STATE OF WISCONSIN | CIRCUIT COURT BRANCH 10 | DANE COUNTY

JERRI LINN PHILLIPS,

Petitioner,

vs. Case No. 89 CV 5680

WISCONSIN PERSONNEL COMMISSION,

Respondent.

MEMORANDUM DECISION AND ORDER

Jerri Linn Phillips petitions for review of a Personnel Commission decision dismissing her charge of employment discrimination for failure to state a claim upon which relief can be granted. Petitioner alleges that her employer, Department of Health and Social Services ("DHSS"), discriminated against her on the bases of marital status, sexual orientation and sex in denying her application for family health insurance coverage for her "spouse equivalent" Lorri Tommerup.

Because I find that the legislature did not intend, directly or indirectly through delegated administrative rule-making authority, to grant legal dependent status for family health insurance purposes to unrelated adults in unmarried relationships and, in fact, intended enhanced health insurance benefits for defined dependents to be an exception to the prohibitions in the Wisconsin Fair Employment Act, I affirm the Commission's decision.

FACTS

The Commission made the following findings of fact:

1. At all times relevant to this proceeding, the petitioner has been employed by the State of Wisconsin, Department of Health and Social Services in the Center for Health Statistics.

2. Petitioner, a female, has a lesbian relationship with Lorri Tommerup. This relationship is based upon love and a lifetime commitment and is recognized by petitioner's and Tommerup's immediate families, friends, neighbors and co-workers. Petitioner and Ms. Tommerup share joint coverage for car and renters insurance, they pool their finances and they take their vacations together.

3. On October 20, 1986, petitioner filed an application to change her health insurance coverage from individual to family coverage. The petitioner supplied an attachment to her application which read:

> I am applying for a change from individual to family health coverage because my partner (spouse) is leaving her full-time job in December to return to school to work toward a graduate degree.
>
> Because ours is a lesbian marriage rather than a conventional one, there is no certificate on file to record it. Therefore, the purpose of this attachment to the application is to provide other evidence of our spousal relationship.
>
> We understand that state law forbids denying any employment benefits solely on the basis of marital status or sexual preference. It is my impression that provision of family health coverage acknowledges two aspects of family relationships: (1) the existence of firmly-established emotional bonds and a consequent responsibility for the well-being of all family members, and (2) the unity of family finances.

> Our marriage is based on love and lifetime commitment. If the option were available to us, we would be married conventionally. Our relationship is recognized by our respective families and by our friends, neighbors, and co-workers. I am attaching statements from my immediate supervisor (Doug Murray) and bureau director (Ray Nashold) acknowledging they are aware we consider ourselves a couple, equivalent to spouses.
>
> We have the same joint coverage for car insurance and renters insurance as is ordinarily obtained by conventionally married couples. All of our finances are pooled--as evidenced by our joint checking, savings, and credit card accounts--and while Lorri is in school we will both be living on my income.
>
> I have been a subscriber and a member of Group Health Cooperative since it was first included as an option for state employes. Lorri has been receiving her health care at Wingra Family Medical Center. Conversion to a family policy will allow both of us to continue health care with our current providers, and will allow them in turn to treat us as a cohesive family unit.

4. Petitioner's application was forwarded by the Department of Health and Social Services to the Department of Employe Trust Funds (DETF) for review.

5. By letter dated November 26, 1986, the petitioner was informed that her application had been denied and that her "health insurance single coverage will continue in effect, unchanged, for January, 1987." Petitioner also received a copy of a letter signed by the director of respondent DETF's Bureau of Health and Disability Benefits which provided, in part:

> This application lists only Lorri J. Tommerup as a dependent under this coverage. Ms. Tommerup does not qualify as a "dependent" under s. 40.02(20), Stats., nor under the rules of the department. Since Ms. Phillips has no other dependents at this time, she is not eligible for "family" coverage pursuant to s. 40.52(1)(a), Stats.

* * *

> Notwithstanding the fact that Ms. Phillips chooses to personally define Ms. Tommerup as her "spouse", the State of Wisconsin does not legally recognize common law nor (sic) other non-traditional relationships as marriages. Therefore, for purposes of the State of Wisconsin employes group health insurance program, Ms. Tommerup is not a "spouse".

