STATE OF WISCONSIN | CIRCUIT COURT BRANCH 12 | DANE COUNTY

JAYNE DUNNUM, et al.,

Plaintiffs,

Case No. 05 CV 1265

vs.

DEPARTMENT OF EMPLOYEE TRUST FUNDS, et al.,

Defendants.

DECISION AND ORDER

The plaintiffs in this action are ten women, each of whom is a partner in one of five long-term committed same-sex domestic relationships. In each of the five relationships one of the two partners is or has been an employee of the State of Wisconsin. The plaintiffs bring this action for declaratory and injunctive relief challenging the constitutionality of state law provisions that that provide access to health care, sick leave and family leave for the benefit of spouses of state employees but deny such benefits to the same-sex partners of state employees.

The focus of this lawsuit is limited to three specific employment issues, sick leave, health insurance and family leave. The plaintiffs have offered a clear demonstration that each plaintiff is in a visible, stable domestic relationship of mutual support involving a commitment ceremony, joint home ownership and joint family finances. The plaintiffs have offered a strong showing that the employment benefits in issue have been provided on a discriminatory basis. The defendants' explanations offered for the continuing discrimination against these plaintiffs are unpersuasive and inadequate.

The result in this case is controlled by the decision of the Wisconsin Court of Appeals, Phillips v. Wisconsin Personnel Commission, 167 Wis.2d 205, 482 N.W.2d 121 (Ct. App. 1992)

which, in substance, determined the state law provisions now in issue to be legally proper. This court cannot simply ignore that precedent and therefore must now dismiss this action. But for the controlling authority of the Phillips decision, however, this court would find that the plaintiffs have proven that the state law provisions which preclude equal treatment as to sick leave, health insurance and family leave deny to the plaintiffs equal protection of law and thus are in violation of Article 1, Section 1 of the Wisconsin Constitution.

The individual plaintiffs are Jayne Dunnum (Dunnum), Robin Timm (Timm), Virginia Wolf (Wolf), Carol Schumacher (Schumacher), Diane Schermann (Schermann), Michelle Collins (Collins), Megan Sapnar (Sapnar), Ingrid Ankerson (Ankerson), Eloise McPike (McPike) and Janice Barnett (Barnett).[1]

The Defendants are the Department of Employee Trust Funds (DETF), Employee Trust Funds Board (ETFB), Secretary of the ETFB, David Stella (Stella), the Group Insurance Board (GIB), the Department of Workforce Development (DWD) and Secretary of the DWD, Roberta Gassman (Gassman)[2].

PROCEDURAL BACKGROUND

Plaintiffs initiated this action on April 20, 2005. In their complaint, Plaintiffs challenged the constitutionality of §40.02(20) Wis. Stats., which defines dependant for the purposes of state employee health insurance eligibility; and, §103.10(3) Wis. Stats., which defines those family members with a serious health condition for whom a state employee may take family leave to provide medical care. Plaintiffs contended that these definitions violated Article I, Section 1 of the Wisconsin Constitution,[3] because the provisions excluded lesbian and gay employees and

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[1] The original complaint included two additional plaintiffs, Jody Helgeland and Jessie Tanner, who are no longer parties to this action. (R. 1:1.)

[2] DETF, ETFB, Stella, GIB, the DWD and Gassman will be referred to collectively as "Defendants."

[3] The court will refer to Article I, Section 1 as the "Equal Protection Provision."

their families from qualifying for those benefits. Plaintiffs sought declaratory and injunctive relief, including a judgment from this court that the statutes and regulations violated their right to equal protection.

This court received two answers to Plaintiffs' initial complaint. The first, filed on June 3, 2005, was from the named defendants, who contended that Plaintiffs had failed to state a claim. The second, received June 8, 2005, was a proposed answer from the Wisconsin State Senate and Assembly (Legislature). The Legislature also submitted a notice of motion and motion to intervene.

On June 9, 2005, Plaintiffs submitted an amended complaint, which Defendants answered on July 6, 2005.[4] Subsequently, on July 27, 2005, Defendants filed a motion for judgment on the pleadings. Before this court could rule on either the Legislature's or Defendants' motions, it received an additional motion for intervention and proposed answer from eight Wisconsin municipalities (Municipalities).

A hearing on the Legislature's and Municipalities' motions for intervention was held on September 23, 2005, and this court issued a written order denying both motions that same day. Both the Legislature and the Municipalities chose to appeal the decision and the court, given the unsettled nature of the parties to this action, declined to exercise its jurisdiction during the pendency of the appeal.

The Court of Appeals affirmed this court's order in a published decision issued September 28, 2006, Helgeland v. Wisconsin Municipalities, 2006 WI App 216, 296 Wis. 2d 880, 724 N.W.2d 208; and, the Wisconsin Supreme Court affirmed on February 7, 2008. Helgeland v. Wisconsin Municipalities, 2008 WI 9, 307 Wis. 2d 1, 745 N.W.2d 1.

On August 20, 2008, Plaintiffs filed a second amended complaint, which dismissed two of the original plaintiffs, added two defendants and substituted one defendant for another.

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[4] The amended complaint removed the Board of Regents of the University of Wisconsin, the Department of Transportation, Frank Busalacchi, the Department of Corrections and Matthew Frank from the action and added Secretary of the DETF, Erich Stanchfield, as a defendant.

Defendants then filed the October 6, 2008, motion to dismiss that is currently pending before the court. Plaintiffs responded, on January 6, 2009, with a cross-motion for summary judgment. As noted above, both motions have been fully briefed, and this decision and order addresses the same.

UNCONTESTED MATERIAL FACTS

The plaintiffs have filed a second amended complaint which states 171 allegations. In response the defendant have moved to dismiss that second amended complaint. The plaintiffs have filed a motion for summary judgment. Both sides have submitted factual materials in the form of Statements of Proposed Undisputed Facts, supported by evidentiary material. The material submitted include an affidavit by William H. Kox, Jr. dated 2/3/09, an affidavit of attorney Laurence DuPuis, dated 1/14/09 and an affidavit by attorney John Knight, dated 1/5/09, to which are attached affidavits by the ten individual plaintiffs and other material. The court has considered these submissions and because the record now extends beyond the pleading, the pending motion to dismiss is to be resolved as one for summary judgment, sec. 802.06(2)(b), Wis. Stats. The court relies primarily upon the parties' proposed statements of undisputed facts to determine that the following facts are material to the issues, supported by admissible evidence and undisputed. In certain instances as noted, particular facts are also demonstrated by the Second Amended Complaint and, with the filing of the motion to dismiss, the defendants represented to the court that it could rely upon facts stated in that pleading, Evans v. Cameron (1985) 360 N.W.2d 25, 121 Wis.2d 421.

