IN THE SUPREME COURT FOR THE STATE OF ALASKA

UNIVERSITY OF ALASKA, Appellant, v. MARK TUMEO and KATE WATTUM, Appellees.	) Supreme Court No. S-6898) Superior Court No.) 4FA-94-43 Civil

APPEAL FROM THE SUPERIOR COURT,
FOURTH JUDICIAL DISTRICT AT FAIRBANKS
Honorable Mary E. Greene, Presiding

BRIEF OF SPECTRUM INSTITUTE

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Filed: 10-10-95
By: Nadya Velus
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Const. Art. 12, s 6: Merit System.

The legislature shall establish a system under which the merit principle will govern the employment of persons by the State.

ALASKA STATUTES:

A.S. 39.25.010: State Personnel Act; Administration; Purpose of Chapter

(a) It is the purpose of this chapter to establish a system of personnel administration based upon the merit principle and adapted to the requirements of the state to the end that persons best qualified to perform the functions of the state will be employed, and that an effective career service will be encouraged, developed and maintained.

(b) The merit principle of employment includes the following:

(1) recruiting, selecting, and advancing employees on the basis of their relative ability, knowledge, and skills, including open consideration of qualified applicants for initial appointment;

(2) regular integrated salary programs based on the nature of the work performed;

(3) retention of employees with permanent status on the basis of the adequacy of their performance, reasonable efforts of temporary duration for correction in inadequate performance, and separation for cause;

(4) equal treatment of applicants and employees with regard only to consideration within the merit principles of employment; and

(5) selection and retention of an employee's position secure from political influences.

A.S. 39.25.160: State Personnel Act; Prohibitions

(a) A classified employee may not take an active part in the management of a political party above the precinct level.

(b) A person may not give, render, pay, offer, solicit, or accept money, services, or other valuable thing in connection with securing or making an appointment, promotion, or advantage in a position in the classified service.

(c) A person may not require an assessment, subscription, contribution, or service for a political party from a state employee.

(d) A person may not seek or attempt to use a political party endorsement in connection with an appointment or promotion in the classified service.

(e) An employee in the classified or partially exempt service who seeks nomination or becomes a candidate for state or national elective political office shall immediately resign any position held in the state service. The employee's position becomes vacant on the date the employee files a declaration of candidacy for state or national elective office.

(f) Action affecting the employment status of a state employee or an applicant for state service, including appointment, promotion, demotion, suspension, or removal, may not be taken or withheld on the basis of unlawful discrimination due to race, religion, color, or national origin, age, handicap, sex, marital status, change in marital status, pregnancy, or parenthood. In addition, action affecting the employment status of an employee in the classified service, including appointment, promotion, demotion, suspension, or removal, may not be taken or withheld for a reason not related to merit.

(g) Action affecting the employment status of an employee in the classified service or an applicant for a position in the classified service, including appointment, promotion, demotion, suspension, or removal, may not be taken or withheld on the basis of unlawful discrimination due to political beliefs.

(h) A person may not knowingly make a false statement, certificate, mark, rating, or report with regard to a test, certification, or appointment made under this chapter or in any manner commit a fraud preventing the impartial execution of this chapter and the personnel rules adopted under this chapter.

(i) A person may not obstruct the right of another person to examination, eligibility, certification, appointment, or promotion under this chapter.

A.S. 23.40.070: Public Employment Relations Act; Declaration of Policy

The legislature finds that joint decision-making is the modern way of administering government. If public employees have been granted the right to share in the decision-making process affecting wages and working conditions, they have become more responsive and better able to exchange ideas and information on operations with their administrators. Accordingly, government is made more effective. The legislature further finds that the enactment of positive legislation establishing guidelines for public employment relations is the best way to harness and direct the energies of public employees eager to have a voice in determining their conditions of work, to provide a rational method for dealing with disputes and work stoppages, to strengthen the merit principle where civil service is in effect, and to maintain a favorable political and social environment. The legislature declares that it is the public policy of the state to promote harmonious and cooperative relations between government and its employees and to protect the public by assuring effective and orderly operations of government. These policies are to be effectuated by

(1) recognizing the right of public employees to organize for the purpose of collective bargaining;

(2) requiring public employers to negotiate with and enter into written agreements with employee organizations on matters of wages, hours, and other terms and conditions of employment;

(3) maintaining merit-system principles among public employees.

A.S. 39.30.095: Insurance and Supplemental Benefits; Group Health and Life Benefits Fund

(a) The commissioner of administration shall establish the group health and life benefits fund as a special account in the general fund to provide for group life and health insurance under AS 39.30.090 and 39.30.160 or for self-insurance arrangements under AS 39.30.091. The commissioner shall maintain accounts and records for the fund. The fund consists of employer contributions, employee contributions, appropriations from the legislature, and income earned on investment of the fund as provided in (d) of this section.

(b) After obtaining the advice of an actuary; the commissioner of administration shall determine the amount necessary to provide benefits under AS 39.30.090, 39.30.091, and 39.30.160 and shall set the rate of employer

contribution and employee contribution, if any. With money in the fund, the commissioner of administration shall pay premiums, claims, and administrative costs required under the insurance policies in effect under AS 39.30.090 and 39.30.160, or required under self-insurance arrangements in effect under AS 39.30.091.

(c) The commissioner of administration or the designee of the commissioner is administrator of the fund. The commissioner may contract with

(1) an insurer authorized to transact business in this state under AS 21.09, or a hospital or medical service corporation authorized to transact business in this state under AS 21.87 to reimburse the state for the cost of administering group insurance provided under AS 39.30.090 and 39.30.160; and

(2) a life or disability insurer authorized to transact business in the state under AS 21.09, a hospital or medical service corporation authorized to transact business in this state under AS 21.87, or a third-party administrator licensed to transact business in this state for the administration of benefit claims and payments under AS 39.30.091.

(d) If the commissioner of administration determines that there is more money in the fund than the amount needed to pay premiums, benefits, and administrative costs for the current fiscal year, the surplus, or so much of it as the commissioner of administration considers advisable, may be invested by the commissioner of revenue in the same manner as retirement funds are invested under AS 14.25.180.

(e) In this section, "fund" means the group health and life benefits fund.

A.S. 39.30.090: Insurance and Supplemental Benefits; Group Health and Life Benefits Fund; Procurement of Group Insurance

(a) The Department of Administration may obtain a policy or policies of group insurance covering state employees, persons entitled to coverage under AS 14.25.168, AS 22.25.090, AS 39.35.535 or former AS 39.37.145, employees of other participating governmental units, or persons entitled to coverage under AS 23.15.136, subject to the following conditions:

(1) A group insurance policy shall provide one or more of the following benefits: life insurance, accidental death and dismemberment insurance, weekly indemnity insurance, hospital expense insurance, surgical expense insurance, dental expense insurance, audiovisual insurance, or other medical care

insurance.

(2) Each eligible employee of the state, the spouse and the unmarried children chiefly dependent on the eligible employee for support, and each eligible employee of another participating governmental unit shall be covered by the group policy, unless exempt under regulations adopted by the commissioner of administration.

(3) A governmental unit may participate under a group policy if

(A) its governing body adopts a resolution authorizing participation, and payment of required premiums;

(B) a certified copy of the resolution is filed with the Department of Administration; and

(C) the commissioner of administration approves the participation in writing.

(4) In procuring a policy of group health or group life insurance as provided under this section or excess loss insurance as provided in AS 39.30.091, the Department of Administration shall comply with the dual choice requirements of AS 21.86.310, and shall obtain the insurance policy from an insurer authorized to transact business in the state under AS 21.09, a hospital or medical service corporation authorized to transact business in this state under AS 21.87, or a health maintenance organization authorized to operate in this state under AS 21.86. An excess loss insurance policy may be obtained from a life or disability insurer authorized to transact business in this state under AS 21.09 or from a hospital or medical service corporation authorized to transact business in this state under AS 21.87.