* * *

> Since Ms. Phillips has, according to definition, no "eligible dependents," she may not be covered under the family coverage option and is therefore eligible only for the "single coverage option for other eligible persons".

6. Had the petitioner been legally married to Ms. Tommerup, the petitioner's application for family coverage would have been approved.

7. On September 14, 1987, the petitioner filed a charge of discrimination with the Commission alleging she had been discriminated against based on her marital status, sex and sexual orientation.

8. Petitioner also appealed the denial of her application by filing an appeal with the Employe Trust Funds Board.

The Court makes the following additional findings of fact:

Petitioner's charge of discrimination alleges, by way of a separate statement of theories, discrimination by DHSS and DETF based on her marital status, sexual orientation and sex, in violation of the Wisconsin Fair Employment Act, and violations of the DHSS Affirmative Action and Equal Employment Opportunity policy statement and the equal

protection clause of the Wisconsin Constitution. Her charge also alleges that denial of group health insurance to Tommerup is unsound public policy in that it encourages sham marriages which would not generate the economic and societal benefits of genuine marriages.

The parties agreed to bypass the probable cause stage and proceed directly to the issues of Commission jurisdiction and, if necessary, whether discrimination had occurred.

The Commission dismissed the complaint for failure to state a claim upon which relief can be granted. Petitioner petitioned for rehearing and the Commission granted the petition for rehearing in part, because respondent DHSS had failed to move to dismiss the sexual orientation discrimination claim and as a result petitioner had not had an opportunity to brief that claim.

On rehearing, the Commission dismissed the sexual orientation discrimination claim for failure to state a claim upon which relief can be granted and dismissed petitioner's constitutional and other claims for lack of ancillary jurisdiction.

On October 9, 1989, Petitioner petitioned this court for review of the Commission's final decision, pursuant to sections 111.375(2) and 227.53, Stats. The petition for review asks that the case be remanded to the Commission for further proceedings and appropriate relief on the grounds that the Commission: (a) erroneously interpreted secs. 111.31 et seq., and 40.02(20), Stats., in dismissing her petition

for failure to state a claim upon which relief can be granted; (b) erroneously interpreted secs. 111.31 et seq. in determining it had no jurisdiction over DHSS; and (c) erroneously decided it had no jurisdiction to determine Phillips' constitutional or DHSS policy statement claims.

STATUTES AND OTHER PROVISIONS INVOLVED

Section 111.31, Stats., provides in part as follows:

> (1) The legislature finds that the practice of unfair discrimination in employment against properly qualified individuals by reason of their . . . marital status, sex . . . [or] sexual orientation . . . substantially and adversely affects the general welfare of the state. Employers . . . which deny employment opportunities and discriminate in employment against properly qualified individuals solely because of their . . . marital status, sex . . . [or] sexual orientation . . . deprive those individuals of the earnings which are necessary to maintain a just and decent standard of living.
>
> (2) It is the intent of the legislature to protect by law the rights of all individuals to obtain gainful employment and to enjoy privileges free from employment discrimination because of . . . marital status, sex . . . [or] sexual orientation . . . and to encourage the full, nondiscriminatory utilization of the productive resources of the state to the benefit of the state, the family and all the people of the state . . ..
>
> (3) In the interpretation and application of this subchapter, and otherwise, it is declared to be the public policy of the state to encourage and foster to the fullest extent practicable the employment of all properly qualified individuals regardless of . . . marital status, sex . . . [or] sexual orientation . . .. This subchapter shall be liberally construed for the accomplishment of this purpose.

Section 40.02, Stats., provides in part as follows:

> (20) "Dependent" means the spouse, minor child, including stepchildren of the current marriage dependent on the employe for support and maintenance, or child of any age, including stepchildren of the current marriage, if handicapped to an extent requiring continued dependence. For group insurance purposes only, the department may promulgate rules with a different definition of "dependent" than the one

otherwise provided in this subsection for each group insurance plan.

Section 40.52, Stats., provides in part as follows:

(1) The group insurance board shall establish by contract a standard health insurance plan in which all insured employes shall participate except as otherwise provided in this chapter. The standard plan shall provide:

(a) A family coverage option for persons desiring to provide for coverage of all eligible dependents and a single coverage option for other eligible persons.