1. The partners in the five domestic relationships are the following;

   a. Jayne Dunnum and Robyn Timm have lived in an committed domestic relationship for fifteen years. Dunnum has worked for the Wisconsin Department of

Corrections for eighteen years. [5]

b. Virginia Wolf and Carol Schumacher have lived in an committed domestic relationship for thirty-three years. Wolf is retired from the University of Wisconsin at Stout where she taught English for twenty-four years. [6]

c. Diane Schermann and Michelle Collins have lived in an committed domestic relationship for five years. Schermann has worked for the Wisconsin Department of Transportation for fourteen years.[7]

d. Megan Sapnar and Ingrid Ankerson have lived in an committed domestic relationship for ten years. Sapnar is a graduate student at the University of Wisconsin-Madison and is employed as a teaching assistant.[8]

e. Eloise McPike and Janice Barnett have lived in an committed domestic relationship for twenty-three years. McPike has worked for the Wisconsin Department of Corrections for twenty-four years. [9]

2. Each plaintiff intends that the committed relationship continue permanently. [10]

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[5] Plaintiff's Proposed Undisputed Fact ¶ 2 and Defendants' response 1/6/09 Knight Aff., Exs. A, ¶¶ 2, 4; B, ¶¶ 2, 4; 2nd Am. Compl. ¶¶ 6 & 16.

[6] Plaintiff's Proposed Undisputed Fact ¶ 2 and Defendants' response 1/6/09 Knight Aff.. Exs. C, ¶¶ 2, 4; D, ¶¶ 2, 4; 2nd Am. Compl. ¶¶ 32 & 36.

[7] Plaintiff's Proposed Undisputed Fact ¶ 2 and Defendants' response 1/6/09 Knight Aff., Exs. E, ¶¶ 2, 4; F, ¶¶ 2, 4; 2nd Am. Compl. ¶¶ 56 & 66.

[8] Plaintiff's Proposed Undisputed Fact ¶ 2 and Defendants' response 1/6/09 Knight Aff., Exs. G, ¶¶ 2, 4; H, ¶¶ 2, 4; 2nd Am. Compl. ¶¶ 82 & 87.

[9] Plaintiff's Proposed Undisputed Fact ¶ 2 and Defendants' response 1/6/09 Knight Aff., Exs. I, ¶¶ 2, 4; J, ¶¶ 2, 4; 2nd Am. Compl. ¶¶ 108 & 115.

[10] Plaintiff's Proposed Undisputed Fact ¶ 2 and Defendants' response 1/6/09 Knight Aff., Exs. A, ¶¶ 2, 4, 26; B, ¶¶ 4; C, ¶¶ 2, 4, 24; D, ¶¶ 2, 4, 21; E, ¶¶ 2, 5, 26; F, ¶¶ 2, 5, 24; G, ¶¶ 2, 4, 6, 25; H, ¶¶ 2, 4, 6, 24; I, ¶¶ 2, 4; J, ¶¶ 2, 4; 2nd Am. Compl. ¶¶ 30, 54, 55, 80,106, 133.

3. Plaintiffs have made binding promises and commitments of mutual support to one another. [11]

4. Plaintiffs hold themselves out to their families and communities as couples. [12]

5. Plaintiffs have contributed their labors and property to build their lives together as couples and each couple's financial worth and the depth and strength of their relationship have grown over time. [13]

6. Plaintiffs have emotionally and financially intertwined their lives through commitment ceremonies, joint home ownership and joint finances. [14]

7. Each plaintiff accepts the emotional and financial responsibility of taking care of her plaintiff partner, and has taken steps to ensure that her relationships has legal protection, including such steps as naming the partner as the beneficiary of pension benefits, self-funded retirement benefits, life insurance policies and the property of her estate. [15]

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[11] Plaintiff's Proposed Undisputed Fact ¶ 3 and Defendants' response 1/6/09 Knight Aff., Exs. A, ¶26; B, ¶21; C, ¶24; D, ¶21; E, ¶26; F, ¶24; G, ¶25; H, ¶24; I, ¶29; J, ¶23; 2nd Am. Compl. ¶¶ 30, 54, 80, 106, 133.

[12] Plaintiff's Proposed Undisputed Fact ¶ 4 and Defendants' response 1/6/09 Knight Aff., Exs. A, ¶4; B, ¶4; C, ¶4; D, ¶4; E, ¶5; F, ¶5; G, ¶4; H, ¶4; I, ¶4; J, ¶4; 2nd Am. Compl. ¶¶ 8, 34, 59, 84, 109.

[13] Plaintiff's Proposed Undisputed Fact ¶ 5 and Defendants' response 1/6/09 Knight Aff., Exs. A, ¶¶10-11; B, ¶¶10-11; C, ¶¶11-12; D, ¶¶11-12; E, ¶¶10-11; F, ¶¶10-11; G, ¶¶11-12; H, ¶¶11-12; I, ¶¶8-9; J, ¶¶8-9; 2nd Am. Compl. ¶¶ 14, 15, 41, 42, 65, 64, 92, 93, 113, 114.

[14] Plaintiff's Proposed Undisputed Fact ¶ 6 and Defendants' response 1/6/09 Knight Aff., Exs. A, ¶¶7-11; B, ¶¶7-11; C, ¶¶8, 10-12; D, ¶¶8, 10-12; E, ¶¶4, 10-11, 25-26; F, ¶¶4, 10-11, 23-24; G, ¶¶5-6, 10-12, 14, 25; H, ¶¶5-6, 10-12, 14, 24; I, ¶¶4, 7-9, 18, 24; J, ¶¶4, 7-9, 16, 22; 2nd Am. Compl. ¶¶ 11-14, 40. 41, 58, 64, 83, 91, 92, 109, 112.

[15] Plaintiff's Proposed Undisputed Fact ¶ 7 and Defendants' response 1/6/09 Knight Aff., Exs. A, ¶¶9-10, 26-27; B, ¶¶9-10, 21-22; C, ¶¶10-11, 24-25; D, ¶¶10-11, 21-22; E, ¶¶10-11, 25-27; F, ¶¶10-11, 23-25; G, Plaintiff's Proposed Undisputed Fact ¶ 22 and Defendants' response ¶¶11-12, 25-26; H, ¶¶11-12, 24-25; I, ¶¶8-9, 29-30; J, ¶¶8-9, 23-24; 2nd Am. Compl. ¶¶ 30, 54, 80, 106, 133.

8. The responsibility that Plaintiffs have promised to each other includes the obligation to provide for one another if the other becomes seriously ill. [16]

9. Plaintiffs are committed to provide nurture, emotional and moral support, and, if necessary, to pay the financial costs of health care for one another. [17]

11. The State extends certain benefits to the spouses of its employees, including health insurance coverage, family leave and sick leave carryover credits. [18]

12. State Employees in same sex relationships are not able to obtain general health insurance or general sick leave carryover for non-spousal partners under state law in its present form.[19]

13. Employees of the University of Wisconsin Board of Regents (Regents) are able to obtain certain benefits, including life insurance, accidental death and dismemberment insurance and vision care insurance, for same sex domestic partners who sign a declaration that provides:

> We, the undersigned ___________ and ___________ declare that on ___________ we agreed to live as domestic partners in a committed relationship of mutual support and caring as defined in this document,

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[16] Plaintiff's Proposed Undisputed Fact ¶ 8 and Defendants' response 1/6/09 Knight Aff., Exs. A, ¶27; B, ¶22; C, ¶25; D, ¶22; E, ¶27; F, ¶25; G, ¶26; H, ¶25; I, ¶30; J, ¶24; 2nd Am. Compl. ¶¶ 31, 55, 81, 107, 134.