(5) The Department of Administration shall make available bid specifications for desired insurance benefits or for administration of benefit claims and payments to (A) all insurance carriers authorized to transact business in this state under AS 21.09 and all hospital or medical service corporations authorized to transact business under AS 21.87 who are qualified to provide the desired benefits; and (B) to insurance carriers authorized to transact business in this state under AS 21.09, hospital or medical service corporations authorized to transact business under AS 21.87, and third-party administrators licensed to transact business in this state and qualified to provide administrative services. The specifications shall be made available at least once every five years. The lowest responsible bid submitted by an insurance carrier, hospital or medical service corporation, or third-party administrator with adequate servicing facilities shall govern selection of a carrier, hospital or medical service corporation, or third-party administrator

under this section or the selection of an insurance carrier or a hospital or medical service corporation to provide excess loss insurance as provided in AS 39.30.091.

(6) If the aggregate of dividends payable under the group insurance policy exceeds the governmental unit's share of the premium, the excess shall be applied by the governmental unit for the sole benefit of the employees.

(7) A person receiving benefits under AS 14.25.110, AS 22.25, AS 39.35, or former AS 39.37 may continue the life insurance coverage that was in effect under this section at the time of termination of employment with the state or participating governmental unit.

(8) A person electing to have insurance under (7) of this subsection shall pay the cost of this insurance.

(9) For each permanent part-time employee electing coverage under this section, the state shall contribute one-half the state contribution rate for permanent full-time state employees, and the permanent part-time employee shall contribute the other one-half.

(10) A person receiving benefits under AS 14.25, AS 22.25, AS 39.35, or former AS 39.37 may obtain auditory, visual, and dental insurance for that person and eligible dependents under this section. The level of coverage for persons over 65 shall be the same as that available before reaching age 65 except that the benefits payable shall be supplemental to any benefits provided under the federal old age, survivors, and disability insurance program. A person electing to have insurance under this paragraph shall pay the cost of the insurance. The commissioner of administration shall adopt regulations implementing this paragraph.

(11) A person receiving benefits under AS 14.25, AS 22.25, AS 39.35, or former AS 39.37 may obtain long-term care insurance for that person and eligible dependents under this section. A person who elects insurance under this paragraph shall pay the cost of the insurance premium. The commissioner of administration shall adopt regulations to implement this paragraph.

(12) Each licensee holding a current operating agreement for a vending facility under AS 23.15.010 -- 23.15.210 shall be covered by the group policy that applies to governmental units other than the state.

(b) In this section

(1) "eligible employee" means

(A) an employee who has served in permanent full-time or part-time employment with the same governmental unit for 30 days or more, except an emergency or temporary employee, and

(B) an elected or appointed official of a governmental unit, effective upon taking the oath of office;

(2) "governmental unit" means the state, a municipality, school district, or other political subdivision of the state, and the North Pacific Fishery Management Council;

(3) "insurance", "insurance carrier" and "insurance policy" include health care services, health care service contractors and contracts, and health maintenance organizations.

A.S. 23.40.250: Public Employment Relations Act; Definitions .

In AS 23.40.070 -- 23.40.260, unless the context otherwise requires,

(1) "collective bargaining" means the performance of the mutual obligation of the public employer or the employer's designated representatives and the representative of the employees to meet at reasonable times, including meetings in advance of the budget making process, and negotiate in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or negotiation of a question arising under an agreement and the execution of a written contract incorporating an agreement reached if requested by either party, but these obligations do not compel either party to agree to a proposal or require the making of a concession;

(2) "election" means a proceeding conducted by the labor relations agency in which the employees in a collective bargaining unit cast a secret ballot for collective bargaining representatives, or for any other purpose specified in AS 23.40.070 -- 23.40.260;

(3) "labor relations agency" means the Alaska labor relations agency established in AS 23.05.360;

(4) "monetary terms of an agreement" means the changes in the terms and conditions of employment resulting from an agreement that will require an appropriation for their implementation or will result in a change in state revenues or productive work hours for state employees;

(5) "organization" means a labor or employee organization of any kind in which employees participate and which exists for the primary purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, and conditions of employment;

(6) "public employee" means any employee of a public employer, whether

or not in the classified service of the public employer, except elected or appointed officials or superintendents of schools;

(7) "public employer" means the state or a political subdivision of the state, including without limitation, a municipality, district, school district, regional educational attendance area, board of regents, public and quasi-public corporation, housing authority, or other authority established by law, and a person designated by the public employer to act in its interest in dealing with public employees;

(8) "regional educational attendance area" means an educational service area in the unorganized borough that may or may not include a military reservation, and that contains one or more public schools of grade levels K -- 12 or any portion of those grade levels that are to be operated under the management and control of a single regional school board;

(9) "terms and conditions of employment" means the hours of employment, the compensation and fringe benefits, and the employer's personnel policies affecting the working conditions of the employees; but does not mean the general policies describing the function and purposes of a public employer.

OTHER STATES:

MARYLAND: Maryland Code 1957, Art. 49B, s 16, sub's. (a) & (g): Unlawful Employment Practices

(a) It shall be an unlawful employment practice for an employer:

(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, age, national origin, marital status, or physical or mental handicap unrelated in nature and extent so as to reasonably preclude the performance of the employment; or

* * *

(g) Notwithstanding any other provision of this subtitle, (1) it is not an unlawful employment practice for an employer to hire and employ employees, for an employment agency to classify, or refer for employment any individual, for a labor organization to classify its membership or to classify or refer for employment any individual, or for an employer, labor organization or joint

labor-management committee controlling apprenticeship or other training or retraining programs to admit or employ any individual in any such program, on the basis of his religion, national origin or physical or mental qualification in those instances where sex, age, religion, national origin or physical or mental qualification is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise; (2) it is not an unlawful employment practice for an employer to establish standards concerning an employee's dress and grooming if the standards are directly related to the nature of the employment of the employee; (3) it is not an unlawful employment practice for a school, college, university, or other educational institution or institution of learning to hire and employ employees of a particular religion if the school, college, university, or other educational institution or institution of learning is, in whole or in substantial part, owned, supported, controlled, or managed by a particular religion or by a particular religious corporation, association, or society or if the curriculum of the school, college, university, or other educational institution or institution of learning is directed toward the propagation of a particular religion; and (4) it is not unlawful for an employer, employment agency or labor organization to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of this subtitle; however, no employee benefit plan shall excuse the failure to hire any individual;

MINNESOTA: Minnesota St. 363.03: Unfair discriminatory practices

Subdivision 1. Employment. Except when based on a bona fide occupational qualification, it is an unfair employment practice:

(1) For a labor organization, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, disability, sexual orientation, or age,

(a) to deny full and equal membership rights to a person seeking membership or to a member;

(b) to expel a member from membership;

(c) to discriminate against a person seeking membership or a member with respect to hiring, apprenticeship, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment; or

(d) to fail to classify properly, or refer for employment or otherwise to

discriminate against a person or member.

(2) For an employer, because of race, color, creed, religion, national origin, sex, marital status, status with regard to public assistance, membership or activity in a local commission, disability, sexual orientation, or age,

(a) to refuse to hire or to maintain a system of employment which unreasonably excludes a person seeking employment; or

(b) to discharge an employee; or

(c) to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment.

MONTANA: Montana St. 49-2-303, sub. (1)(a): Discrimination in employment.

(1) It is an unlawful discriminatory practice for:

(a) an employer to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of race, creed, religion, color, or national origin or because of age, physical or mental disability, marital status, or sex when the reasonable demands of the position do not require an age, physical or mental disability, marital status, or sex distinction;

WASHINGTON: Washington St. 49.60.180, sub-s (1) - (3). Unfair practices of employer defined

It is an unfair practice for any employer:

(1) To refuse to hire any person because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained guide dog or service dog by a disabled person, unless based upon a bona fide occupational qualification: Provided, That the prohibition against discrimination because of such disability shall not apply if the particular disability prevents the proper performance of the particular worker involved.