Section ETF 10.01, Wis. Admin. Code, provides in part as follows:

(2) "Dependent" means:

* * *

(b) For health insurance purposes, an employe's spouse and an employe's unmarried child who is dependent upon the employe or the employe's former spouse for at least 50% of support and maintenance. In this paragraph, "child" means a natural child, stepchild, adopted child, child in an adoptive placement . . . and a legal ward who became a legal ward of the employe or the employe's former spouse prior to age 19, and who is:

1. Under the age of 19,

2. Age 19 or over but less than age 25 if a full-time student, or

3. Age 19 or older and incapable of self-support because of a physical or mental disability which is expected to be of long-continued or indefinite duration.

Section 15.04, Stats., provides in part as follows:

(1) . . . Each head of a department or independent agency shall:

* * *

(g) . . . In order to determine whether there is any arbitrary discrimination on the basis of . . . sex, marital status, or sexual orientation as defined in s. 111.32(13m), examine and assess the statutes under which the head has powers or regulatory responsibilities, the procedures by which those statutes are administered and the rules

promulgated under those statutes. If the department or agency head finds any such discrimination, he or she shall take remedial action, including making recommendations to the appropriate executive, legislative or administrative authority.

Section 765.001, Stats., provides in part as follows:

* * *

(2) . . . It is the intent of chs. 765 to 768 to promote the stability and best interests of marriage and the family. It is the intent of the legislature to recognize the valuable contributions of both spouses during the marriage and at termination of the marriage by dissolution or death. Marriage is the institution that is the foundation of the family and of society. Its stability is basic to morality and civilization, and of vital interest to society and the state. The consequences of the marriage contract are more significant to society than those of other contracts and the public interest must be taken into account always. The seriousness of marriage makes adequate premarital counseling and education for family living highly desirable and courses thereon are urged upon all persons contemplating marriage. The impairment or dissolution of the marriage relation generally results in injury to the public wholly apart from the effect upon the parties immediately concerned. Under the laws of this state, marriage is a legal relationship between 2 equal persons, a husband and a wife, who owe to each other mutual responsibility and support. Each spouse has an equal obligation in accordance with his or her ability to contribute money or services or both which are necessary for the adequate support and maintenance of his or her minor children and of the other spouse. No spouse may be presumed primarily liable for support expenses under this subsection.

DECISION

The Agency Decision and Standard of Review.

Since the Commission essentially adopted the petitioner's version of facts in its findings of fact, I find that there is no dispute concerning the material facts and only questions of law are presented for review.

Trial courts owe varying degrees of deference to an agency's conclusions, none of them absolute. See, e.g.,

Trinwith v. LIRC, 149 Wis. 2d 634, 640 (Ct. App. 1989); Bargo Foods North, Inc. v. Department of Revenue, 141 Wis. 2d 589, 593 (Ct. App. 1987). However, the court will hesitate to substitute its judgment for that of the agency on a question of law if a rational basis exists in law for the agency's interpretation and it does not conflict with legislative history, case law, or constitutional prohibitions. Secs. 227.52(5), (8), Stats.; Wehr Steel Co. v. DILHR, 102 Wis. 2d 480, 487 (Ct. App. 1981) (mod'd and affm'd, 106 Wis. 2d 111 (1982); Dairy Equipment Co., Inc. v. ILHR Dept., 95 Wis. 2d 319, 327 (1980). If a rational basis exists for the agency's conclusion, the court should affirm the agency's interpretation of the applicable law, even if the court does not entirely agree with the agency's rationale. NCR Corp. v. Department of Revenue, 128 Wis. 2d 442, 447-8 (Ct. App. 1986).

Section 230.45, Stats. defines the powers and duties of the Commission and does not confer upon the Commission the power to determine the constitutionality of a statute or administrative rule. An agency only has powers which are expressly granted or fairly implied by statute. State ex rel. Farrell v. Schubert, 52 Wis. 2d 351, 358 (1971). The Commission therefore lacks jurisdiction to determine the constitutionality of an administrative rule or statute.

