. and J.R. ("Grievants"). Therein, Grievants claimed that the Employer had discriminated against Grievants, who are gay and lesbian faculty, on the basis of their sexual orientation by refusing to extend medical benefits to Grievants' domestic partners, but extending those benefits to the spouses of their colleagues who are legally married. Grievants contended that, by depriving them of the same benefits provided to employees who are legally married, the Employer: 1) was violating its non-discrimination policies, rules and regulations which apply to compensation and benefits, and which provide that the Employer does not discriminate on the basis of sexual orientation in access to, treatment or employment in its programs or activities; and 2) was engaging in an unlawful employment practice proscribed by the Fair Employment Practices Act, 21 VSA §495 et seq. ("FEPA"), which prohibits employment discrimination on the basis of sexual orientation.

The Employer filed a motion to dismiss claims made by Grievant premised upon alleged violations of FEPA. By Memorandum and Order issued December 10, 1992, the Labor Relations Board

granted the Employer's motion to dismiss claims made by Grievant premised upon alleged violations of FEPA. 15 VLRB 503 (1992).

On December 9, 1992, Grievants filed a motion to amend their grievance to allege that the Employer is engaging in an unfair labor practice under the State Employees Labor Relations Act ("SELRA"), 3 VSA §901 et seq., in violation of §961(6) of SELRA, which prohibits discrimination on the basis of sexual orientation. The Employer did not object to the motion with the understanding that Grievants are not seeking relief retroactive prior to the effective date of the revision of 3 VSA §961(6) to include reference to discrimination based on sexual orientation. Given that Grievants had not requested such retroactive relief, the understanding of the Employer was consistent with the amended grievance as filed. Pursuant to the Employer's lack of objection to the Motion to Amend, the Labor Relations Board granted the motion.

Also, Grievants and the Employers agreed to a proposed order, for the Board's approval, providing that Grievants may keep their identities confidential in filing this grievance. The Board signed this order on March 1, 1993.

On February 18, 1993, the parties filed a partial stipulation of facts. On February 25, 1993, the Employer filed a Motion for Summary Judgment. The Board reserved judgment on this motion. On March 1, 1993, an evidentiary hearing and oral argument was held before Board Members Charles McHugh, Chairman; Catherine Frank and Louis Toepfer. Attorney Beth Danon represented Grievants. Attorney Karen McAndrew represented the Employer. Grievants withdrew B.B. as a grievant. The Employer indicated it was not contesting the admissibility of an

Affirmative Action/Equal Opportunity Policy statement made by Employer President George Davis even though the Employer did question its relevance. The Employer also stipulated that, for purposes of this grievance, the Board may assume that there is a class of employees of the Employer engaged in domestic relationships with same sex partners. The Findings of Fact contained herein are based on the stipulation of facts (and attached exhibits) of the parties, and the evidence introduced at the March 1 hearing.

In addition to oral argument made on March 1, the parties submitted pre-hearing and post-hearing briefs. The post-hearing briefs were filed on March 9, 1993.

FINDINGS OF FACT

1. The Employer is an educational corporation and instrumentality of the State of Vermont with its principal place of business in Burlington, Vermont.

2. There is a class of employees of the Employer engaged in domestic relationships with same sex partners.

3. Grievants are faculty members employed by the Employer. They are grieving on the basis that they are gays and lesbians, and the Employer is refusing to extend medical and dental benefits to Grievants' domestic partners.

4. The Employer provides its faculty and other employees with certain benefits, including medical and dental plan benefits. Eligibility requirements and coverage limitations are set out in the terms of the University's Medical Plan and Dental Plan. In addition to the plans themselves, a summary of benefits

is contained in the Officers' Handbook of the Employer, which contains the operating practices, procedures and policies concerning employees. The summary of benefits under the Medical and Dental Plans is contained in a section of the Handbook entitled "Benefit Programs For Officers of the University of Vermont" (Exhibit C).

5. The Employer's Medical Plan makes benefits thereunder available to 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, and certain unmarried children (Exhibit A, p. 7 and 44 of the Plan).

6. The Employer's Dental Plan similarly makes benefits available to 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) and unmarried children (Exhibit B, p.2 of the Plan).