(2) To discharge or bar any person from employment because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained guide dog or service dog by a disabled person.

(3) To discriminate against any person in compensation or in other terms or conditions of employment because of age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained guide dog or service dog by a disabled person: Provided, That it shall not be an unfair practice for an employer to segregate washrooms or locker facilities on the basis of sex, or to base other terms and conditions of employment on the sex of employees where the commission by regulation or ruling in a particular instance has found the employment practice to be appropriate for the practical realization of equality of opportunity between the sexes.

STATEMENT OF THE ISSUE

This appeal presents the following issue:

> Does the University of Alaska, by granting health care coverage to spouses of employees but denying such coverage to financially-interdependent domestic partners of employees, discriminate on the basis of marital status in violation of AS 18.80.220(a)(1)?

STATEMENT OF THE CASE[1]

Statement of Facts

The University provides employer-subsidized health benefits to its employees and their "eligible dependents." The University conclusively presumes that all spouses of its employees are dependents, even if many spouses are working and earn more money than the University employees to whom they are married. As a result, the spouses of University employees are automatically eligible for health benefits regardless of the actual dependency of the spouse on the University employee. The University conclusively presumes that all domestic partners of University employees are not dependents, even though many of such domestic partners may be equally or more dependent on their lifemates than are many spouses of University employees.[2]

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[1] Since the factual support for this statement can be found in the University's statement of the case, as modified by the statement of facts in the employees' brief, both of which include appropriate references to the record, such references will not be repeated in this summary.

[2] Such disparate treatment of similarly situated employees may violate the right of such employees to equal protection of the law. *In re Urie*, 617 P.2d 505, 508 (Alaska 1980).

As a result, the domestic partners of University employees are automatically excluded from the employer-subsidized health benefits plan.

Appellee, Mark Tumeo, was denied coverage for his male partner. Similarly, Kate Wattum was denied coverage for her female partner. Tumeo supplied an affidavit proving that his domestic partner was as financially dependent on him as many spouses are dependent on University employees. Wattum offered to provide proof of financial interdependency but the University ignored her offer. In the end, the University denied health benefits to these couples.

Statement of Proceedings[3]

Plaintiff Tumeo asked the University to provide health benefits for his domestic partner, Bruce Anders. Plaintiff Wattum filed a similar request for her partner, Beverly McClendon. When the University denied their requests, each plaintiff filed a grievance.

When the grievance was denied, plaintiffs appealed to the Superior Court. The court ruled that the University had discriminated against plaintiffs in refusing to provide compensation (in the form of health insurance benefits) based on the marital status of plaintiffs. The University brought this appeal.

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[3] This statement of proceedings is taken from the brief of the University. (See University's brief, pp. 4-5.)

ARGUMENT

The primary purpose of this *amicus curiae* brief is to address a portion of the University's brief that has so far gone unanswered. The University compared the marital status provision of Alaska's Human Rights Act with statutes in some 20 other states. In the process, the University made several assertions that do not withstand scrutiny. The University's brief also fails to mention out-of-state precedents that undercut its position. The results of the research of *amicus curiae* are presented below, and hopefully will assist the Court by providing a more complete picture. However, before doing so, *amicus curiae* would like to place its arguments in context by briefly discussing what this case is about and what it is not about.

What this case is about.

From a legal perspective, this case is about respect for diversity, protection of personal privacy, and implementation of the merit principle. Factually, it is about unmarried employees who have the same legal obligation to pay the medical bills of a partner that a married employee would have to pay for his or her spouse.[4]

This Court must decide whether the Legislature intended to "homogenize" the package of benefits for state employees or whether it intended to implement the principle of "equal pay for equal work" when it prohibited marital status and other forms of arbitrary discrimination in employment compensation. In deciding this question, the Court may wish to recall its previous observation that: "The United

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[4] See infra, at pp. 23-24, for further discussion of the legally enforceable obligation of plaintiffs to provide for the health care of their partners.

States of America, and Alaska in particular, reflect a pluralistic society, grounded upon such basic values as the preservation of maximum individual choice, protection of minority sentiments, and appreciation for divergent lifestyles." *Breese v. Smith*, 501 P.2d 159, 169 (Alaska 1972).

The Alaska Constitution requires that "the merit principle will govern the employment of persons by the State." Ak Const., art. 12, § 6. The "merit principle" requires "equal treatment of applicants and employees." A.S. 39.25.010(b)(4). Under the merit principle, "action affecting the employment status of an employee . . . may not be taken or withheld for a reason not related to merit." A.S. 39.25.160. Discrimination against state employees on the basis of marital status violates the merit principle. A.S. 39.25.160. The underlying question in this case is whether merit principles will prevail or whether they will be sacrificed to administrative expediency or social conformity.

The Legislature has declared "It is the public policy of the state to promote harmonious and cooperative relations between government and its employees." A.S. 23.40.070. Discrimination in compensation, and particularly in an aspect of compensation as critical as health benefits, disrupts harmony in the workplace. Those who are being paid less, even though they do the same work and possibly even perform better than others, justifiably feel they are being treated unfairly. Discrimination in extending benefits does not promote workplace harmony.

AS 39.30.095 and AS 39.30.090 require the extension of health care benefits to the spouses and unmarried children of an employee. These provisions do not

preclude the extension of such benefits to other dependents of employees, such as interdependent domestic partners. Furthermore, when it prohibited "marital status" in employment compensation, the Legislature specifically did not exempt health benefits plans, nor did it exempt the University from this requirement.

The Legislature has provided for flexibility in the administration of employee benefits programs for state employees. For example, under current law the commissioner of administration "has authority to obtain a policy that provides insurance coverage through a cafeteria plan." 1989 Alaska Op. Atty. Gen. (Inf.) 217; No. 663-89-0230, filed March 14, 1989.[5] "Cafeteria plans" allow an employer to allot a specific amount of money per employee for benefits and then let the employee choose the array of benefits that best suits his or her personal or family needs, or to opt for taxable cash instead. Furthermore, the Legislature has authorized the commissioner to establish "special individual employee benefit accounts" in order to provide "supplemental health benefits" or "supplemental dependent care benefits" or other benefits in addition to the husband-wife-child benefits package. A.S. 39.30.160; see also 2 AAC 37.125 et seq. governing the "Supplemental Benefits System."

As this Court has acknowledged, "there is a public policy supporting the protection of employee privacy." *Luedtke v. Nabors Alaska Drilling, Inc.*, 768 P.2d 1123, 1130 (Alaska 1989). The right of privacy protects not only personal

[5] Opinions of the attorney general, while not controlling on matters of statutory interpretation, are entitled to some deference. *Girves v. Kenai Peninsula Borough*, 536 P.2d 1221, 1225 (Alaska 1975).

information from unwarranted disclosures, but also freedom of choice in certain highly personal decisions. For example, the freedom of choice to marry or not to marry resides with the individual. *Loving v. Virginia*, 386 U.S. 1, 12 (1967). By enacting a protection against marital status discrimination in employment, the Legislature has prohibited employers from treating employees adversely because of how they exercise that personal choice.

Referring to the Human Rights Act, this Court has stressed that the Legislature intended "to put as many 'teeth' into the law as possible." *McLean v. State of Alaska*, 583 P.2d 867, 870, (Alaska 1978). This Court can strengthen the law's bite by affirming the decision of the trial court below.[6]

What this case is not about.

A ruling for the plaintiffs will not affect private sector employers and force them to extend employer-subsidized health benefits to employees with domestic partners. As one legal commentator recently wrote:

> "[T]he federal Employee Retirement Income Security Act (ERISA)[7] preempts state and local governments from attempting to regulate employee benefits, thus precluding them from either directly requiring private employers to recognize employee domestic partners or indirectly requiring such recognition through the enforcement of

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[6] Since the Human Rights Act is remedial in nature, it should be "liberally construed to effectuate its purpose." *SKW Eskimos, Inc. v. Sentry Automatic Sprinkler Co.*, 723 P.2d 1293, 1297 (Alaska 1986). The purpose of eliminating unequal compensation for similarly situated employees will be supported if the decision of the trial court is upheld.