[17] Plaintiff's Proposed Undisputed Fact ¶ 9 and Defendants' response 1/6/09 Knight Aff., Exs. A, ¶27; B, ¶22; C, ¶25; D, ¶22; E, ¶27; F, ¶25; G, ¶26; H, ¶25; I, ¶30; J, ¶24; 2nd Am. Compl. ¶¶ 31, 55, 81, 107, 134.

[18] Plaintiff's Proposed Undisputed Fact ¶ 11 and Defendants' response; 1st Am. Compl., ¶148 – 153; Answer to 1st Am. Compl., ¶148-153; 2nd Am. Compl. ¶¶ 145, 148, 151, 154

[19] Plaintiff's Proposed Undisputed Fact ¶ 12 and Defendants' response; 2nd Am. Compl. ¶ 145; 1st Am. Compl., ¶148; Answer to 1st Am. Compl., ¶148; Plaintiffs also contend that state employees in same-sex relationships cannot take family leave to care for their non-spousal, same-sex domestic partners. Defendants object to this proposed fact based on the language of the statute, §103.10(2) Wis. Stats., and Plaintiffs' allegation that the University of Wisconsin System does provide family leave to employees to care for non-spousal partners. (2nd Am. Compl., ¶152.)

and that we have so lived since that time. We further state that since that time we have held ourselves out publicly to be each other's sole domestic partner and intend to remain in such a committed relationship for the foreseeable future. [20].

14. "Domestic partners" for purposes of the benefits offered by the Regents, are defined as two individuals who:

1. Are 18 years of age or older.

2. Are competent to enter into a contract.

3. Are not legally married to, nor the domestic partner of, any other person.

4. Are not related by marriage.

5. Are not related by blood closer than permitted under marriage laws of the State of Wisconsin.

6. Have entered into the domestic partner relationship voluntarily, willingly and without reservation.

7. Have entered into a relationship which is the functional equivalent of a marriage, and which includes all of the following:

a. living together as a couple;

b. mutual support of each other;

c. mutual caring and commitment to each other;

d. mutual fidelity;

e. mutual responsibility for each other's welfare; and

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[20] Plaintiff's Proposed Undisputed Fact ¶ 13 and Defendannts' response; 2nd Am. Compl. ¶ 155; Defendants agree that the Regents use the declaration, but dispute Plaintiffs' assertion that the Regents "provide" these benefits. Defendants note that these programs are authorized, under Wisconsin Statutes, for all state employees, but that Defendants, themselves, do not administer or set eligibility standards for these "supplemental" benefits. Defendants contend that the premiums are set by the supplemental benefit providers and those employees who choose such coverage pay for the supplemental coverage in its entirety.

f. joint responsibility for the necessities of life.

8. Have been living together as a couple for at least six (6) months prior to registration with the Subscriber's employer.

9. Intend to continue the domestic partner relationship indefinitely, with the understanding that the relationship is terminable at the will of either partner.[21]

15. Plaintiffs would marry, if possible in Wisconsin, and could marry but for the fact that they are the same sex.[22]

16. Plaintiffs, if permitted to obtain the employment-related benefits available to spouses of similarly situated employees, would enroll to obtain those benefits for their life partners.[23]

17. Because Plaintiffs are unable to take advantage of the employment benefits available to spouses of state employees, most pay for inferior insurance.[24]

18. Some of the Plaintiffs have, in the past, gone without insurance or purchased only catastrophic coverage.[25]

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[21] Plaintiff's Proposed Undisputed Fact ¶ 14 and Defendants' response; 2nd Am. Compl. ¶ 156; 1st Am. Compl., ¶158; Defs. Answer to 1st Am. Compl., ¶158; *Available at:*http://www.uwsa.edu/hr/benefits/ins/uws50.pdf .

[22] Plaintiff's Proposed Undisputed Fact ¶ 15 and Defendants' response; 1/6/09 Knight Aff., Exs. A, ¶4; B, ¶4; C, ¶4; D, ¶4; E, ¶5; F, ¶5; G, ¶4; H, ¶4; I, ¶4; J, ¶4; 2nd Am. Compl. ¶¶ 8, 34, 59, 84, 109, 164;

[23] Plaintiff's Proposed Undisputed Fact ¶ 16 and Defendants' response; 1/6/09 Knight Aff., Exs. A, ¶21; B, ¶20; C, ¶20; D, ¶20; E, ¶21; F, ¶21; G, ¶22; H, ¶22; I, ¶23; J, ¶21; 2nd Am. Compl. ¶¶ 25, 50, 76, 103, 128.

[24] Plaintiff's Proposed Undisputed Fact ¶ 17 and Defendants' response; 1/6/09 Knight Aff., Exs. A, ¶¶15-20; B, ¶¶14-19; C, ¶¶18-19; D, ¶¶18-19; G, ¶¶13, 15-21; H, ¶¶13, 15-21; I, ¶¶18-22; J, ¶¶18-22; 2nd Am. Compl. ¶¶. 21, 22, 48, 49, 74, 102, 126, 127.

[25] Plaintiff's Proposed Undisputed Fact ¶ 18 and Defendants' response; 1/6/09 Knight Aff., Exs. F, ¶¶18-19; H, ¶¶17-19; J, ¶¶12, 1; 2nd Am. Compl. ¶¶ 73, 74, 98, 99, 122;

19. Some of the Plaintiffs go without medical care and prescription drugs, because they cannot afford the cost. [26]

20. Collins lives with a disabling back injury and psoriasis, which have been un- or undertreated in the past. [27]

21. Schumacher spent less time with her and Wolf's children because both were forced to work to obtain insurance.[28].

22. Wolf cannot use her sick leave carryover to purchase health insurance for her life partner, Schumacher. [29]

23. By contrast, spouses of married employees are able to use unused sick leave to purchase health insurance at retirement and after the state employee pre-deceases the spouse.[30]

24. If Wolf were to pass away before her partner, Schumacher, and before she had used up her sick leave, that leave would be lost. [31]

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[26] Plaintiff's Proposed Undisputed Fact ¶ 19 and Defendants' response; 1/6/09 Knight Aff., Exs. B, ¶17; F, ¶19; H, ¶18; J, ¶15; 2nd Am. Compl. ¶¶ 22, 99.

[27] Plaintiff's Proposed Undisputed Fact ¶ 20 and Defendants' response 1/6/09 Knight Aff., Ex. F, ¶¶18-19; 2nd Am. Compl. ¶¶ 73, 74.