7. The Employer has a non-discrimination policy contained in the Officer's Handbook which provides, in part, that:

> Applicants for admission and employment, students, employees, sources of referral of applicants for admission and employment, and all unions or professional organizations holding collective bargaining or professional agreements with the University of Vermont are hereby notified that the University of Vermont does not discriminate on the basis of race, sex, sexual orientation, handicap, color, religion, age, national origin, or Vietnam Veteran status in admission or access to, or treatment or employment in, its programs and activities. In addition, it is the policy of the University that sexual harassment is unacceptable and will not be tolerated (Exhibit C).

8. The provisions of the medical and dental plans with respect to the definition and coverage of "dependents" were implemented a number of years before the non-discrimination policy was implemented.

9. The University is at the present time self-insured with respect to Medical and Dental benefits.

10. Employer President George Davis issued a document entitled Affirmative Action/Equal Opportunity Policy Statement, University of Vermont, September 1, 1991 - August 31, 1992, which provided in pertinent part as follows:

> Universities, especially public universities, have the responsibility to provide leadership in enlightened social behavior. The University of Vermont is doubly obligated to express and demonstrate its commitment to Equal Employment and Educational Opportunity for all persons in our community, regardless of irrelevant factors such as race, sex, age, color, religion, national origin, sexual preference, disability, marital status, or status as a disabled or Vietnam-era veteran. I am personally deeply committed to these principles and am convinced that they are essential for a distinguished university.
>
> Each of us within the university community must not only labor to abide by the rules, regulations and policies of Equal Employment and Education Opportunity, but should also be conscious of our own individual responsibility. Each must ensure that all our actions are fair and equitable, and reflect the purpose and intent of Affirmative Action and Equal Employment and Educational Opportunity.
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> In order to be effective, Equal Employment Opportunity will affect all employment practices including, but not limited to, recruitment, hiring, transfers, promotions, benefits, compensation, training, educational opportunities, and terminations (Exhibit D).

11. Grievants requested and were denied medical and dental insurance benefits for their same-sex domestic partners as is afforded spouses of employees under the terms and conditions of the University's Medical and Dental plans.

12 Grievants have exhausted their internal University administrative remedies.

13. Grievants first filed a Petition for Grievance Hearing with the University's Faculty Grievance Committee. That Committee is comprised of seven members, five of whom are faculty members and two of whom are administrators at the University with

academic experience. The Faculty Grievance Committee makes findings and may also submit recommendations to the President of the University (Section 270, Officer's Handbook, Exhibit E).

14. On May 12, 1992, the Faculty Grievance Committee issued its findings and recommendation in the form of a letter to University President Thomas Salmon. The Committee unanimously found in favor of Grievants. The Committee concluded that excluding Grievants' same-sex domestic partners from health benefits coverage violated the Employer's non-discriminatory policy contained in the Officer's Handbook and the Affirmative Action/Equal Opportunity Policy Statement Exhibit F).

15. University President Salmon, by letter dated June 8, 1992, declined to accept the recommendations and conclusions of the Faculty Grievance Committee. In his letter denying the grievance, President Salmon concluded that the health care benefit plan did not discriminate on the basis of sexual orientation (Exhibit G).

OPINION

Grievants contend that the Employer has discriminated against them on the basis of their sexual orientation in violation of its own non-discrimination rules and regulations by denying medical and dental insurance benefits to their same sex domestic partners. Grievants also claim that the Employer's denial of benefits constitutes an unfair labor practice on the basis of sexual orientation, as proscribed by 3 VSA §961(6). We first address the claim concerning the alleged violation of the Employer's non-discrimination rules and regulations.

The Board has such adjudicatory jurisdiction as is conferred on it by statute. In re Grievance of Brooks, 135 Vt. 563, 570 (1977). In deciding grievances, the Board is limited by the statutory definition of grievance, Boynton v. Snelling, 147 Vt. 564, 565 (1977), which statutory definition provides:

> "Grievance" means an employee's, group of employees or the employee's collective bargaining representative's expressed dissatisfaction, presented in writing, with aspects of employment or working conditions under collective bargaining agreement or the discriminatory application of a rule or regulation, which has not been resolved to a satisfactory result through informal discussion with immediate supervisors. 3 VSA §902(14).

Since there is no applicable collective bargaining agreement here, Grievants must allege and prove the discriminatory application of a rule or regulation. In re Grievance of Gobin, ___ Vt. ___, slip op. at 3 (May 15, 1992). Failure of an employer to follow a binding rule constitutes an actionable grievance. Id.