[7] 29 U.S.C. §§ 1001-1461 (1974).

general antidiscrimination statutes."[8]

This observation is supported by the recent decision in *Rovira v. American Telephone & Telegraph Co.*, 817 F. Supp. 1062 (S.D.N.Y. 1993).[9]

A ruling for the plaintiffs under the marital status provision of the Human Rights Act will not require the University to compensate employees who have no dependents the same as employees who do have dependents. Requiring an employer to give dependent benefits to all employees with dependents on an equal basis will not force the University to provide pay raises to those employees without dependents. An employee with no dependents is not "similarly situated" to an employee who has dependents for purposes of a discrimination analysis. As a result, the Human Rights Act would not be violated by such differential treatment. *Shepherd v. State*, 897 P.2d 33, 43-44 (Alaska 1995); *Braatz v. Labor and Industry Review Commission*, 496 N.W.2d 597, 600 (Wis. 1993). Therefore, while affirming the trial

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[8] Arthur S. Leonard, "Lesbian and Gay Families and the Law: A Progress Report," 21 Fordham Urb. L.J. 927 (Summer 1994). Publication page references were not available for this document. However, the quote referenced above appeared immediately preceding footnote 116 in this article.

[9] In *Rovira*, the court ruled that ERISA precluded a lawsuit against private employers under a theory of marital status discrimination because ERISA does not preclude such discrimination in employee benefit plans. Furthermore, the United States Supreme Court has held that state nondiscrimination laws are preempted by ERISA insofar as they attempt to prohibit a private employer from doing something that is lawful under federal law governing employee benefits plans. *Shaw v. Delta Airlines*, 463 U.S. 85, 103 S.Ct. 2890 (1983). ERISA, however, would not preclude a lawsuit against state or local government employers for violating a state nondiscrimination law since ERISA does not apply to such governmental entities. See 29 U.S.C. 1003(b)(1) (1988).

court's decision will require the University to provide the same health benefits to employees with interdependent domestic partners (both same-sex and opposite-sex), it will not require the University to provide equal compensation in benefits to single employees who have no dependents.[10]

Finally, there are no indications that requiring the University to provide health benefits to interdependent domestic partners will break the bank.[11] Although the University claims that the financial impact of the addition of domestic partner coverage can not be determined,[12] data is available from a variety of reliable sources to indicate that costs for domestic partner coverage will be the same or less than costs for spousal coverage. For example, the International Foundation of Employee Benefits Plans reports:[13]

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[10] While the plaintiffs in the instant case have same-sex domestic partners, affirming the trial court would appear to require the University to provide the same health benefits to opposite-sex couples who are interdependent. If the University granted domestic partner benefits to unmarried interdependent same-sex couples but denied them to unmarried interdependent opposite-sex couples, such action would appear to constitute illegal sex discrimination in violation of the Human Rights Act. Apparently the University recognizes this, since the program it now operates in response to this lawsuit includes health benefits for "non-married financially interdependent partners" regardless of the gender of the partners. (See Employees' Excerpt of Record, pp. 13-15.)

[11] In any case, cost is no justification for discriminatory practices. *McLean v. State*, 583 P.2d 867, 877 (Alaska 1978).

[12] See Letter from Mike Humphrey, Statewide Director of Benefits, to Representative Robinson, dated March 27, 1995. (Employees' Excerpt of Record, p. 9.)

[13] The International Foundation of Employee Benefits Practices is a nonprofit educational association dedicated exclusively to the exchange of information and the (continued...)

> "Almost across the board, employers offering domestic partner benefits report, at most, minimal additional costs. In general, there is no evidence to indicate that the average health care costs of a domestic partner (same sex and/or opposite sex) will be significantly higher than that of a spouse." ("Domestic Partner Benefits: Employer Considerations, *Employee Benefits Practices* (Fourth Quarter 1994).)

Another report finds that plans offering coverage to same-sex and opposite-sex domestic partners have experienced approximately a 3% increase in health care costs. See "Domestic Partner Benefits Prove to be Rare," *CCH Employee Benefits Management Directions* (June 21, 1994), p. 7.

The city of Berkeley, California, has offered such benefits longer than any other employer in the nation. Berkeley's benefits manager has estimated that domestic partner coverage accounts for about 2.8% of the city's overall health insurance costs. See "Domestic Partners: Should Unmarried Partners Get A Wider Range of Benefits?" *The CQ Researcher*, Vol. 2, No. 33, p. 767 (Congressional Quarterly, 1992).

Hewitt Associates reports that, typically, "only up to 2% to 3% or less of all employees elect domestic partner coverage at organizations offering the benefit." See "Domestic Partners and Employee Benefits," Research Paper, p. 7 (Hewitt Associates

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[13](...continued)
education of those who serve employee benefit plans. *Employee Benefits Practices* is prepared by the research staff of the foundation.

1994).[14] Hewitt also reports that "Experience thus far indicates employers are at no more risk when adding domestic partners than when adding spouses." (Ibid.)

Therefore, affirming the trial court is not opening "Pandora's box" or creating a "slippery slope" that would affect private employers, provide a windfall to single state employees who have no dependents, or cost the University "an arm and a leg." Rather, it will simply insure that similarly situated employees are treated equally.

[14] Hewitt Associates is an international firm of consultants and actuaries specializing in the design, financing, communication, and administration of employee benefit and compensation programs. Hewitt has several offices in the United States and many offices throughout the world.

I

THE ALASKA LEGISLATURE DID INTEND TO PROHIBIT MARITAL STATUS DISCRIMINATION IN HEALTH BENEFITS

In its opening brief, the University compared Alaska's Human Rights Act with the Civil Rights Acts of other jurisdictions that prohibit discrimination in employment on the basis of marital status. University's brief, pp. 22-28. The obvious purpose of this comparison was to bolster the University's position that the ban on marital status discrimination in Alaska's Human Rights Act was not intended to prohibit discrimination against state employees in health benefits plans. However, when the Alaska Human Rights Act is closely compared with the statutes in these other states, the only reasonable conclusion that emerges is that the Alaska Legislature intended for the prohibition against marital status discrimination to apply to all employment practices, including employee benefits.

The University argues that when the Alaska Legislature added "marital status" to the Human Rights Act in 1975, it was "following a nation-wide trend." University's brief, p. 22. The University also argues that Alaska's legislation "was designed to effect the same protections as were similar statutes in other states." Ibid.

Although the University lists 20 states that prohibit marital status discrimination in employment (University's brief, pp. 22-23), it fails to acknowledge that only a handful of states had such laws in effect at the time the Alaska Legislature prohibited such discrimination in 1975. Needless to say, any consideration by the Alaska Legislature of what other states had done with respect

to marital status discrimination could only be based on laws in other jurisdictions predating 1975.

As it was amended in 1975, A.S. 18.80.220 made it unlawful for "an employer to refuse employment of a person, or to bar a person from employment, or to discriminate against any person in compensation or in a term, condition, or privilege of employment because of a person's ... marital status ... when the reasonable demands of the position do not require distinction on the basis of ... marital status ...." See SLA 1975, ch. 104, § 9.

Only five states prohibited marital status discrimination in employment prior to 1975.[15] If, as the University suggests, the Alaska Legislature was "following" the lead of other states, it could have considered the statutes of only these five states when it added marital status to Alaska's Human Rights Act.

The law of New Jersey made it illegal "[f]or an employer, because of the ... marital status ... of any individual ... to discriminate against such individual in compensation or in terms, conditions or privileges of employment." See NJ ST 10:5-12. Although New Jersey law provided for some exemptions from this prohibition, it did not exempt health benefits plans.

In Minnesota it was illegal "[f]or an employer, because of ... marital status ...

