

COPY

STATE OF NEW MEXICO
COUNTY OF BERNALILLO
SECOND JUDICIAL DISTRICT

ENDORSED
FILED IN MY OFFICE THIS

DEC 10 2007

N. HAVENS LEVITT & REBECCA DAKOTA,
MARY MEYER & H. HOPE MINER, and
DORIS FIELDS & ANNE FROST,

Quantita M. Duran
CLERK DISTRICT COURT

Plaintiffs,

v.

CV-2007-01048

BOARD OF THE NEW MEXICO
RETIREE HEALTH CARE AUTHORITY,
and STATE OF NEW MEXICO,

Defendants.

SECOND AMENDED COMPLAINT FOR DECLARATORY
AND INJUNCTIVE RELIEF

COME NOW PLAINTIFFS, through the undersigned counsel, and bring this action pursuant to the New Mexico Declaratory Judgment Act, NMSA 1978, §§ 44-6-1 to 44-6-15 (1975), and New Mexico common law. Plaintiffs respectfully request that this Court declare that defendants' failure, under the New Mexico Retiree Health Care Act, NMSA 1978, §§ 10-7C-1 to 10-7C-19 (2006), and otherwise, to provide plaintiffs with an opportunity to enjoy post-retirement same-sex domestic partnership health insurance benefits on the same terms as post-retirement opposite-sex spousal health insurance benefits, is a violation of plaintiffs' rights to equal protection and substantive due process under Article II, § 18 of the New Mexico Constitution, and a violation of plaintiffs' inherent rights under Article II, § 4 of the New Mexico Constitution. Plaintiffs further request that this Court enjoin defendants from continuing to deny Plaintiffs such

opportunity to enjoy such benefits. Plaintiffs are same-sex couples in committed, intimate and loving relationships who lead shared lives that are intertwined financially, emotionally, and in all other aspects. One member of each plaintiff couple is an active or retired public employee who is eligible to enjoy post-retirement health insurance benefits under the New Mexico Retiree Health Care Act. Plaintiffs seek access to post-retirement health insurance benefits under the New Mexico Retiree Health Care Act equal to those of opposite-sex couples in spousal relationships.

JURISDICTION, VENUE, AND PARTIES

1. Jurisdiction of this Court is invoked pursuant to the Declaratory Judgment Act, NMSA 1978, §§ 44-6-1 to 44-6-15 (1975), and New Mexico common law.
2. Venue is proper pursuant to NMSA 1978, § 38-3-1 (1988).
3. Plaintiff N. Havens Levitt is a resident of the County of Bernalillo in New Mexico, whose rights, status and other legal relations are affected by the New Mexico Retiree Health Care Act and its interpretation and administration by defendants.
4. Plaintiff Rebecca Dakota is a resident of the County of Bernalillo in New Mexico, whose rights, status and other legal relations are affected by the New Mexico Retiree Health Care Act and its interpretation and administration by defendants.
5. Plaintiff Mary Meyer is a resident of the County of Sandoval in New Mexico, whose rights, status and other legal relations are affected by the New Mexico Retiree Health Care Act and its interpretation and administration by defendants.

6. Plaintiff H. Hope Miner is a resident of Placitas and the County of Sandoval in New Mexico, whose rights, status and other legal relations are affected by the New Mexico Retiree Health Care Act and its interpretation and administration by defendants.

7. Plaintiff Doris Fields is a resident of Placitas in the County of Sandoval in New Mexico, whose rights, status and other legal relations are affected by the New Mexico Retiree Health Care Act and its interpretation and administration by defendants.

8. Plaintiff Anne Frost is a resident of Placitas in the County of Sandoval in New Mexico, whose rights, status and other legal relations are affected by the New Mexico Retiree Health Care Act and its interpretation and administration by defendants.

8. Defendant Board of the New Mexico Retiree Health Care Authority is sued in its official capacity under the Declaratory Judgment Act and common law, and is a person for purposes of the Declaratory Judgment Act, NMSA 1978, § 44-6-3 (1975).

9. Defendant State of New Mexico is the entity to be sued regarding the constitutionality of statutes under the Declaratory Judgment Act and common law, and is a person for purposes of the Declaratory Judgment Act, NMSA 1978, § 44-6-3 (1975).

GENERAL ALLEGATIONS

10. On April 9, 2003, Governor Bill Richardson signed Executive Order No. 2003-010, which allows state employees to enjoy domestic partnership employment benefits, including same-sex domestic partnership health insurance benefits.