Section 227.05, Stats. provides that a party may challenge the constitutionality of a statute or administrative rule in a declaratory judgment action in

circuit court. However, courts may also determine the constitutionality of an administrative rule when reviewing administrative agency decisions under sec. 227.52, Stats., if the issue was raised before the agency. Linse v. LIRC, 135 Wis. 2d 399, 403 (Ct. App. 1986); Charter Mfg. Co. v. Milwaukee River Restoration Council, Inc., 102 Wis. 2d 521, 527 (Ct. App. 1981).

The Commission reviewed the above statutory and administrative definitions of "dependent" and first concluded that, on the basis of those provisions, Tommerup was not eligible for inclusion in family insurance coverage, since she is neither petitioner's spouse nor child. The Commission then examined petitioner's marital status, sexual orientation and sex discrimination claims individually.

With respect to petitioner's marital status and sexual orientation discrimination claims, the Commission reviewed the legislative history of chapters 40 and 111, Stats., as well as Ray v. DHSS, a Personnel Commission decision, and Hartman & Lavine v. Mueller Food Services, a LIRC decision. The Commission noted that the legislature codified the current definition of "dependent" at the same time it amended ch. 111 to prohibit marital status and sexual orientation discrimination in employment. Therefore, the Commission concluded as follows: 1) the legislature intended to permit employers to favor married employees over single employees in the provision of health insurance benefits; 2) in amending ch. 111, Stats., to prohibit discrimination on the basis of

marital status and sexual orientation, the legislature only intended to prohibit these types of discrimination in the areas of hiring, firing and compensation. Such differential treatment, the Commission concluded, demonstrated the legislature's intent to promote the stability and best interests of marriage and the family, consistent with the objectives of ch. 765, Stats.

The Commission specifically considered the amendment to sec. 40.52, Stats., which gave the Department of Employee Trust Funds authority to modify the definition of "dependent," and how much rule-making authority the legislature intended agencies to have in this area. The legislative history of that section disclosed a report of the Joint Survey Committee on Retirement Systems, which characterized the rule-making provision as a "minor policy change."

The Commission also noted that the enhanced rule-making authority had replaced that part of the earlier definition of dependent which included unmarried dependent "children" in the 19 to 25 year old category. The Commission concluded from these changes that the legislature did not intend to give DETF discretion to codify the sweeping public policy changes that inclusion of "spouse equivalents" in the definition of dependent would entail. Rather the Commission concluded that the legislature only intended the DETF to "fine-tune" the definition of "child" within the statutory definition of dependent. For these reasons, the Commission

concluded that petitioner failed to state claims of discrimination based on marital status and sexual orientation upon which relief could be granted and denied petitioner's request for family coverage for her lesbian partner.

With respect to petitioner's sex discrimination claim, the Commission concluded that because family insurance coverage is denied to female and male homosexual partners alike, petitioner is not being discriminated against because of her sex. Her sex discrimination theory is really an attack on the fact that same-sex, self-proclaimed marriage-like relationships have no legal status in Wisconsin.

The Commission concluded that it had no jurisdiction to consider petitioner's contractual and constitutional claims because claims like those were not included in sec. 230.45, Stats., which enumerates the Commission's powers, nor could jurisdiction over these claims be inferred from the statute.

Petitioner's Claims.

The petitioner contends that sec. 15.04(1)(g), Stats., which pre-dates the changes in the statutory definition of "dependent," shows that the legislature intended to give administrative agencies broad discretion to remedy marital status discrimination of the type she experienced in this case. The Commission was therefore wrong, petitioner contends, in concluding that the legislature only intended to give agencies authority to "fine tune" the definition of dependent. According to petitioner, the Commission's

analysis of Ray and Hartman & Lavine, supra, by attempting to determine legislative intent, misses the fundamental point that sec. ETF 10.01(2)(b) illegally discriminates on the basis of marital status and must succumb to the mandate of sec. 15.04(1)(g). Petitioner further argues that the Commission erred by concluding that the public policy objectives of ch. 765 permitted marital status discrimination in the face of the express mandate of ch. 111 to eliminate such discrimination in employment. Petitioner contends that the traditional concept of marital status embodied in the statutory definition of dependent is not a legitimate factor to justify greater employment benefits for a certain group, actual dependence being the only legitimate factor. Because Tommerup is actually dependent upon petitioner, petitioner argues that she should be eligible for family insurance coverage.