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[15] New Jersey (added in 1970 by L.1970 c. 80, § 9 and § 14); Minnesota (added in 1973 by Laws 1973, c 729, § 3); Washington (added in 1973 by Laws 1973, ch. 141, § 10); Maryland (added in 1974 by Laws 1974, ch. 875); Montana (added in 1974 by Laws 1974, ch. 283, § 2.) **Also see: "Table 1: States Prohibiting Marital Status Discrimination in Employment" in Appendix A.**

to discriminate against a person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment." See MN ST 363.03. The law did not exempt benefits plans from the prohibition against discrimination.

The law of Washington made it illegal "for any employer ... to discriminate against any person in compensation or in other terms or conditions of employment because of ... marital status ...." See WA ST 49.60.180. Although the law expressly allowed an employer to base "terms and conditions of employment on the sex of employees" under certain circumstances, no exemption of any kind was created for marital status discrimination.

Maryland's law made it illegal "for an employer ... "[t]o fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... marital status ...." See MD Code 1957, Art. 49B, § 16. It also declared "It is not unlawful for an employer, employment agency or labor organization to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purpose of this subtitle; however, no employee benefit plan shall excuse the failure to hire any individual."

In Montana, it was unlawful for "an employer to refuse employment to a person, to bar a person from employment, or to discriminate against a person in compensation or in a term, condition, or privilege of employment because of ... marital status ... when the reasonable demands of the position do not require [a] ...

marital status ... distinction." See MT ST 49-2-303. The law did not exempt benefits plans from the prohibition against discrimination.

Thus, assuming that the University is correct in its assertion that amendments to Alaska's Human Rights Act have not occurred "in a vacuum" (University's brief, p. 22), it is reasonable to conclude that, when it added "marital status" to the Act in 1975, the Alaska Legislature considered the statutory schemes of these five statutes as it deliberated over passage of the "marital status" amendment.

Three of these five states flatly outlawed marital status discrimination in compensation or other terms of employment, without exception. One contained a limited exemption for sex discrimination in some terms of employment. Only one contained a broad-based exemption for employee benefits plans. Having presumably considered these legislative models, the Alaska Legislature chose to outlaw marital status discrimination without inclusion of any exemption for employee benefits plans. The only reasonable conclusion that can be drawn is that the Legislature intended the ban on marital status discrimination to apply to employee benefits, in addition to hiring, firing, and other employment practices.

Furthermore, the decision of the Alaska Legislature to prohibit marital status discrimination in "terms and conditions of employment" signals a legislative intent to apply the prohibition to employee benefits. Although that phrase was not specifically defined in the Human Rights Act, when it passed section 23.40.250 of the Public Employment Relations Act in 1972, the Alaska Legislature had already expressed its awareness that "terms and conditions of employment" includes "compensation and

fringe benefits." See SLA 1972, ch 113, § 2.[16]

II

OTHER COURTS HAVE HELD THAT A PROHIBITION AGAINST MARITAL STATUS DISCRIMINATION IN A GENERAL CIVIL RIGHTS STATUTE PRECLUDES DISCRIMINATION IN HEALTH BENEFITS.

The issue of marital status discrimination in health care benefits provided by an employer has been considered by appellate courts in several other states. Because these cases address legal principles that have a direct bearing on the outcome of the litigation at bench, they are addressed here.

a. Judicial interpretation of Montana's law supports the employees' position.

When Alaska's nondiscrimination law is compared with the statutes in the five states that prohibited "marital status" discrimination prior to 1975, Alaska's law most closely resembles the law of Montana. Several common factors suggest that Alaska's law, in fact was patterned after Montana's statute.

Alaska's law uses the phrase "to bar a person from employment." A.S. 18.80.220(a)(1). Of the five other states under review, only Montana's law contains such a phrase. Alaska's statute is like Montana's law in another interesting respect. Of the five states in question, only Montana's statute contains a limited exemption

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[16] Citing several pre-1975 decisions from a variety of jurisdictions, the Attorney General of Alaska has concluded that "compensation and fringe benefits are terms of employment." (1980 WL 27595 (Alaska A.G.); A.G. Opinion No. J-66-448-80, filed February 1, 1980.)

"when the reasonable demands of the position" require a distinction based on marital status or one of several other criteria. Alaska's law utilized the same language. Finally, and most importantly, like Montana's law, Alaska's statute does not exempt bona fide benefits plans from the prohibition against discrimination. The Alaska Legislature could have created a broad exemption similar to that embodied in Maryland's law, or a narrow one similar to that in Washington. However, it decided to outlaw marital status discrimination in employment, without exception or reservation.

The apparent decision of the Legislature to pattern Alaska's nondiscrimination statute on Montana's law gains added significance when judicial interpretation of Montana's statute is considered. In *Glasgow Education Association v. Board of Trustees, Valley County*, 791 P.2d 1367 (Mont. 1990), the Supreme Court of Montana declared that the statute prohibiting marital status discrimination applies to health insurance benefits.

The *Glasgow* case involved a dispute between local teachers and the school district in Valley County. A written agreement with the employer provided that the district pay 85 percent of the employees' health insurance premiums. However, a grievance was filed when the district started to pay 100 percent of premiums for some employees, i.e., those who were married to other employees of the district. The grievance was filed by a teacher who was not married to another employee of the district.

When the district denied her grievance, the case went to arbitration. Relying

on a provision of the contract that required the district to comply with state law prohibiting discrimination, the arbitrator determined that the district had violated Montana Code section 49-2-303(1)(a) which prohibits marital status discrimination in employment. The Supreme Court agreed and therefore affirmed the arbitrator's decision. The court held that "the employer's practice of paying 100% of the premiums based on marital status violated both the contract between the parties and state law." *Glasgow Education Association, supra*, 791 P.2d at p. 1371.

Three years after the *Glasgow* decision, the Montana Legislature amended the relevant statute to provide that: "It is not a violation of the prohibition against marital status discrimination in this section for an employer or labor organization to provide greater or additional contributions to a bona fide group insurance plan for employees with dependents than to those employees without dependents or with fewer dependents." See Laws 1993, ch. 13, § 3.

As the University correctly points out, "[p]rior to the amendment, the Montana statute was, in all relevant respects, very nearly identical to the Alaska statute." University's brief, p. 27. However, the University's conclusion that "[t]he legislative clarification underscores the fact that the Montana statute always meant what the University asserts the identical Alaska statute means" is flawed. In fact, as it was originally enacted, the Montana Legislature passed a law that prohibited marital status discrimination in compensation or other terms or conditions of employment, without exception or reservation. The Montana Supreme Court expressly declared that this law prohibited discrimination in health insurance benefits. *Glasgow, supra.*

The Montana Legislature decided to change the law in 1993 to specifically permit certain types of marital status discrimination in group insurance plans. Thus, prior to this legislative amendment, the Montana statute in effect between 1974 and 1993 always meant the opposite of what the University now alleges.

Just as the Montana statute, when it did not have an exemption for group insurance plans, was interpreted to prohibit marital status discrimination in health benefits, so too should this Court interpret Alaska's ban on marital status discrimination since the Alaska Legislature expressly chose not to adopt any exception. As enacted, Alaska's law prohibits discrimination in compensation or other terms of employment. Since "terms" of employment include "fringe benefits," Alaska's statute is clear on its face. Furthermore, resort to extrinsic aids in the process of statutory construction (such as the comparison with the five other jurisdictions with similar laws in effect prior to 1975) bolsters the position of the employees and undercuts the arguments advanced by the University. The Alaska Legislature, of course, could amend the statute if it chooses to override this Court's interpretation of the current nondiscrimination statute.

b. Judicial interpretation of California's law also favors the employees.

California added "marital status" to its employment nondiscrimination law in 1976. See Stats.1976, ch. 1195, § 5.[17] As it was originally introduced, Senate Bill

[17] California's Fair Employment Practices Act was originally found in the Labor Code. However, in 1980, the codes were reorganized and the civil rights protections dealing with employment and housing were placed in the Government Code.