Grievants allege that the Employer's denial of health insurance benefits to their domestic partners violates its binding rule that it will not discriminate on the basis of sexual orientation in how it administers its programs and activities. The Employer has adopted a non-discrimination policy, contained in its Officers Handbook, which provides that the Employer "does not discriminate on the basis of . . . sexual orientation . . . in access to, treatment or employment in, its programs and activities." It is apparent that the provision of medical and dental benefits constitute "programs" within the meaning of this non-discrimination policy since the summary of benefits under the medical and dental plans is contained in a section of the Handbook identified as "benefit programs". Further, it is clear that the Officers Handbook, the provisions of which were formally adopted as rules governing the administration of the University, constitute binding rules. Gobin, slip op. at 3-4. Thus, we conclude that it is a binding rule of the Employer not to discriminate on the basis of sexual orientation in its providing of health and dental benefits to its employees.

Our conclusion in this regard is reinforced by the Equal Opportunity Policy Statement issued by University President George Davis, which stated the commitment of the Employer to equal employment opportunity, regardless of "irrelevant factors" such as "sexual preference", and provided that equal employment opportunity "will affect all employment practices including . . . benefits, compensation . . ." Although the Employer takes the position that this policy statement is not relevant in this matter, because it is not a binding rule, we believe the Supreme

Court's Gobin decision refutes that position. In Gobin, the Court concluded that salary increase guidelines were binding rules even though they were issued autonomously by the Provost, without formal review, and were intended to "guide", not govern, the administration of the University. Gobin, slip op. at 4. The Court reasoned that the guidelines were virtual mirror images of a formally adopted regulation governing the procedure to be followed and did not merely indicate or outline future policy or conduct. Id.

Similarly here, the policy statement is best construed as generally mirroring the non-discrimination policy contained in the Employer's formally adopted Officer's Handbook by specifying programs and activities which the Employer considered to be included in its policy of non-discrimination. By identifying "benefits" and "compensation" as among those programs and activities, the President was reinforcing, for the guidance of administrators and employees, the Employer's stated commitment that medical and dental benefits would be provided to its employees without discrimination on the basis of sexual orientation.

Thus, the Employer is in violation of a binding rule by providing health benefit coverage to the spouses of its married faculty members, while denying the same coverage to the same sex domestic partners of its gay and lesbian faculty members, if such distinction constitutes discrimination on the basis of sexual orientation. Grievants make their claim of discrimination based

on a "disparate impact" theory. Such a theory has been developed under the non-discrimination provisions of Title VII of the Civil Rights Act of 1964, which theory we conclude is applicable to evaluating a sexual orientation discrimination claim.

Non-discrimination requirements prohibit "not only overt discrimination but also practices that are fair in form but discriminatory in practice." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971). Under the disparate impact theory, a facially neutral employment practice 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. Wards Cove Packing Co. v. Antonio, 490 U.S. 642, 645-46 (1989). 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. Griggs, 401 U.S. at 431; Section 703 of the Civil Rights Act of 1964 (42 U.S.C. §2000e-2), as amended by Section 105 of the Civil Rights Act of 1991.

Grievants contend that the Employer's exclusion of coverage of domestic partners of gay and lesbian employees from its health benefit programs has caused a disparate impact on the protected class of gay and lesbian employees. This contention is based on the fact that gay and lesbian employees cannot legally marry their domestic partners, and therefore can never qualify for the full benefits afforded their heterosexual colleagues who can marry their partners and qualify for spousal benefits.

The Employer contends that its health benefit plans does not discriminate against Grievants on the basis of their sexual orientation, but rather makes a distinction on the basis of marriage as defined by Vermont law. The Employer so reasons because, under the definition of "dependents" under its health benefit plans, benefits are not available to any individuals involved in significant relationships with employees, regardless of whether such relationships are homosexual, heterosexual, or otherwise. The Employer contends that, as a result, gay and lesbian employees are not being treated differently than similarly-situated unmarried heterosexual employees.

The Employer's argument misconstrues the thrust of the disparate impact theory. 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. A brief discussion of the Griggs case will demonstrate this principle.

In Griggs, black employees of a generating plant brought a claim of race discrimination, challenging the employer's requirement of a high school diploma or passing of aptitude tests as a condition of employment in or transfer to jobs at the plant. 401 U.S. at 427-28. The Court of Appeals rejected the employees' claim that these requirements, unless shown to be job-related, constituted race discrimination because they rendered ineligible a markedly disproportionate number of blacks. Id. at 429. The

U.S. Supreme Court reversed the Court of Appeals decision. The Court concluded that barriers to employment, which were not related to job performance and not consistent with business necessity, must be removed if they operated invidiously to discriminate on the basis of racial or other impermissible classification. Id. at 431. The Court indicated that good intent or absence of discriminatory intent does not redeem employment practices that operate as "built-in headwinds" for protected groups and are unrelated to job capability. Id. at 432. The thrust of non-discrimination requirements under a disparate impact theory are the consequences of employment practices, not the motivation. Id.