11. Executive Order No. 2003-010 gives certain state employees with domestic partners the same set of employment benefits as that given to employees with opposite-sex spouses, which include opposite-sex spousal health insurance benefits. Executive

Order No. 2003-010 does not distinguish among types of employment benefits.

Executive Order No. 2003-010 does not distinguish between employees with same-sex domestic partners and those with opposite-sex domestic partners.

12. In 2004, Albuquerque Public Schools (“APS”) similarly granted same-sex domestic partnership employment benefits to its employees. These benefits include health insurance benefits for same-sex domestic partners of APS employees. The APS policy regarding same-sex domestic partnership benefits does not distinguish among types of employment benefits. The APS policy does not distinguish between employees with same-sex domestic partners and those with opposite-sex domestic partners.

13. Both state retirees and APS retirees enjoy health insurance benefits under the Retiree Health Care Act. NMSA 1978, §§ 10-7C-1, et seq.

14. Despite Executive Order No. 2003-010 and the comparable APS policy, health care coverage for the same-sex domestic partner of a state or APS employee terminates upon the employee’s retirement.

15. The Retiree Health Care Act applies to retired employees subject to the Public Employees Retirement Act, NMSA 1978, §§ 10-11-1, et seq., the Judicial Retirement Act, NMSA 1978, §§ 10-12B1, et seq., the Magistrate Retirement Act, NMSA 1978, §§ 10-12C-1, et seq., the Public Employees Retirement Reciprocity Act, NMSA 1978, §§ 10-13A-1, et seq., and the Educational Retirement Act, NMSA 1978, §§ 22-11-1, et seq., as well as to retired employees of certain other public employers including certain municipal employers (collectively, “state retirees”). NMSA 1978, § 10-7C-4.

16. Under the Retiree Health Care Act, health insurance benefits are available to eligible dependents of state retirees. For purposes of the Retiree Health Care Act, the term "eligible dependent" is defined to include a spouse; it is silent as to a domestic partner. NMSA 1978, § 10-7C-4(F).

17. Because defendants provide dependent health insurance benefits to state retirees with opposite-sex spouses but refuses them to similarly situated state retirees with committed same-sex life partners, defendants deprive plaintiffs of their inherent rights, and violate their rights to equal protection and substantive due process under the New Mexico Constitution.

18. For purposes of the dependent health insurance benefits at issue, plaintiffs are similarly situated to married state retirees and their spouses. Plaintiffs satisfy the eligibility criteria for same-sex domestic partnership benefits set forth under Executive Order 2003-010. If permitted to do so, plaintiffs would sign and submit an affidavit of domestic partnership and would pay the additional insurance premiums required for the family coverage available to married state retirees and their spouses in order to obtain post-retirement same-sex domestic partnership health insurance benefits.

19. Defendants intentionally deny plaintiffs and other state retirees with same-sex domestic partners equal access to post-retirement health insurance benefits. Such denial has the practical effect of directly and substantially harming plaintiffs.

MARY MEYER and H. HOPE MINER

20. Mary Meyer and H. Hope Miner have been in an intimate, loving, committed same-sex relationship for over twelve years. Mary and Hope are lesbians. They cannot change their sexual orientation.
21. Mary and Hope hold themselves out to their community as a couple in a lifelong relationship.
22. Mary and Hope own their home jointly, have joint checking and savings accounts, and are otherwise financially interdependent. Together, they are raising two children, ages 13 and 14.
23. Mary is 48 years old. Hope is 55.
24. Mary has been employed by the New Mexico Department of Health for twenty-two years. She is a Program Manager. She plans to retire in three years. She is vested and is eligible to enjoy post-retirement health insurance benefits under the New Mexico Retiree Health Care Act.
25. Hope is a retired educator who worked for Albuquerque Public Schools for twenty-five years.
26. After Governor Richardson signed Executive Order 2003-010, Mary added Hope to her health insurance through the State of New Mexico as her same-sex domestic partner. Hope currently accesses health insurance benefits as Mary's domestic partner.
27. When Mary retires in three years, Hope will no longer be eligible for health insurance through the State of New Mexico as Mary's same-sex domestic partner. Upon information and belief, Hope and Mary will incur greater expense in order to provide

Hope with an independent source of health insurance after Mary retires. Upon information and belief, Hope and Mary will incur greater expense in order to provide Hope with an independent source of health insurance after Mary retires.

28. If defendants were to allow Mary to maintain Hope on her health insurance through the State of New Mexico as her same-sex domestic partner when she retires, Mary would do so.