1642 did not contain any exceptions to the new provision prohibiting marital status discrimination in employment. However, two amendments were added in the state Senate on August 31, 1976. See Senate Journal, 1975-76 Session, p. 17035. Those amendments, which were included in the final version of the law when the bill was signed by the Governor the following month, declared:

> "Nothing in this part relating to discrimination on account of marital status shall either (i) affect the right of an employer to reasonably regulate, for reasons of supervision, safety, security, or morale, the working of spouses in the same department, division, or facility, consistent with the rules and regulations adopted by the commission, or (ii) prohibit bona fide health plans from providing additional or greater benefits to employees with dependents than to those employees without or with fewer dependents." See former Labor Code § 1420(a)(3); current Government Code § 12940(a)(3)(b).

The Fair Employment and Housing Commission, the agency charged with enforcement of California's nondiscrimination law, has promulgated regulations interpreting the act. With respect to fringe benefits as "terms, conditions and privileges of employment," the Commission has interpreted the legislative exemption allowing discrimination in health plans as follows:

> "(a) Fringe Benefits.
> "(1) The availability of benefits to any employee shall not be based on the employee's marital status. However:
> "(A) Bona fide fringe benefits plans or programs may provide benefits to an employee's spouse or dependents;
> "(B) Such bona fide fringe benefit plans or programs may decline to provide benefits to any individual who is not one of the following; an employee of the employer, a spouse of an employee of the employer, or a dependent of

an employee of the employer." See Cal. Adm. Code, Tit. 2, § 7292.6.

It was the existence of this legislative exemption, as interpreted by the Commission, that the appellate court relied on in *Hinman v. Department of Personnel Administration*, 213 Cal.Rptr. 410 (Cal.App. 1985), when it ruled that the refusal of the state to provide dental benefits to domestic partners of state employees did not violate the statutory ban on marital status discrimination.

Boyce Hinman was a state employee. When the state refused to provide the same dental benefits to Hinman's domestic partner of 12 years as it provided to spouses of state employees, Hinman filed suit. Among other arguments, Hinman claimed that the refusal to provide dental benefits constituted marital status discrimination in violation of Government Code section 12940. Rejecting his argument, the Court of Appeal stated:

> "While discrimination by employers on the basis of marital status is prohibited in section 12940, subdivision (a), there is an express provision in subdivision (a)(3)(ii) of that same section which states in part: 'Nothing in this part relating to discrimination on account of marital status shall ... prohibit bona fide health plans from providing additional or greater benefits to employees with dependents than to those employees without or with fewer dependents.' Regulations interpreting the above provision state: '[P] (A) Bona fide fringe benefit plans or programs may provide benefits to any employee's spouse or dependents; [P] (B) Such bona fide fringe benefit plans or programs may decline to provide benefits to any individual who is not one of the following: an employee of the employer, a spouse of an employee of the employer, or a dependent of an employee of the employer.' (Emphasis added; Cal. Admin. Code, tit. 2, s 7292.6.)

> "... Accordingly, as a matter of ... state law, dental benefits under the state plans qualify as bona fide fringe benefits exempted from marital status discrimination." *Hinman, supra*, 213 Cal.Rptr., at p. 418.

The case at bench is distinguishable from *Hinman* in two important respects. Legally, California law carved out an exception clarifying that distinctions based on dependency would not constitute marital status discrimination in health benefits plans. Alaska's Human Rights Act does not contain such an exception. Factually, Hinman never claimed that his partner was totally or partially dependent on him, a claim that would have brought them back into the scope of the main protection and, correspondingly, would have taken them outside of the scope of the dependency exemption. In contrast, the employees in the instant case have demonstrated that they are financially interdependent and that, in the case of the male couple, Tumeo and Anders, they are similarly situated to spouses for purposes of health care benefits because Tumeo is responsible for the financial obligations of Anders. See infra, pp. 23-24. As a result, the University's refusal to provide health benefits to the employees constitutes marital status discrimination in violation of the state Human Rights Act.

c. Wisconsin precedents also support the employees.

The University has argued that "No court in any jurisdiction, other than the Superior Court in this action, has ever interpreted a civil rights act containing a marital status discrimination ban to apply to health care benefits." University's brief, p. 24. This assertion is not accurate. In addition to the decision of the Montana

Supreme Court in *Glasgow*, mentioned above, the decision of the Wisconsin Supreme Court in *Braatz v. Labor and Industry Review Commission*, 496 N.W.2d 597 (Wis. 1993), also has held that a general statutory ban on marital status discrimination in employment compensation prohibits discrimination in health benefits.

The plaintiffs in *Braatz* were teachers employed by the Maple School District. Each plaintiff was married; each had a spouse who was employed; and each spouse's employer offered health insurance benefits to the spouse. Plaintiffs filed suit to challenge the districts's "nonduplication policy." Under that policy, a married employee who also had health insurance coverage through the employer of his or her spouse was required to make a choice. The married employee could have coverage through the Maple School District, or through the employer of his or her spouse, but not both. Single employees, however, who had additional coverage from another source were not forced to choose between that coverage and the district's coverage. The Wisconsin Supreme Court flatly declared that the school district's nonduplication policy "constitutes marital status discrimination." *Braatz, supra*, 496 N.W.2d, at p. 599. The court rejected the district's argument that health insurance benefits were implicitly excepted by the Legislature from the statutory prohibition against marital status discrimination.

The Wisconsin Fair Employment Act prohibits employers from "discriminat[ing] against any individual in promotion, compensation or in terms, conditions or privileges of employment" on the basis of marital status. *Braatz, supra*, at p. 598. As the Supreme Court has noted, "Health insurance is not excepted from

this prohibition, expressly or implicitly." Ibid. There is only one express exception to the prohibition against marital status discrimination: the law permits an employer to prohibit direct supervision of an employee by his or her spouse. Id., at p. 599.

The court in *Braatz* took pains to distinguish the decision of an intermediate appellate court in *Phillips v. Wisconsin Personnel Commission*, 482 N.W.2d 121 (Wis.App. 1992). The Supreme Court explained that, in *Phillips*, the appeals court had ruled that it was not marital status discrimination for the state to offer dependent health insurance coverage to an employee's spouse but not to an employee's "adult companion." *Braatz, supra*, at p. 600. The Supreme Court added:

> "The court reasoned that 'it is only where similarly situated persons are treated differently that discrimination is an issue.' Id. at 219, 482 N.W.2d 121. Even though an employee and an adult companion may 'have a committed relationship that partakes of many of the attributes of marriage in the traditional sense,' a spouse and a companion are not similarly situated. Id. at 220, 482 N.W.2d 121. This is so because Wisconsin law imposes a general duty of support upon married couples, but there is no comparable duty of support imposed on adult companions. Id.
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> "In effect, the plaintiff in *Phillips* wanted something not even married employees got: reimbursement for medical expenses that she had no obligation to pay. Phillips and the policy reviewed therein are not relevant to this case." *Braatz, supra*, 496 N.W.2d, at p. 600.

It is noteworthy that both of these Wisconsin cases referred to Ms. Tommerup (the dependent of Phillips) as a "companion" rather than a "partner." A close reading of the decision in *Phillips* shows that the use of the term "companion" was probably not the result of happenstance. Although Phillips and Tommerup shared incomes,

rented a home together, co-owned an automobile, and had joint renters and auto insurance, and although Tommerup became financially dependent on Phillips when Tommerup returned to school, there is nothing in the court's opinion to suggest that Phillips had any legal obligation to support Tommerup. There was no evidence of any written or oral cohabitation agreement between the two women. There was no mention of a "domestic partnership" or a "spousal equivalency affidavit." Thus, from a judicial perspective, there was no discrimination because the two women were not similarly situated to a married couple in any legal respect. Phillips and her companion may have been cohabiting, and Phillips may have gratuitously provided support to her companion, but there was no evidence that Phillips had any legal obligation to do so.