So too, here, the absence of discriminatory intent on the part of the Employer to discriminate against gay and lesbian employees on the basis of sexual orientation is not determinative. The consequences of the Employer's exclusion of unmarried domestic partners of employees from health benefits coverage is determinative. It is self-evident here that the consequences are that there is a markedly disproportionate impact on gay and lesbian employees compared to heterosexual employees. This is because heterosexual 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 terms of benefits coverage. Just as the exclusionary effect of the diploma and testing requirements

on some white employees did not bar a conclusion of adverse impact on black employees, the exclusion of the partners of unmarried heterosexual employees does not bar a conclusion of adverse impact on gay and lesbian employees. The disproportionate impact is determinative in both cases.

Nonetheless, the Employer, in reliance on contract construction rules, contends that the specific provisions of the medical and dental plans, and the Handbook, relating to coverage of "dependents" must prevail over the more general provisions of the non-discrimination policy. We disagree. The non-discrimination requirements must prevail over the specific components of the health benefit plans which conflict with non-discrimination requirements. Otherwise, the expressed purpose of the Employer's rules to prohibit discrimination based on sexual orientation in provision of such benefits would be frustrated. Grievance of Lowell, 15 VLRB 291, 324-25.

If the Employer intended to exempt employee benefit plans from its policy protecting employees from discrimination on the basis of sexual orientation, which policy was implemented a number of years after the applicable provisions of the benefit plans, it could have done so expressly. This is what the Vermont General Assembly did in amending the Fair Employment Practices in 1991 to prohibit discrimination on the basis of sexual orientation. 21 VSA §495(a). Simultaneous with that amendment, the legislature provided that 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". 21 VSA §495(f). The failure of the Employer to make such an express exemption in its non-discrimination policy lends support to our ultimate conclusion that no such exemption exists under its rules.

Also, the Employer requests that we take into account cost considerations in determining whether exclusion of same sex domestic partners of gay and lesbian employees from benefits coverage constitutes discrimination based on sexual orientation. The Employer has presented no evidence aiding us in ruling on such a business necessity defense. Under such circumstances, we follow the general rule that the expense of changing employment practices is not a business purpose that will validate the effects of an otherwise unlawful employment practice. Robinson v. Lorillard Corp., 444 F.2d 791, 800 (4th Cir. 1971).

In sum, the Employer is in violation of a binding rule by providing health benefit coverage to the spouses of its married faculty members, while denying the same coverage to the same sex domestic partners of its gay and lesbian faculty members. This constitutes discrimination on the basis of sexual orientation. Grievants have demonstrated that this employer practice causes a disparate impact on gay and lesbian employees in the provision of health and dental benefits, and the Employer has not demonstrated that the practice is related to job performance and consistent with business necessity.

We conclude that an appropriate remedy for this violation of a binding rule is to order the Employer to cease and desist from its blanket refusal to provide medical and dental plan coverage

for same sex domestic partners of its gay and lesbian employees, and to develop a plan providing non-discriminatory coverage. We believe it is impractical for us to provide the specific terms for such a plan, such as the definition of "dependent", and unwarranted to order the Employer to negotiate such a policy with the individual grievants. A general remedy by the Board also allows the Employer to consider whether its revised non-discriminatory benefits plan also should provide coverage for partners of heterosexual employees. We make no judgment on that issue in this case.

Given our conclusion, it is unnecessary to decide the unfair labor practice claim.

ORDER

NOW THEREFORE, based on the foregoing findings of fact and for the foregoing reasons, it is hereby ORDERED that the Grievance of B.M., S.S., C.M. and J.R. is SUSTAINED, and:

1. The University of Vermont shall CEASE and DESIST from its blanket refusal to provide medical and dental plan coverage for the same sex domestic partners of its gay and lesbian employees; and

2. The University shall develop and implement a revised medical and dental plan providing coverage, which does not discriminate on the basis of sexual orientation, within 60 days of this order.

Dated this 4th day of June, 1993, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

Charles H. McHugh, Chairman

Catherine L. Frank

Louis A. Toepfer