Petitioner's sexual orientation and sex discrimination arguments echo her arguments based on marital status discrimination: although section ETF 10.01(2)(b) is facially neutral, it is discriminatory in its effect. Petitioner argues that she and Tommerup are similarly situated to a heterosexual married couple in that Tommerup is actually dependent upon the petitioner, and yet they cannot legally marry and receive family insurance coverage. Only if petitioner were a male could she legally marry Tommerup and qualify for family insurance coverage. Hence, petitioner argues, there is both sexual orientation and sex

discrimination.

Although petitioner acknowledges that the Commission lacks the authority to determine the constitutionality of a statute, she argues that the Commission has the authority to determine the constitutionality of an administrative rule and to review her contractual claims under the DHSS policy statement. Even if the court should decide that the Commission lacks this authority, however, the Commission should not have dismissed these claims because the court has the authority under ch. 227 to review the claims.

Petitioner advocates strict scrutiny in any analysis of her claims of denial of equal protection on the basis of marital status, sexual orientation and sex.

Analysis on Review.

The language of chapters 40 and 111 shows that the legislature did not directly address the relationship between the amendment to the definition of dependent and ch. 111's mandate to eliminate marital status, sexual orientation and sex discrimination in employment. When the legislature does not state a rationale for its actions, it is the court's obligation to locate or to construct a rationale that might have influenced the legislature and that reasonably upholds the legislative determination. Sambs v. City of Brookfield, 97 Wis. 2d 356, 371 (1980). Courts may look to legislative history to determine legislative intent. Rice v. City of Oshkosh, 148 Wis. 2d 78, 84 (1989).

The history of secs. 40.02(20) and 111.37 indicates that the legislature intended differential treatment of married persons and children in the area of employment benefits to be an exception to the prohibitions against employment discrimination. The history of these sections also indicates that the legislature did not intend to give administrative agencies authority to legislate, through rule making, family insurance coverage for spouse equivalents or other types of family units.

The legislature added marital status to ch. 111 as a prohibited form of employment discrimination at the same time it amended sec. 40.02(20) to provide the current definition of dependent. See, ch. 334, Laws of 1981, sec. 1c. When the legislature enacts a statute, it is presumed to act with full knowledge of existing laws, including statutes. Mack v. Joint School District No. 3, 92 Wis. 2d 476, 489 (1979). Courts are to construe statutes to resolve potential conflicts, if reasonably possible. Id.

A reasonable conclusion from the timing of these amendments is that the legislature intended that denying family insurance benefits to alternative families like petitioner's would not violate ch. 111. See also, Ray v. Personnel Commission, Case No. 84-CV-6165, Memorandum Decision, Dane County Circuit Court, May 15, 1985, pp. 3-5, pp. 194-6, Petitioner's Appendix; Hartman & Lavine v. LIRC, Case No. 85-CV-0515, Decision, Washington County Circuit Court, July 18, 1986, p. 3, p. 221, Petitioner's Appendix.

Section 40.02(20), as enacted in 1981, contained a provision for unmarried young adult children. See, ch. 96, Laws of 1981, sec. 24. The 1982 amendment to section 40.02(20) removed the reference to unmarried young adult children and authorized administrative agencies to change the definition of dependent for group insurance purposes only. This amendment restored an earlier provision giving agencies authority to include unmarried children in the definition of dependent. See, sec. 40.11(6), Stats (1979-80).

I conclude from the foregoing changes that the legislature only intended changes in the classes of dependent children included in the definition of "dependent." The legislature did not intend to authorize administrative agencies to make rules providing group insurance benefits to spousal equivalents or other unmarried adults, such as adult sibling units, handicapped/helper or elderly parent/adult child combinations, or pairs of "significant others," i.e., permanent heterosexual unions of unmarried persons without marital property constraints or legal obligations to support.