[28] Plaintiff's Proposed Undisputed Fact ¶ 21 and Defendants' response; 2nd Am. Compl. ¶¶ 46; 1/6/09 Knight Aff., Exs. C, ¶17; D, ¶17; 2nd Am. Compl. ¶¶

[29] Plaintiff's Proposed Undisputed Fact ¶ 22 and Defendants' response; 1/6/09 Knight Aff., Ex. F, ¶¶14-16; 1st Am. Compl., ¶¶36, 38, 39; Answer to 1st Am. Compl., ¶¶ 36, 38, 39; 2nd Am. Compl. ¶¶ 43–45

[30] Plaintiff's Proposed Undisputed Fact ¶ 23 and Defendants' response; 1/6/09 Knight Aff., Ex. C, ¶15; 1st Am. Compl., ¶¶38, 161; Answer to 1st Am. Compl., ¶¶38, 161; 2nd Am. Compl. ¶45.

[31] Plaintiff's Proposed Undisputed Fact ¶ 24 and Defendants' response; 1/6/09 Knight Aff., Ex. C, ¶16; 1st Am. Compl., ¶39; Answer to 1st Am. Compl., ¶39; 2nd Am. Compl. ¶ 46.

25. The legislative record to Wis. Const. art. XIII, §13 (the "Marriage Amendment") includes a February 24, 2006, memorandum from Don Dyke (Dyke), Chief of Legal Service for the Wisconsin Legislative Council, to Representative Mark Gundrum (Rep. Gundrum) regarding the possible effects of the then-proposed Marriage Amendment on unmarried persons. The memorandum reads, in part: "no evidence appears to exist to show that the intent of the provision in question is to prohibit unmarried individuals from receiving individual benefits or protections. . . ." [32]

26. In his co-sponsorship and circulation memos about the Marriage Amendment, Rep. Gundrum stated that the Marriage Amendment would "not prohibit the state, local governments or private entities from setting up their own legal construct to provide particular privileges or benefits, such as health insurance, benefits, pension benefits, joint tax return filing, hospital visitation, etc. ...." [33]

27. The legislative record also includes a January 29, 2004, memorandum from Dyke to Rep. Gundrum regarding the proposed Marriage Amendment. The memorandum read in part:

> The Legislature or the governing body of a political subdivision or local governmental unit is not precluded from authorizing or requiring that a right or benefit traditionally associated with marriage be extended to two or more unmarried individuals; for example, family health insurance benefits. [34]

28. Representative Scott Suder (Rep. Suder), Rep. Gundrum, and Representative Karl Van Roy (Rep. Van Roy) issued press releases dated March 1, 2006, February 28, 2006 and March 1, 2006, respectively, regarding the Marriage Amendment. Each of the three press releases

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[32] Plaintiff's Proposed Undisputed Fact ¶ 25 and Defendants' response 1/6/09 Knight Aff., Ex. L, pp. 1-2.

[33] Plaintiff's Proposed Undisputed Fact ¶ 26 and Defendants' response 1/6/09 Knight Aff., Exs. K; L, p. 8, *quoting* circulation memo.

[34] Plaintiff's Proposed Undisputed Fact ¶ 27 and Defendants' response 1/6/09 Knight Aff., Ex. M, p. 3.

noted that that the Marriage Amendment would not prohibit the state, local government and private entities from providing health insurance to unmarried persons.[35]

29. A July 30, 2006, Milwaukee Journal Sentinel article reported that, according to Rep. Gundrum, "the amendment shouldn't affect what kind of benefits employers might choose to offer their workers."[36]

30. A February 25, 2006, article about the Marriage Amendment in The Capital Times quoted Senator Scott Fitzgerald (Sen. Fitzgerald) as follows: "[t]he proposed constitutional amendment would not prohibit state or local governments or a private entity from setting up a legal construct to provide privileges or benefits such as health insurance benefits . . . to same-sex or unmarried couples."[37]

31. That same article reported that, according to Julaine Appling (Appling), executive director of the Family Research Institute of Wisconsin, "domestic partner benefits were not threatened" by the Marriage Amendment.[38]

32. A March 10, 2006, article about the Marriage Amendment in the Wisconsin State Journal reported that Sen. Fitzgerald had "insisted that local governments and private companies that offer domestic partnership benefits to unmarried couples could continue to do so."[39]

33. A December 8, 2005, article in The Capital Times regarding the Marriage Amendment reported that Appling had stated that Dane County's domestic partner benefits and the health

[35] Plaintiff's Proposed Undisputed Fact ¶ 28 and Defendants' response 1/6/09 Knight Aff., Ex. N.

[36] Plaintiff's Proposed Undisputed Fact ¶ 29 and Defendants' response 1/6/09 Knight Aff., Ex. O.

[37] Plaintiff's Proposed Undisputed Fact ¶ 30 and Defendants' response 1/6/09 Knight Aff., Ex. P.

[38] Plaintiff's Proposed Undisputed Fact ¶ 31 and Defendants' response 1/6/09 Knight Aff., Ex. P.

[39] Plaintiff's Proposed Undisputed Fact ¶ 32 and Defendants' response 1/6/09 Knight Aff., Ex. Q.

care coverage offered to gay couples by Madison schools were not prohibited by the Marriage Amendment. [40]

34. The same article reported that, according to Sen. Fitzgerald, the question of whether the Marriage Amendment would potentially endanger the domestic partner benefits that Dane County offers its employees could ultimately be decided by the courts if the Marriage Amendment became law. [41]

35. An August 2006, document entitled "Questions and Answers About Wisconsin's Marriage Protection Amendment," and attributed to the Family Research Institute of Wisconsin, states that "existing and future benefits given by local units of government and private companies/corporations to unmarried individuals . . . would not be affected by Wisconsin's Marriage Protection Amendment." [42]

36. A document entitled, "Vote Yes For Marriage – One Man & One Woman – Frequently Asked Questions" was available at the web address, http://www.voteyesformarriagewi.org/faq.php on October 5, 2006, even though that website is no longer active. [43]

37. Peggy A. Lautenschlager (Lautenschlager), the former Wisconsin Attorney General, issued an opinion dated December 27, 2006, regarding the Marriage Amendment's effect on benefits, including health insurance, provided by the City of Madison to its employees and their domestic partners. Lautenschlager "concluded that this provision does not restrict the ability of

[40] Plaintiff's Proposed Undisputed Fact ¶ 33 and Defendants' response 1/6/09 Knight Aff., Ex. R.

[41] Plaintiff's Proposed Undisputed Fact ¶ 34 and Defendants' response 1/6/09 Knight Aff., Ex. R.

[42] Plaintiff's Proposed Undisputed Fact ¶ 35 and Defendants' response 1/6/09 Knight Aff., Ex. T, p. 3.

[43] Plaintiff's Proposed Undisputed Fact ¶ 36 and Defendants' response 1/6/09 Knight Aff., Ex. T, pp. 7-8; 1/15/09 DuPuis Aff., pp. 3-4.

governmental bodies to protect domestic partners from discrimination, or the ability of either governmental or private employers to provide benefits to the domestic partners of their employees."[44]

38. Defendants acknowledge that gay and lesbian people "whose sexual identities have been known or suspected have, as a general rule, suffered a history of discrimination."[45]

39. Plaintiffs do not believe that they can change their sexual orientation.[46]

40. The cost of including same-sex domestic partners among beneficiaries is the same as the cost for spouses.[47]

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[44] Plaintiff's Proposed Undisputed Fact ¶ 37 and Defendants' response 1/6/09 Knight Aff., Ex. U.