While a married employee would have had a legal obligation to support his or her spouse in a medical emergency and to pay for the spouses' medical bills, the Wisconsin courts seem to have focused on the fact that Phillips could have walked away in a medical emergency and that Tommerup (or a third party medical provider) would have had no legal recourse against Phillips. Thus, Phillips and Tommerup were considered "companions" who were not similarly situated to spouses for purposes of the state employee health benefits plan.

In the instant case, however, plaintiff Tumeo and his partner, Bruce Anders, are similarly situated to married employees for purposes of receiving health benefits

from the University.[18] Tumeo and Anders filed an "Affidavit of Spousal Equivalency" in support of their request for health benefits from the University. See University's Excerpt of Record, p. 2; Memorandum of Decision and Order, p. 2. In the affidavit, Tumeo and Anders attested that they were "jointly responsible for each other's common welfare and financial obligations." Ibid. Under Alaska law, such an agreement is legally binding and enforceable. *Levar v. Elkins*, 604 P.2d 602 (Alaska 1980). As a result, the impediment that foreclosed a marital status discrimination claim in *Phillips* is absent here. Plaintiffs are similarly situated to married employees for purposes of receiving equal health benefits. As a result, this Court should affirm the decision of the trial court below.[19]

d. Employee benefits packages are subject to Oregon's civil rights law

Under Oregon Statute 659.030, it is illegal for an employer to discriminate

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[18] Plaintiffs have emphasized that "it is their legally-cognizable financial relationships with their partners, and not the simple fact of cohabitation, that entitle them to benefits equal to those enjoyed by married University employees. The University's policy discriminates on the basis of marital status because it recognizes only a marriage license as evidence of a couple's reciprocal financial obligations." Brief of Employees, p. 2.

[19] Whether Wattum and her partner, Beverly McClendon, are similarly situated to spouses for purposes of receiving equal health benefits is a factual question that could be resolved on remand. On her application for benefits, Wattum listed McClendon as her "partner/spouse." University's Excerpt of Record, p. 3. Apparently, the couple did not file an affidavit of spousal equivalency. However, in a letter to the University, Wattum offered to "provide alternative documentation of the committed nature of my relationship." University's Excerpt, p. 7. It would appear that proof of such equivalency could be satisfied if they meet the criteria now used by the University for "financially interdependent partners." Employees' Excerpt of Record, pp. 14-15.

against an employee "in compensation or in terms, conditions or privileges of employment." According to the Attorney General of that state, employee benefits are "compensation" or "terms" of employment. See 40 Or.Op.Atty.Gen. 231 (1980). The Attorney general has also concluded that "A requirement that women employees pay more than men employees for insurance provided as a fringe benefit because the insurance includes pregnancy benefits for the woman would constitute discrimination "in compensation or in terms, conditions or privileges of employment, because of the employee's sex." See 39 Or.Op.Atty.Gen. 328 (1978). In determining whether a such illegal discrimination has occurred, a state appellate court has compared the "total benefits packages" of the favored class of employees with the disfavored class to determine if Oregon's nondiscrimination statute has been violated. *Hillesland v. Paccar*, 722 P.2d 1239, 1243-1243 (Or.App. 1985).

The employees in the instant case are asking this Court to do the same: compare the total benefits package offered to the favored class (interdependent couples who are married) with the package offered to the disfavored class (interdependent couples who are not married.) Although the Oregon case involved sex discrimination rather than marital status discrimination, the result is still the same: the employer is discriminating in compensation, or terms and conditions of employment, on the basis of prohibited criteria.

e. Precedents in Minnesota and Georgia can be distinguished.

The University seems to suggest that two reported appellate decisions involving challenges to local domestic partnership ordinances are somehow relevant to the

outcome of this case. University's brief, pp. 25-26. In fact, since both cases are clearly distinguishable, neither is helpful to a resolution of the instant appeal.

In 1988, three employees of the City of Minneapolis filed a complaint against the city for refusing to provide health benefits to their same-sex domestic partners. *Lilly v. City of Minneapolis*, 527 N.W.2d 107, 109 (Minn.App. 1995). In 1992, the Minneapolis Commission on Civil Rights determined that the City's employee benefits program discriminated against lesbian employees of the Library Board based upon their "affectional preference." Ibid.

In response to the Commission's order, the City Council passed resolution 93R-106, authorizing limited reimbursement to city employees for health care insurance costs for same sex domestic partners and for qualified blood relatives who are "not considered a dependent under current City health plans." Ibid. Soon after passing this resolution, the city withdrew its appeal of the City Civil Rights Commission order. *Lilly, supra*, at p. 112, fn. 3.

Respondent Lilly, a local resident and taxpayer, filed suit seeking to enjoin the implementation of the benefits resolution as *ultra vires*. The district court issued an injunction, ruling that the city lacked authority to extend employment benefits to anyone not considered a "dependent" under state law governing employment benefits. The Court of Appeal affirmed.

There were only two issues on appeal: (1) whether the state statute governing benefits for municipal employees, and its limited definition of the term "dependent" which included only spouses and some children of employees, was permissive or

restrictive; and (2) whether the state law prohibiting sexual orientation discrimination required a municipality to grant such benefits to employees with same-sex partners.

On the former question, the Court ruled that an analysis of the statutory history of the relevant state law demonstrated that it was restrictive. The legislature intended that a city could only grant benefits to those specifically mentioned in the relevant state law. In answering the latter question, the court relied on debates that occurred in the Legislature when it passed a law forbidding sexual orientation discrimination in employment. Those debates made it clear that the Legislature did not intend to require the extension of health benefits when it had enacted a sexual orientation amendment into the state civil rights law.

The *Lilly* case involved a claim of "sexual orientation" discrimination. Minnesota's "marital status" nondiscrimination was not addressed by the Court of Appeal. In contrast, the instant case, the sole issue on appeal involves the applicability of Alaska's "marital status" law to health benefits plans offered by the state to its own employees. The rather extensive legislative history of Minnesota's sexual orientation law clearly revealed that the Legislature did not intend its inclusion in the state civil rights statute to require employers to provide health benefits to same-sex partners of employees. In stark contrast, the direct legislative history of Alaska's ban on marital status discrimination is nonexistent, but extrinsic evidence shows that it was intended to apply to all terms and conditions of employment, including fringe benefits. In sum, the *Lilly* decision adds nothing to the resolution of the dispute involved in the instant case.

Similarly, the decision in *City of Atlanta v. McKinney*, 454 S.E.2d 517 (Ga. 1995), is distinguishable from the case at bench. There, the Georgia Supreme Court considered whether the City of Atlanta had authority to grant health benefits to the same-sex and opposite-sex domestic partners of city employees. In a split decision, the court ruled that the city exceeded the authority granted to it by the state Legislature to extend benefits to "dependents" of city employees.

The majority declared that the city lacked the authority to refer to domestic partners as a "family relationship" because conferring a legal status on a relationship lies solely in the province of the state. Furthermore, the majority observed that under various state laws, a dependent is limited to a "spouse, child or one who relies on another for financial support." Id., at p. 521. The majority found the city's definition of dependent inconsistent with state law. However, it would appear that if the city amended the ordinance to delete the reference to domestic partners as a "family relationship" and if the city required domestic partners to certify that the partner relies upon the employee for financial support, the amendment would be consistent with state law and would be upheld by the state Supreme Court.

Therefore, the *McKinney* decision actually supports the authority of a municipality to extend health benefits to domestic partners, so long as the municipality limits benefits to partners who rely upon an employee for support and so long as the municipality does not attempt to confer a legal status of "family" on a domestic partner relationship.

In any event, *McKinney* is not relevant to the outcome of the current case

because *McKinney* did not involve the application of a "marital status" nondiscrimination law to an employee benefits plan. Unlike the situation in Alaska, Georgia's state civil rights law does not prohibit marital status discrimination.