29. Mary and Hope have made promises and commitments of mutual support to one another. Mary and Hope have accepted the emotional and financial responsibilities of taking care of one another, and have taken steps to ensure that their relationship has legal protections. For example, Mary and Hope have named one another as the responsible party on health care powers of attorney.

30. The responsibilities that Mary and Hope have promised to each other include the obligation to provide for one another if either becomes seriously ill. If serious illness were to befall one of them, the other would be committed to providing emotional support, and, if necessary, to paying the financial costs of health care.

N. HAVENS LEVITT and REBECCA DAKOTA

31. N. Havens Levitt and Rebecca Dakota have been in an intimate, loving, committed same-sex relationship for over ten years. Havens and Rebecca are lesbians. They cannot change their sexual orientation.

32. Havens and Rebecca hold themselves out to their community as a couple in a lifelong relationship.

33. Havens and Rebecca own their home jointly, have joint checking and savings accounts, and are otherwise financially interdependent.
34. Havens is 53 years old. Rebecca is 56.
35. Havens is an educator who has been employed as a public school teacher for twenty-four years. She plans to retire in two years. She is vested and is eligible to enjoy post-retirement health insurance benefits under the New Mexico Retiree Health Care Act.
36. Rebecca is a self-employed consultant and has worked in that capacity for four years. She does not have access to her own employer-sponsored health insurance benefits, and will not have access to such benefits when she retires.
37. In 2004, Havens was employed with Albuquerque Public Schools. After Albuquerque Public Schools granted same-sex domestic partnership benefits to its employees in 2004, Havens added Rebecca to her health insurance through APS as her same-sex domestic partner. Rebecca continues to access health insurance benefits as Havens's domestic partner.
38. When Havens retires in two years, Rebecca will no longer be eligible for health insurance as Haven's same-sex domestic partner.
39. If Rebecca were able to maintain her health insurance as Havens's same-sex domestic partner, Rebecca's health insurance would cost approximately \$250 per month. Havens and Rebecca will incur greater expense in order to provide Rebecca with an independent source of health insurance after Havens retires.
40. If defendants were to allow Havens to maintain Rebecca on her health insurance as her same-sex domestic partner when she retires, Havens would do so.

41. Havens and Rebecca have made promises and commitments of mutual support to one another. Havens and Rebecca have accepted the emotional and financial responsibilities of taking care of one another, and have taken steps to ensure that their relationship has legal protections.

42. The responsibilities that Havens and Rebecca have promised to each other include the obligation to provide for one another if either becomes seriously ill. If serious illness were to befall one of them, the other would be committed to providing emotional support, and, if necessary, to paying the financial costs of health care.

DORIS FIELDS and ANNE FROST

43. Doris Fields and Anne Frost have been in an intimate, loving, committed same-sex relationship for over eight years. Doris Fields and Anne Frost are lesbians. They cannot change their sexual orientation.

44. Doris and Anne hold themselves out to their community as a couple in a lifelong relationship.

45. Doris and Anne own a vacation home jointly, have joint checking and savings accounts, own automobiles and insurance policies jointly, and are otherwise financially interdependent.

46. Doris is 62 years old. Anne is 56.

47. Doris was a health educator who was employed with the New Mexico Department of Health ("DOH") for twenty-five years. She retired on May 19, 2006. She was vested and enjoys post-retirement health insurance benefits under the New Mexico Retiree Health Care Act.

48. Anne is a massage therapist and has worked in that capacity for five years. She does not have access to her own employer-sponsored health insurance benefits, and will not have access to such benefits when she retires.
49. After Governor Richardson signed Executive Order 2003-010, Doris added Anne to her health insurance through the State of New Mexico as her same-sex domestic partner.
50. When Doris retired in May 2006, Anne was no longer eligible for health insurance as Doris's same-sex domestic partner.
51. Since May 2006, Anne has been paying for health insurance through COBRA, because she is not eligible for health insurance as Doris's same-sex domestic partner. The continuation of health insurance coverage through COBRA has cost Anne approximately \$357 per month.
52. Anne's health insurance through COBRA will expire in November 2007, at which time she will need to obtain a private insurance policy.
53. Anne estimates that a private insurance policy will cost her approximately \$372 per month.
54. If Anne had been able to maintain her health insurance as Doris's same-sex domestic partner, Anne's health insurance would cost considerably less per month than she is paying now, or that she will pay for a private health insurance policy. Doris and Anne have incurred and will continue to incur greater expense in order to provide Anne with an independent source of health insurance since Doris's retirement. Anne would receive a broader scope of coverage, if she were able to maintain her health insurance as

Doris's same-sex domestic partner, than she will if she obtains private health insurance policy

55. If defendants were to allow Doris to maintain Anne on her health insurance as her same-sex domestic partner, Doris would do so.