The Legislature's Joint Survey Committee Report on the above changes to chapter 40 indicated that the amendment to sec. 40.02(20) was only a minor policy change and implied that the changes would have only minimal fiscal impacts. See, Phillips v. Secretaries, DHSS and DETF, Case No. 87-0128-PC-ER, Commission's Decision and Order, March 15, 1989, pp. 13-14. I conclude from the Committee's report that the

legislature did not intend to implement major policy changes through the rule-making provision and did not intend to empower administrative agencies to extend family health insurance benefits to alternative families like petitioner's or other types.

While there is disparate treatment of petitioner in this case, I do not agree that it is unlawfully discriminatory.

Discrimination is disparate treatment of similarly situated persons. Federated Rural Electric Insurance Co. v. Kessler, 131 Wis. 2d 189, 211 (1986). The legislature has decided that heterosexual marriage and/or the presence of dependent children, not mere actual dependence, will determine eligibility for family health insurance benefits. Therefore, petitioner, not legally married, is not similarly situated to heterosexual married persons.

Petitioner has also not shown that she was discriminated against because of her sexual orientation or sex. Unmarried, but committed heterosexuals without children are not eligible for family insurance coverage under the current definition of dependent in sec. 40.02(20), regardless of actual dependency. The current definition of dependent also excludes from coverage dependent persons of married heterosexuals other than children or stepchildren. Thus, single males with "actual" dependents, or male homosexuals with spousal equivalents, are similarly barred from obtaining family coverage for those actual dependents. Thus, the disparate

treatment complained of here does not flow from either the sexual orientation of the parties, or from their sex.

Petitioner contends that the Commission erred in concluding that the public policy objectives of sec. 765.001 justify disparate treatment for her and others with alternative families.

I do not agree.

Petitioner correctly observes that the institutions of heterosexual marriage and the traditional family are experiencing serious problems today. As petitioner's situation demonstrates, groups in our society seek to expand the definitions of "marriage" and "family" to include more of the types of family living units which provide financial and emotional security to individuals in our society. This lawsuit, in fact, reflects the fact that shifting social mores and scientific developments increasingly challenge the monopoly that the traditional heterosexual marriage and biological family have had as the acknowledged building block of our society.

Marriage, of course, has never been a requisite to heterosexuals creating children. Now, through artificial insemination, surrogacy, in vitro fertilization or adoption, heterosexuality is also not a prerequisite to creating children. The advent of an artificial uterus and the research into cloning may one day make optional female pregnancy as well.

However, legislative policy continues to recognize the

heterosexual marriage and the traditional family with a husband, wife and children as the foundation of our society. The Commission acted rationally when it concluded that it possessed delegated authority only to preserve those traditional institutions at the risk of providing less favorable employment benefits to other types of family units. It may be argued that other conclusions, such as recognizing spouse equivalents and other family types that have significant social utility are equally reasonable.

However, the courts are not to upset an agency interpretation of a statute or administrative rule even if an alternative view may be equally reasonable. See, Falls Communications, Inc. v. Department of Revenue, 131 Wis. 2d 545, 547 (Ct. App. 1986); Calumet County v. LIRC, 120 Wis. 2d 297, 300 (Ct. App. 1984). Construing the above statutes and rule to mean that actual dependence determines the legal status of dependency for family health insurance purposes would have major public policy implications, not the least of which would be the fiscal and actuarial impact on the public employee benefit system.

The legislature is much more capable of dealing with matters of changing public policy and allocation of scarce fiscal resources than are the courts. I am convinced that the legislature is aware of the growing role of alternative families in society (See, e.g., 1989 Wis. Act 201, sec. 16(b), providing for HIV blood testing in certain circumstances for unconscious persons upon the consent of a

person "with whom the individual has a meaningful social and emotional relationship"). Petitioner must therefore turn to the legislature, not to the courts, as a forum wherein the voices of change are most properly heard and weighed.

Petitioner also argues that ETF 10.01(2)(b) violates sec. 15.04(1)(g), which gives an agency head authority to remedy arbitrary marital status, sexual orientation or sex discrimination stemming from statutes giving the agency powers or regulatory responsibilities. Whether section 15.04(1)(g) applies in this case depends on whether the denial of family health insurance to petitioner was arbitrary. Since determination of whether discrimination is arbitrary is an element of equal protection analysis, the applicability of sec. 15.04(1)(g) will be discussed in conjunction with whether petitioner has been denied equal protection under the Wisconsin Constitution.