After applying relevant out-of-state precedents, with appropriate distinctions, and discarding irrelevant decisions, a comparison of Alaska's Human Rights Act with similar laws elsewhere supports the plaintiffs' position that the Alaska Legislature intended the ban on marital status discrimination to apply to health benefits.

CONCLUSION

This Court has twice ruled that by adding the term "marital status" to the Human Rights Act the Legislature intended to prohibit discrimination against unmarried couples. *Foreman v. Anchorage Equal Rights Commission*, 779 P.2d 1199 (Alaska 1989); *Swanner v. Anchorage Equal Rights Commission*, 874 P.2d 274 (Alaska 1994). In the instant case, the Court can logically apply those decisions to the context of employment compensation.

However, by doing so, this Court will not be declaring that, by the simple act of cohabitation, unmarried couples are somehow similarly situated to married couples for all purposes. Rather, it will merely affirm that, for purposes compensating employees in the form of health benefits, the state may not exclude all interdependent domestic partners for purposes of health benefits compensation if the University grants such benefits to all spouses, regardless of whether or not such spouses are in fact dependent upon an employee of the University.

As Canadian Supreme Court Justice L'Heureux-Dube stated in his dissenting opinion in a recent case involving survivor benefits for same-sex couples,

> "I am in entire agreement with Iacobucci J.'s observation that the presumption that same-sex relationships are somehow less interdependent than opposite-sex relationships is, itself, a fruit of stereotype rather than one of demonstrable, empirical reality .... It would be strange, indeed, to permit the government to justify a discriminatory distinction on the basis of presumptions which are, themselves, discriminatory." *Egan v. Canada*, Supreme Court of Canada, File No. 23636, filed May 25, 1995, slip opinion, p. 34.

In the same case, Justice Iacobucci emphasized in his dissent:

> "[M]uch of the evidence which exists attests to the fact that same-sex relationships involve similar levels of economic dependence, mutual responsibilities and emotional commitment than heterosexual relationships .... [P] Whereas there is a presumption of interdependence in heterosexual relationships, there is a presumption against interdependence in same-sex relationships. The latter presumption is not only incorrect, but it is also the fruit of stigmatizing stereotype." *Egan, supra*, at p. 59.[20]

For the reasons articulated above, and based on the arguments of the employees and the other *amici curiae* who filed a separate brief in support of the employees, the judgment of the trial court should be affirmed.

Pursuant to the order of the trial court, the University is currently providing health benefits to interdependent domestic partners of its employees who meet the criteria indicating interdependency. This practice should continue because a fair

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[20] This Court has also condemned the use of presumptions based on stigmatizing stereotypes. *S.N.E. v. R.L.B.*, 699 P.2d 875, 879, fn. 6 (Alaska 1985).

reading of the Human Rights Act requires such a result.

DATED this 19 day of September, 1995, at Anchorage Alaska.

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TABLE 1:
STATES PROHIBITING MARITAL STATUS DISCRIMINATION IN EMPLOYMENT

State	Year MS Added	Statute Number	Wording Pertaining to Compensation Discrimination It is unlawful for an employer to:	Exception for Benefits
Alaska	1975	SLA 1975, ch. 104, § 9 (AS 18.80.220)	"discriminate against a person in compensation or in a term, condition, or privilege of employment because of the person's ... marital status ...."	No
California	1976	Stats.1976, c. 1195, § 5 (Gvt. Code § 12940)	"because of the ... marital status ... of any person, to discriminate against the person in compensation or in terms, conditions, or privileges of employment."	Yes, on the basis of marital status only (included in 1976 law)
Connecticut	1975	1975, P.A. 75-446, § 2 (C.G.S.A. § 46a-60)	"discriminate against him in compensation or in terms, conditions or privileges of employment because of the individual's ... marital status ...."	Yes, on the basis of age only
Delaware	1984	64 Del.Laws, c. 333 (19 Del.C. § 711)	"discriminate against any individual with respect to compensation, terms, conditions or privileges of employment because of such individual's ... marital status ...."	Yes, on the basis of age and sex only
Florida	1977	Laws 1977, c. 77-341, § 6 (Fl.St. 760.10)	"discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's ... marital status ...."	Yes, on the basis of productivity only
Hawaii	1988	L 1988, c 219, § 1 (Hi.St. § 368-1)	"[T]he practice of discrimination because of ... marital status ... in employment ... is against public policy."	No
Illinois	1980	P.A. 81-1216, § 1-102 (Il.St. Ch. 775, 5/1-102)	"It is the policy of this State ... to secure for all individuals within Illinois the freedom from discrimination against any individual because of his or her ... marital status ... in connection with employment ...."	No

State	Year MS Added	Statute Number	Wording Pertaining to Compensation Discrimination It is unlawful for an employer to:	Exception for Benefits
Indiana	1976	Acts 1976, P.L. 100, § 1 (In.St. 20-6.1-6-11)	"Neither a governing body nor its agent may make or enforce any rule or regulation concerning the employment of teachers which discriminates in any manner because of marital status."	No
Maryland	1974	1974, ch. 601; ch. 875, § 1 (Md.Code 1957, Art. 49B)	"to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's ... marital status ...."	Yes, unless it is a subterfuge
Michigan	1976	P.A.1976, No. 453, § 202 (Mi.St. 37.2202)	"discriminate against any individual with respect to employment, compensation, or a term, condition, or privilege of employment because of ... marital status."	Yes, for retirement benefits only, unless it is a subterfuge
Minnesota	1973	Laws 1973, c. 729, § 3 (Mn.St. 363.03)	"because of ... marital status ... to discriminate against any person with respect to hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment."	No
Montana	1974	L. 1974, ch. 283, § 2 (Mt.St. 49-2-303)	"discriminate against a person in compensation or in a term, condition, or privilege of employment because of ... marital status ... when the reasonable demands of the position do not require ... marital status ... distinction."	Yes, on the basis of marital status only (added in 1990)
Nebraska	1977	Laws 1977, LB 161, § 6 (Ne.St. 48-1104)	"discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's ... marital status ...."	No
New Hampshire	1975	L. 1975, 24:1-6, 476:1-7 (NH St. 354-A:7)	"because of the ... marital status ... of any individual ... to discriminate against such individual in compensation or in terms, conditions or privileges of employment ...."	No

State	Year MS Added	Statute Number	Wording Pertaining to Compensation Discrimination It is unlawful for an employer to:	Exception for Benefits
New Jersey	1970	L. 1970, c. 80, § 14 (NJ St. 10:5-12)	"because of the ... marital status ... of any individual ... to discriminate against such individual in compensation or in terms, conditions, or privileges of employment ...."	No
New York	1975	L. 1975, c. 662, § 1; c 803, §§ 3-10 (NY Exec 296)	"because of the ... marital status of any individual, ... to discriminate against any such individual in compensation or in terms, conditions or privileges of employment."	No
Oregon	1977	L. 1977, c. 770, § 1; c. 801, § 1a (Or.St. 659.030)	"because of an individual's ... marital status ... to discriminate against such individual in compensation or in terms, conditions or privileges of employment."	No
North Dakota	1983	S.L. 1983, ch. 173, § 1 (ND St. 14-02.4-01)	"It is the policy of this state to prohibit discrimination on the basis of ... status with regard to marriage ... in employment relations ...."	No
Virginia	1987	L. 1987, c. 581 (Va.St. 2.1-715)	"It is the policy of the Commonwealth ... to safeguard all individuals ... from unlawful discrimination because of ... marital status ... in employment ...."	No
Washington	1973	Laws 1973, ch. 141, § 10 (Wa.St. 49.60.180)	"discriminate against any person in compensation or in other terms of conditions of employment because of ... marital status ...."	No
Wisconsin	1981	Laws 1981, ch. 386, § 3; ch. 334, § 22 (Wi.St. 111.31)	"discriminate in employment against properly qualified individuals solely because of their ... marital status ...."	No