56. Doris and Anne have made promises and commitments of mutual support to one another. Doris and Anne have accepted the emotional and financial responsibilities of taking care of one another, and have taken steps to ensure that their relationship has legal protections.

57. The responsibilities that Doris and Anne have promised to each other include the obligation to provide for one another if either becomes seriously ill. If serious illness were to befall one of them, the other would be committed to providing emotional support, and, if necessary, to paying the financial costs of health care.

COUNT I
(EQUAL RIGHTS AMENDMENT – N.M. Const. art. II, § 18)

58. Plaintiffs incorporate herein by reference the allegations made in Paragraphs 1 to 57.

59. Article II, Sec. 18 of the New Mexico Constitution provides:

No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person.

60. Defendants' failure to provide health insurance benefits for same-sex domestic partners of state retirees, including plaintiffs, is sex discrimination in violation of the Equal Rights Amendment of Article II, Sec. 18 of the New Mexico Constitution.

61. The denial of dependent health insurance benefits to state retirees with same-sex domestic partners but not state retirees with opposite-sex spouses is a form of sex discrimination.

62. The denial of dependent health insurance benefits to state retirees with same-sex domestic partners but not state retirees with opposite-sex spouses does not further a compelling governmental interest in a narrowly tailored manner; it does not even rationally further a legitimate governmental interest.

63. Defendants deprive plaintiffs of their right to be free from unjustified sex discrimination under Article II, § 18 of the New Mexico Constitution by denying dependent health insurance benefits to plaintiffs but not married state retirees and their spouses.

COUNT II
(EQUAL PROTECTION – N.M. Const. art. II, § 18)

64. Plaintiffs incorporate herein by reference the allegations made in Paragraphs 1 to 63.

65. Article II, Sec. 18 of the New Mexico Constitution provides:

No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person.

66. Defendants' failure to provide health insurance benefits for same-sex domestic partners of state retirees, including plaintiffs, is sexual orientation discrimination and otherwise discrimination in violation of the Equal Protection Clause of Article II, Sec. 18 of the New Mexico Constitution.

67. The denial of dependent health insurance benefits to state retirees with same-sex domestic partners, but not state retirees with opposite-sex spouses, is a form of sexual orientation discrimination.

68. The denial of dependent health insurance benefits to state retirees with same-sex domestic partners but not state retirees with opposite-sex spouses does not further a compelling governmental interest in a narrowly tailored manner; it does not even rationally further a legitimate governmental interest.

69. Defendants deprive plaintiffs of their right to equal protection under Article II, § 18 of the New Mexico Constitution by denying dependent health insurance benefits to plaintiffs but not married state retirees and their spouses.

COUNT III

(SUBSTANTIVE DUE PROCESS - N.M. Const. art. II, § 18)

70. Plaintiffs incorporate herein by reference the allegations made in Paragraphs 1 to 69.

71. Article II, Sec. 18 of the New Mexico Constitution provides:

No person shall be deprived of life, liberty or property without due process of law; nor shall any person be denied equal protection of the laws. Equality of rights under law shall not be denied on account of the sex of any person.

72. Defendants' failure to provide health insurance benefits for same-sex domestic partners of state retirees, including plaintiffs, is a burden and penalty on the exercise of fundamental rights and liberty interests in violation of the substantive components of the Due Process Clause of N.M. Const. art. II, § 18.

73. The denial of dependent health insurance benefits to state retirees with same-sex domestic partners but not state retirees with opposite-sex spouses burdens and penalizes the exercise of fundamental rights and liberty interests.

74. The denial of dependent health insurance benefits to state retirees with same-sex domestic partners but not state retirees with opposite-sex spouses does not further a compelling governmental interest in a narrowly tailored manner; it does not even rationally further a legitimate governmental interest.

75. Defendants deprive plaintiffs of their right to substantive due process under Article II, § 18 of the New Mexico Constitution by denying dependent health insurance benefits to plaintiffs but not married state retirees and their spouses.