[45] Plaintiff's Proposed Undisputed Fact ¶ 38 and Defendants' respons; 2nd Am. Compl. ¶ 163; The acknowledgement is stated in a letter regarding Plaintiffs' Request to Admit No. 17. The request stated: [l]esbians and gay men have suffered a history of purposeful discrimination." Defendants initially objected, stating:

> The term "purposeful discrimination" is not understood and is subject to a variety of reasonable interpretations and shades of meaning from "distinctions drawn upon a rational basis" to "intentional bigotry." The statement cannot be admitted or denied as it is not factual in nature, but rather constitutes a philosophical argument and/or legal conclusion.
>
> 1/6/09 Knight Aff., Ex. Z, p. 10.

In an August 23, 2005, letter, Defendants amended their answer adding the following:

> Subject to such objection, defendants admit that lesbians and gay men whose sexual identities have been known or suspected have, as a general rule, suffered a history of discrimination.
>
> 1/6/09 Knight Aff., Ex. Z, *see letter attached.*

[46] Plaintiff's Proposed Undisputed Fact ¶ 39 and Defendants' response; 1/6/09 Knight Aff., Exs. A, ¶3; B, ¶3; C, ¶3; D, ¶3; E, ¶3; F, ¶3; G, ¶3; H, ¶3; I, ¶3; J, ¶3.

[47] Plaintiff's Proposed Undisputed Fact ¶ 40 and Defendants' response; 1/6/09 Knight Aff., Ex. V, p. 3; There is dispute as to whether this cost is "very small." Plaintiffs characterize the cost as "very small." (Plfs. 1/15/09 Proposed Undisputed Fact, ¶40.) Defendants object, citing an accounting firm estimate for increased annual costs of 2 to 6.2 million dollars. (2/16/09 Kox Aff., ¶3.)

41. Defendants require state employees "to sign a statement acknowledging that they have provided truthful and accurate information in applying for state health insurance coverage" and Defendants do not routinely ask for marriage licenses. [48]

42. In preparing to respond to bargaining proposals and legislative efforts to add domestic partner benefits, Defendants acknowledge that "in general, there does not appear to be material adverse risk associated with this coverage." [49]

43. The University of Wisconsin has indentified significant costs to it resulting from its failure to offer domestic partner benefits.[50]

44. McPike was unable to take family leave to be with her domestic partner, Barnett, after an automobile accident in 1996. [51]

45. McPike recently confirmed through her employer that she would not be entitled to the protections of the FMLA to care for domestic partner, should her partner be injured again or suffer a serious illness. [52]

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[48] Plaintiff's Proposed Undisputed Fact ¶ 41 and Defendants' response; 1/6/09 Knight Aff., Ex. Y, p. 12, *see also attached letter.*

[49] Plaintiff's Proposed Undisputed Fact ¶ 42 and Defendants' response; 1/6/09 Knight Aff., Ex. AA.

[50] Plaintiff's Proposed Undisputed Fact ¶ 45 and Defendants' response; 1/6/09 Knight Aff., Exs. BB, p. 3; CC, p. 3 & att.; DD, p. 2; EE; FF, p. 8; GG. Defendants object to this proposed finding as premised upon in admissible hearsay. However, Defendants stipulate that the University of Wisconsin has identified significant costs to it resulting from its failure to offer domestic partner benefits. (Defs. 2/16/09 Proposed Undisputed Fact, ¶45.)

[51] Plaintiff's Proposed Undisputed Fact ¶ 46 and Defendants' response 1/6/09 Knight Aff., Ex. I, ¶¶14-16. Defendants do not dispute this fact; however, they note that it was McPike's employer who denied her family medical leave, not any defendant named in this lawsuit. (Defs. 2/16/09 Prposed Undisputed Fact, ¶46.)

[52] Plaintiff's Proposed Undisputed Fact ¶ 47and Defendants' response 1/6/09 Knight Aff., Ex. I, ¶28.

46. William H. Kox, Jr. (Kox) is employed by DETF as Director of Health Benefits and Insurance Plans. Among his duties are the day-to-day oversight and administration of health and life insurance contracts of various insurers and third-party administrators that provide these benefits to state and participating local government employees.[53]

47. DETF and GIB, one of DETF's governing boards, administer the state employee health care benefit plans. [54]

48. The accounting firm of Deloitte & Touche LLP in Minneapolis, Minnesota has provided DETF with informal cost increases should Wisconsin add coverage for same-sex domestic partners of employees to existing state employee health care benefit plans. The most recent estimate DETF has seen is that costs to the state would increase by 0.25% to 0.75%. [55]

49. Considering average costs of the state employee health care plans in recent years, DETF estimates that providing health care coverage to same-sex domestic partners of state employees would result in increased overall costs to the state of $2.0 million to $6.2 million. [56]

50. Adding same-sex partner benefits to the state employee health care benefits plan, would require developing new definitions of "dependant," making necessary legislative and/or administrative code changes, designing new application forms and setting up new systems.[57].

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[53] . 2/16/09 Kox Aff., ¶1.

[54] 2/16/09 Kox Aff., ¶1.

[55] 2/16/09 Kox Aff., ¶3; 1/6/09 Knight Aff., Ex. X, p. 1.

[56] 2/16/09 Kox Aff., ¶3; 1/6/09 Knight Aff., Ex. X, p. 4.

[57] 2/16/09 Kox Aff., ¶4; Though the parties agree that providing health care benefits to same-sex domestic partners would require certain legislative and administrative changes, they disagree regarding the "burden" on the DETF of administering such a plan. (*Compare*, Defs. 2/16/09 Proposed Undisputed Fact, ¶5, *to*, Plfs. 3/2/09 Proposed Undisputed Fact, ¶5.)

51. Because domestic partner benefits are not recognized by the federal government for tax deduction purposes, providing health care benefits would need to be included as additional income to qualifying employees, further adding to the administrative costs for all state agencies, including DETF.[58]

52. Kox estimates that, in addition to the potential administrative costs of commencing the same-sex domestic partner program, DETF may need additional staffing to monitor and maintain the program on an on-going basis. [59]

53. The State of Wisconsin offers health-related benefits to its employees in addition to, or supplemental to, the general health care plan. These programs are authorized under Wisconsin Statutes[60] and offered through private, non-state carriers. They include Anthem DentalBlue (supplemental dental insurance), OptumHealth (formerly Spectera) (eye care insurance), and the Zurich Accidental Death and Dismemberment Insurance, among others. [61]

54. The premiums for these additional or supplemental health-related insurance plans are offered on a 100% employee-paid basis. Neither the State as a whole, nor state employers (including the University of Wisconsin System) are required to pay any amounts to provide these insurance programs additional to the premiums paid by the employees who chose supplemental coverage. [62]

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[58] 2/16/09 Kox Aff., ¶4; Plaintiffs do not dispute this assertion; however, they note that many state and local governments have been able to address this issue in order to provide domestic partner benefits, including local governments in Wisconsin. (Plfs. 3/2/09 Proposed Undisputed Fact, ¶5d.)