Equal Protection.

Strict scrutiny under the equal protection clause of the U.S. constitution is presently reserved for "suspect" classifications by race, alienage, national origin, gender and illegitimacy. Ben-Shalom v. Marsh, 881 F.2d 454, 464 n. 8 (7th Cir. 1989). Equal protection analysis under the U.S. and Wisconsin Constitutions is substantially equivalent. State v. McManus, 152 Wis. 2d 113, 130 (1989). Where a suspect classification is not alleged, the challenged statute must be sustained unless it is patently arbitrary and bears

no rational relationship to a legitimate government interest. Id., at 131. The test is not whether some inequality results, but whether any reasonable basis or legitimate governmental interest exists justifying the classification created by the statute or rule. Richards v. Cullen, 150 Wis. 2d 935, 942 (Ct. App. 1989).

The legislature has expressed its interest in preserving heterosexual marriage and the traditional family; the Supreme Court affirmed that interest in Federated Electric, supra, 131 Wis. 2d at 214. The legislature also has a legitimate interest in maintaining the financial stability of the public employee benefit system. I conclude, therefore, that there are legitimate governmental interests which support the current public employee health insurance scheme.

Moreover, limiting family insurance coverage to married heterosexuals and children is a rational way to promote marriage and the family because it is a financial incentive to marry. The protections of the Wisconsin Marital Property Act (chapter 766, Stats.) during marriage and the judicial power to divide marital estates equitably upon divorce (ch. 767, Stats.) serve the legitimate governmental interest of making state citizens as self-sufficient as possible, thereby reducing the number of adults and children who might otherwise become public charges. Moreover, I am not persuaded by any evidence in the record that denying family health insurance coverage to alternative families has

encouraged the practice of "sham" marriages to the detriment of genuine heterosexual marriage. Therefore, to the extent that the current definition of dependent disfavors alternative families, petitioner was not denied equal protection under the Wisconsin Constitution because of her marital status or sexual orientation.

Even though sex is a suspect classification and therefore warrants strict scrutiny of alleged discrimination under the equal protection clause, I have concluded above that petitioner failed to show discrimination against her because of her sex. Therefore, I need not address petitioner's claim of denial of equal protection because of sex discrimination. Lastly, because the denial of family health insurance to petitioner's family passes the equal protection test and serves legitimate governmental interests, I conclude it was not arbitrary discrimination which must be remedied under section 15.04(1)(g), Stats.

DHSS Policy Statement.

Petitioner raises a contractual claim under the DHSS Policy Statement, which provides in relevant part:

EQUAL EMPLOYMENT OPPORTUNITY

The Department is committed to providing equal employment opportunity in all terms, conditions or privileges of employment, including but not limited to . . . benefits . . ..

Equal employment for all persons regardless of . . . sex . . . sexual orientation, marital status . . . is a fundamental agency policy.

The DHSS policy statement embodies the essential

elements of ch. 111 as well as other statutes. The application of the statement to the facts therefore presents a question of law similar to the legal questions presented by chs. 111 and 40 above. The policy statement claim was, like the equal protection claim, preserved for review when raised before the Commission. Therefore, this court may decide the issue despite the Commission's decision that it lacked jurisdiction to do so.

I conclude that denial of family health insurance benefits to petitioner did not violate the DHSS policy statement. DHSS must act within a statutory framework and that framework provides for more favorable treatment for traditional marriages and families in the provision of health care benefits to public employees. Consequently, DHSS did not violate its policy statement in denying family health insurance benefits to petitioner.

CONCLUSION AND ORDER

For the reasons above and based upon the record herein, I conclude that the legislature did not authorize the granting of legal dependent status to unmarried spouse equivalents for family health insurance purposes and intended that enhanced health insurance benefits for legal dependents be an exception to the prohibitions against discrimination in the Wisconsin Fair Employment Act. I therefore affirm the Commission's decision which dismissed petitioner's charge of discrimination in connection with the denial of family health

insurance benefits for petitioner's unmarried spouse equivalent for failure to state a claim upon which relief can be granted.

Dated this 8th day of November, 1990.

BY THE COURT:

Angela B. Bartell
Circuit Judge

cc:

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