COUNT IV
(INHERENT RIGHTS - N.M. Const. art. II, § 4)

76. Plaintiffs incorporate herein by reference the allegations made in Paragraphs 1 to 75.

77. N.M. Const. art. II, § 4 provides:

All persons are born equally free, and have certain natural, inherent and inalienable rights, among which are the rights of enjoying and defending life and liberty, of acquiring, possessing and protecting property, and of seeking and obtaining safety and happiness.

78. Defendants' failure to provide health insurance benefits for same-sex domestic partners of state retirees violates plaintiffs' inherent rights to enjoy life and liberty, to acquire, possess and protect property, to seek and obtain safety and happiness, secured by N.M. Const. art. II, § 4.

RELIEF REQUESTED

WHEREFORE, plaintiffs respectfully request that this Court:

A. Enter a declaratory judgment that the Retiree Health Care Act or, in the alternative, defendants' interpretation and administration of it, violate plaintiffs' rights protected by the Equal Rights Amendment of Article II, § 18 of the New Mexico Constitution by denying state retirees with same-sex domestic partners the same post-retirement health insurance benefits that are available to state retirees with opposite-sex spouses;

B. Enter a declaratory judgment that the Retiree Health Care Act or, in the alternative, defendants' interpretation and administration of it, violate plaintiffs' rights protected by the Equal Protection Clause of Article II, § 18 of the New Mexico Constitution by denying state retirees with same-sex domestic partners the same post-retirement dependent health insurance benefits that are available to state retirees with opposite-sex spouses;

C. Enter a declaratory judgment that the Retiree Health Care Act or, in the alternative, defendants' interpretation and administration of it, violate plaintiffs' rights protected by the substantive components of the Due Process Clause of Article II, § 18 of the New Mexico Constitution, by denying state retirees with same-sex domestic partners the same post-retirement dependent health insurance benefits that are available to state retirees with opposite-sex spouses;

D. Enter a declaratory judgment that the Retiree Health Care Act or, in the alternative, defendants' interpretation and administration of it, violate plaintiffs' inherent

rights protected by Article II, § 4 of the New Mexico Constitution, by denying state retirees with same-sex domestic partners the same post-retirement dependent health insurance benefits that are available to state retirees with opposite-sex spouses;

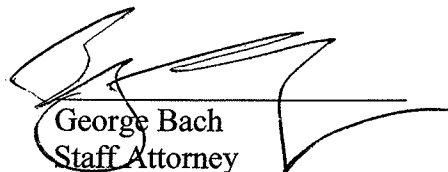
E. Enter a declaratory judgment that the New Mexico Constitution requires that defendants provide state retirees with same-sex domestic partners, including plaintiffs, the same post-retirement dependent health insurance benefits that are available to state retirees with opposite-sex spouses, including by classifying same-sex domestic partners of state retirees as “eligible dependents” for purposes of the Retiree Health Care Act;

F. Enter an order enjoining defendants from excluding same-sex domestic partners of state retirees, including plaintiffs, from enjoying the same post-retirement dependent health insurance benefits that opposite-sex spouses of state retirees enjoy, including by classifying same-sex domestic partners of state retirees as “eligible dependents” for purposes of the Retiree Health Care Act;

G. Award attorney fees pursuant to the private attorneys general doctrine and the substantial benefit doctrine; and

H. Award such other and further relief as this Court deems just and proper.

Respectfully submitted,



George Bach
Staff Attorney
ACLU of New Mexico
P.O. Box 566
Albuquerque, NM 87103

(505) 243-0046
Facsimile (505) 266-5916

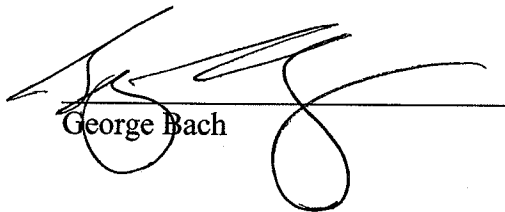
Maureen A. Sanders
Sanders & Westbrook, P.C.
Cooperating Attorney for the New Mexico
Civil Liberties Foundation
102 Granite NW
Albuquerque, NM 87102
(505) 243-2243
Facsimile (505) 243-2750

Kenneth Y. Choe
American Civil Liberties Union Foundation
Lesbian Gay Bisexual Transgender & AIDS Projects
125 Broad Street, 18th Floor
New York, NY 10004
(212) 549-2627
Facsimile (212) 549-2650

Attorneys for Plaintiffs

Certificate of Service

I hereby certify that a true and accurate copy of the foregoing pleading was sent via U.S. mail this 10th day of December, 2007, to all opposing counsel of record.


George Bach