[59] 2/16/09 Kox Aff., ¶5.

[60] The parties cite different statutes for this undisputed proposition. (*Compare*, Defs. 2/16/09 Proposed Undisputed Fact, ¶7, *to*, Pls. 3/2/09 Proposed Undisputed Fact, ¶7.)

[61] 2/16/09 Kox Aff., ¶5.

[62] 2/16/09 Kox Aff., ¶6.

DISCUSSION

"The purpose of a motion to dismiss for failure to state a claim upon which relief can be granted is to test the legal sufficiency of the claim." Weber v. City of Cedarburg, 129 Wis. 2d 57, 64, 384 N.W.2d 333 (1986). As such, only those allegations made within the complaint are relevant to the court's decision. Id. Here, however, Plaintiffs have filed a cross-motion for summary judgment and both parties have now submitted affidavits and evidentiary materials in support of their respective positions; therefore, the court will apply the summary judgment methodology to the pending motions.

Under § 802.08(1) Wis. Stats., a party may move for summary judgment on any claim asserted by or against that party. The statute provides:

> [t]he judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary judgment as a matter of law.

§ 802.08(2) Wis. Stats. "Summary judgment is used to determine whether any disputed issues exist for trial." Transportation Ins. Co. v. Hunzinger Constr. Co., 179 Wis. 2d 281, 289, 507 N.W.2d 136 (Ct. App. 1993).

The summary judgment methodology requires that a court first look to the plaintiff's complaint, to determine whether it states a claim for relief. Kasbaum v. Lucia, 127 Wis. 2d 15, 17, 377 N.W.2d 183 (Ct. App. 1985). If it does, "and if the responsive pleadings join the issue, the court must examine the evidentiary record to determine whether there is a genuine issue of any material fact." Hunzinger, 179 Wis. 2d at 289.

"[A] party seeking summary judgment must establish a record sufficient to demonstrate . . . that there is no triable issue of material fact on any issue presented." Id. at 290 (internal citation omitted). The court must then examine the moving party's affidavits to determine whether they state a prima facie case for relief, or a prima facie defense. Kasbaum, 127 Wis. 2d at 18.

Plaintiffs here challenge the constitutionally of state law provisions that provide access to health insurance and family leave to spouses of state employees, but not to same-sex domestic partners of other employees. The Plaintiffs claim that Wisconsin statutes, or, in the alternative, the defendants through their interpretation and administration of those statutes, deprive plaintiffs of the right to equal protection under Article I, sec. 1 of the Wisconsin Constitution by denying these employment benefits to lesbian and gay male employees with same-sex domestic partners, because of their sexual orientation, sex and marital status." (2nd Am. Compl., ¶171.)

Defendants contend that Plaintiffs have failed to state a claim, while Plaintiffs contend they are entitled to relief as a matter of law. The question for this court is thus not only whether Plaintiffs have stated a claim for relief, but whether they have demonstrated, as a matter of law, that they are entitled to such relief.

I. STATUTES AND CONSTITUTIONAL PROVISIONS AT ISSUE

> **The Equal Protection Provision: Wis. Const. Art. I, Sec. 1.**
> All people are born equally free and independent, and have certain inherent rights; among these are life, liberty and the pursuit of happiness; to secure these rights, governments are instituted, deriving their just powers from the consent of the governed.
>
> **The Marriage Amendment: Wis. Const. Art. XIII, Sec. 13.**
> Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state.
>
> **§40.52(1) Wis. Stats.**
> (1) The group insurance board shall establish by contract a standard health insurance plan in which all insured employees 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.
>
> **§40.95(1)(a) Wis. Stats.**
> (1)(a) Subject to sub. (2), the department [of employee trust funds] shall administer a program that provides health insurance premium credits for the purchase of health insurance for a retired employee, or the retired employee's surviving insured dependents. . . .

§40.02(20) Wis. Stats.
"Dependent" means the spouse, minor child, including stepchildren of the current marriage dependent on the employee 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.

§103.10 (2)(a) & (3)(b) Wis. Stats.
(2) Scope. (a) Nothing in this section prohibits an employer from providing employees with rights to family leave or medical leave which are more generous to the employee than the rights provided under this section.
. . .
(3) Family leave.
. . .
(b) An employee may take family leave for any of the following reasons:
1. The birth of the employee's natural child, if the leave begins within 16 weeks of the child's birth.
2. The placement of a child with the employee for adoption . . . .
3. To care for the employee's child, spouse or parent, if the child, spouse or parent has a serious health condition.

II. PARTIES' ARGUMENTS

The Plaintiffs submit that the Defendants' denial of these specific employment benefits to lesbian and gay employees and their same-sex domestic partners violates the Equal Protection Provision. Plaintiffs contend that the statutes at issue classify state employees so that those who are married, or can marry, may receive benefits for their spouses, while Plaintiffs may not. Plaintiffs argue that this classification by marriage discriminates on the basis of sex *and* sexual orientation. Because the statutes at issue purportedly discriminate on the basis of sexual orientation, Plaintiffs contend that the statutes should be subject to the strict scrutiny standard of constitutional review. Plaintiffs note that Wisconsin courts are free to interpret the Wisconsin Constitution as providing greater protections than the United States Constitution. Plaintiffs contend that this court should find that the denial of benefits to lesbian and gay state employees and their life partners is subject to strict scrutiny because: (1) sexual orientation is not related to one's ability to participate in society; (2) lesbian and gay people have experienced a history of

purposeful unequal treatment; (3) lesbian and gay people have been relegated to a position of political powerlessness; and, (4) sexual orientation meets the immutability test.

Plaintiffs contend that Defendants' denial of benefits to same-sex domestic partners fails under any level of review. Plaintiffs argue that the denial is not based on substantial distinctions that make lesbian and gay male employees and their domestic partners different from married employees and their spouses. Plaintiffs contend that there is no significant cost saving that is furthered by the exclusion of same-sex domestic partners from employment benefits. They claim that there is no significant difference in administrative convenience that is furthered by their exclusion from these three categories of benefits.

Plaintiffs further argue that the Marriage Amendment does not remove lesbian and gay state employees from the protection of the Equal Protection Provision and contend that their family and medical leave act claim is indeed ripe for review.

Defendants assert that this court is bound by the Wisconsin Court of Appeals' decision in Phillips v. Wisconsin Personnel Commission, 167 Wis. 2d 205, 482 N.W.2d 121 (Ct. App. 1992); and, because of this binding precedent, this court must rule in favor of Defendants.

The Defendants submit that the Marriage Amendment mandates different treatment of same-sex couples and prohibits civil unions. Specifically, that the Marriage Amendment, "on its face, denies to same-sex couples the rights . . . that are available to married couples." (Defs. 10/6/08 Brief, p. 5.) Defendants argue that Wisconsin's Constitution cannot be read to *prohibit* differing treatment of same-sex couples when it *requires* such treatment under the Marriage Amendment. Defendants assert that the Equal Protection Provision does not require that same-sex domestic partners be provided health insurance and family leave benefits equal to those provided to married couples. They contend that the question of defining who is a dependant for purpose of such benefits is for the legislature, not the courts.

The Defendants contend that the proper analysis, for purpose of the Equal Protection Provision is the rational basis test, rather than the strict scrutiny standard. They assert that it is

rational for the state to limit health insurance coverage to those individuals who have a legal relationship to the employee because the limitation reflects that State's desire "to control and contain employee health care costs and promote administrative efficiency." (Defs. 10/6/08 Brief, p. 14.). Defendants submit that the goal of cost control is reasonably related to the statutory definitions and further contend that the spousal restriction promotes administrative efficiency. Finally, Defendants contend that Plaintiffs' family and medical leave act claim is not ripe for review.

III. APPLICABILITY OF THE MARRIAGE AMENDMENT

A. Standard

The interpretation of a constitutional provision is a question of law and is, therefore, an appropriate issue for summary judgment review. Dairyland Greyhound Park, Inc. v. Doyle, 2006 WI 107, ¶16, 295 Wis. 2d 1, 719 N.W.2d 408. "The purpose of construing a constitutional amendment is to give effect to the intent of the framers and of the people who adopted it." Dairyland, 2006 WI 107, ¶19 (citation omitted).

"Constitutions should be construed so as to promote the objects for which they were framed and adopted." Dairyland, 2006 WI 107, ¶19. "The constitution means what its framers and the people approving of it have intended it to mean, and that intent is to be determined in the light of the circumstances in which they were placed at the time[.]" Dairyland, 2006 WI 107, ¶19 (*quoting*, State ex rel. Bare v. Schinz, 194 Wis. 397, 404, 216 N.W.2d 509 (1927)). Wisconsin courts "therefore examine three primary sources in determining the meaning of a constitutional provision: the plain meaning, the constitutional debates and practices of the time, and the earliest interpretations of the provision by the legislature, as manifested through the first legislative action following adoption." Dairyland, 2006 WI 107, ¶19.

Wisconsin courts "have broadly understood the second of these sources, the constitutional debates and practices in existence contemporaneous to the writing, to include the

general history relating to a constitutional amendment . . . as well as the legislative history of the amendment." Schilling v. State Crime Victims Rights Board, 2005 WI 17, ¶16, 278 Wis. 2d 216, 692 N.W.2d 623 (internal citation omitted). Moreover, courts presume "that, when informed, the citizens of Wisconsin are familiar with the elements of the constitution and with the laws, and that the information used to educate the voters during the ratification campaign provides evidence of the voters' intent." Dairyland, 2006 WI 107, ¶37. "[W]here such intention appears, the construction and interpretation of the acts must follow accordingly." Dairyland, 2006 WI 107, ¶37 (citation omitted).

Here, the court has no subsequent legislative action to consider in interpreting the Marriage Amendment's applicability; therefore, it will confine itself to a review of the plain meaning and the constitutional debates and practices of the time.

B. Application

"In order to amend the Wisconsin Constitution, two successive legislatures must pass a proposed constitutional amendment before putting the measure to the voters for ratification." Dairyland, 2006 WI 107, ¶25 (*citing*, Wis. Const. art. XII, §1.) After passing the legislature in 2003 and 2005, Wisconsin voters approved the Marriage Amendment on November 7, 2006. 2003 A.J.R. 66; 2005 S.J.R. 53; William B. Turner, *The Gay Rights State: Wisconsin's Pioneering Legislation to Prohibit Discrimination Based on Sexual Orientation*, 22 Wis. Women's L.J. 91, 91 (2007) (introduction). The Marriage Amendment provides:

> Only a marriage between one man and one woman shall be valid or recognized as a marriage in this state. A legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state
>
> Wis. Const. art XIII, §13.

The Defendants appear to argue that same-sex couples do not have the right to marry and, therefore, cannot have a right to health insurance because health insurance for spouses of

state employees is a benefit of marriage.[63] Defendants contend that Plaintiffs "cannot prevail in this case because the Wisconsin Constitution does not and cannot be interpreted to require state employers to provide same-sex domestic partners of state employees with health care coverage where it, itself, prohibits [P]laintiffs from obtaining the legal benefits of marriage." (Defs. 2/16/09 Brief, p. 10.).

1. Plain Meaning

The second sentence of the Marriage Amendment prohibits a "legal status identical or substantially similar to that of marriage. . . ." Wis. Const. art XIII, §13. "Status" refers to "[a] person's legal condition, whether personal or propriety; the sum total of a person's legal rights, duties, liabilities, and other legal relations. . . ." *Black's Law Dictionary* (8th ed. 2004). "Substantially" is "being largely but not wholly that which is specified"; *Merriam-Webster's Collegiate Dictionary* 1245 (11th ed. 2008), while "similar" is defined as "having characteristics in common" or "alike in substance or essentials." *Merriam-Webster's Collegiate Dictionary* 1161 (11th ed. 2008). [64]

The plain language thus suggests that the Marriage Amendment prohibits granting legal rights to same-sex couples that are not just *like* those offered to heterosexual married couples, but *largely alike*.[65] Thus, the more closely the bundle of rights offered to same-sex couples resembles that offered to married couples, the more likely that bundle is prohibited by the Marriage Amendment. Wisconsin law provides a remarkable array of protections and benefits

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[63] In their initial brief, Defendants appeared to argue that the Marriage Amendment *prohibits* state employers from extending health care benefits to same-sex couples. (Defs. 10/6/08 Brief, pp. 5-6.) Defendants deny making such an argument in their reply brief. (Defs. 2/16/09 Brief, p. 8.)

[64] Wisconsin courts "normally turn to a recognized dictionary to determine the common and ordinary meaning of a word." Orion Flight Serv., Inc. v. Basler Flight Serv., 2006 WI 51, ¶24, 290 Wis. 2d 421, 714 N.W.2d 130 (citation and internal quotation omitted).

[65] Note, in 2003, during the Marriage Amendment's first consideration, the legislature defined "substantially similar" in Chapter 77 of Wisconsin Statutes as "80% or more." §77.51(14g)(h) (2003-04). The court could locate no other statutory provision defining the term.

for married couples,[66] while the Plaintiffs here request only three: health insurance, sick leave conversion benefits and family leave. Under even the broadest reading of the Marriage Amendment, offering just three benefits to same-sex domestic partners, while denying them the remainder of benefits available to married couples cannot possibly amount to a recognition of a legal status identical or substantially similar to that of marriage.

2. Constitutional Debates and Practices

The legislative history of the Marriage Amendment confirms that both the legislature and the voters understood that the provision would not affect domestic partner benefits. The Marriage Amendment was first introduced by Rep. Gundrum and others on February 2, 2004.[67] Prior to that, on January 29, 2004, Dyke, Chief of Legal Service for the Wisconsin Legislative Council, sent Rep. Gundrum a memorandum regarding how the proposed Marriage Amendment might be interpreted. (1/6/09 Knight Aff., Ex. M, p. 1.) The memorandum read in part:

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[66] Wisconsin Statutes provide a variety of benefits to married couples, including, for example:

- spousal and support benefits: §§45.33(1)(c), 45.40(2m), 45.42(2), 45.51(2)3, 49.19(1)(c)2, 49.455(4)(a)2 & (6)(a), 49.19(4)(d), 109.03(3), 241.09, 615.03(1)(c), 705.04(2m) Wis. Stats.;
- non-health insurance benefits: §§40.02(8)(a)2, 40.65(7)(am), 632.746(7)(a)1 Wis. Stats.;
- workers compensation benefits: §102.51(2) Wis. Stats.;
- income tax benefits: §§71.66(2)(b), 71.75(10), 71.87, 71.88 Wis. Stats.;
- transfer-of-home benefits: §§49.496(2)(b)1, 77.25(8m), 806.15(4), 867.035(2m)(a)1 Wis. Stats.;
- joint tenancy: §700.19(2) Wis. Stats.;
- marital property benefits: §§425.106(2), 766.31(2), 766.58(1), 766.60(4)(b)2, (5)(a)-(c), 766.605, 766.62(1)(a), 766.63(2), 766.70, 766.75, 815.18(8), 867.046(1m) Wis. Stats.;
- adoption and child rearing benefits: §891.40, 891.41 Wis. Stats.;
- medical treatment and decision-making benefits: §§50.06(3), 50.94(3), 51.30(4)(b)12 Wis. Stats.,
- benefits and privileges in the legal process: §§301.046(4)(1), 301.048(4m)1, 301.38(1)(a) & (2)(a), 301.46(3)1, 302.105(1)(a) & (2)(b), 304.06(1)(a)1 & (2)(d)1, 304.09(1)(a) & (2)(c), 803.04(3), 905.05(1), 971.17(4m) & (6m), 980.(1)(b) & (2) Wis. Stats.;
- probate benefits: §§852.01(1), 854.13(2)(c), 861.01, 861.02(1), 861.20, 861.31, 861.33 (1), 861.35, 861.41 Wis. Stats.;
- miscellaneous benefits: §§29.219(4), 30.541(3)(d)2a, 36.27(2)(b)1, (3m)(b) & (3n)(b), 38.24(5) & (7), 45.61(2)(c), 45.84(1), 49.496(3)(b), 100.51, 115.345(9), 125.04(12)(b), 155.40(2), 180.1805(3), 230.16(7)(a), 254.64(4), 303.068(1), 342.14(3m), 342.17(4)(b), 946.47(3) Wis. Stats.

[67] Though the drafting records of 2003 AJR 66 and 2005 SJR 53 contain numerous draft amendments, the language of the provision did not change after its first introduction.

> The Legislature or the governing body of a political subdivision or local governmental unit is not precluded from authorizing or requiring that a right or benefit traditionally associated with marriage be extended to two or more unmarried individuals; for example, family health insurance benefits. . . .
>
> 1/6/09 Knight Aff., Ex. M, p. 3.

The Marriage Amendment passed its first consideration on March 11, 2004. (2003 AJR 66 Bill History.)

The Amendment was presented for its second consideration on November 11, 2005, and referred to committee that same day. (2005 SJR 53 Bill History.) Prior to that introduction, on November 18, 2005, Sen. Fitzgerald and Rep. Gundrum circulated an email on co-sponsorship in which they explained:

> This proposal does not prohibit the **state**, local governments or private entities from setting up their own legal construct to provide particular privileges or benefits, such as health insurance benefits . . . as those bodies are able and deem appropriate. As long as the legal construct designed by the state does not rise to the level of creating a legal status identical or substantially similar to marriage, no particular privileges or benefits would be prohibited.
>
> 1/6/09 knight Aff., Ex. K, emphasis added.

Thereafter, on November 29, 2005, the Senate Committee on Judiciary, Corrections and Privacy held a public hearing on the Marriage Amendment. (2005 SJR 53 Bill History.)

During the meeting, several organizations voiced their opposition to the Marriage Amendment, arguing that the Amendment went farther than simply banning same-sex marriage and endangered benefits, including health benefits, offered to same-sex domestic partners.[68]

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[68] *See*, Memorandum from League of Women Voters of Wisconsin, Inc., to the Senate Committee on Judiciary, Corrections and Privacy, and to Assembly Committee on Judiciary (Nov. 29, 2005) (on file with Wisconsin Legislative Council) (last sentence of the Marriage Amendment "could be interpreted to also ban domestic partnerships which currently are recognized by many employers in Wisconsin"); Memorandum of Testimony from Kelda Helen Roys, Executive of NARAL Pro-Choice Wisconsin, to Wisconsin State Senate & Assembly Judiciary Committees (Nov. 29, 2005) (on file with Wisconsin Legislative Council) (the Marriage Amendment goes much further than just banning gay marriage "by eliminating any benefit substantially similar to marriage . . . . this includes health insurance. . . ."); Memorandum of Testimony from Brian Tanner, Legislative Affairs Director, United Council of UW Students, to Senate Committee on Judiciary, Corrections, and Privacy & Assembly Committee on Judiciary (Nov. 29, 2005) (on file with Wisconsin Legislative Council) (Marriage Amendment would

Dane County Executive Kathleen Falk wrote to the joint committee, expressing her opposition to the Marriage Amendment and arguing that the Amendment endangered the domestic partner benefits that Dane County provided its employees.[69] Kathleen Falk also presented the joint committee with a Dane County Board Resolution supporting the preservation of domestic partner benefits and an analysis by Dane County Corporation Counsel indicating that the Marriage Amendment's language was too broad and "could used to challenge domestic partner benefits." [70]

A February 24, 2006, memorandum from Dyke to Rep. Gundrum regarding the possible effects of the Marriage Amendment on unmarried persons reads, in part: "no evidence appears to exist to show that the intent of the provision in question is to prohibit unmarried individuals from receiving individual benefits or protections. . . ." (1/6/09 Knight Aff., Ex. L, pp. 1-2.)[71] The memorandum goes on to state:

> It does not seem reasonable to conclude that two unmarried individuals who title property as joint tenants or make health care decisions for each other under a durable power of attorney for health care, or who are offered family health insurance by an employer, have a legal status identical or substantially similar to that of husband and wife.
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> 1/6/09 Knight Aff., Ex. L, p. 7

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invalidate domestic partner benefits currently provided by majority of UW institutions); Memorandum of Testimony from Patrick Flaherty, Director of Center Advocates, Inc., to Wisconsin Joint Judiciary Committee (Nov. 29, 2005) (on file with Wisconsin Legislative Council) (the Marriage Amendment puts health care for same-sex domestic partners at risk); Memorandum from Attorney Eva L. Shiffrin, Secretary/Treasurer, Public Interest Law Section, State Bar of Wisconsin, to Senate Committee on Judiciary, Corrections & Privacy, Assembly Committee on Judiciary (Nov. 29, 2005) (on file with Wisconsin Legislative Council) ("The amendment could potentially erode protections for gay individuals in . . . health insurance. . . .").

[69] *See*, Memorandum from Kathleen M. Falk, Dane County Executive, to Senator David Zien, Chairman, Senate Judiciary Committee, Representative Mark Gundrum, Chairman, Assembly Judiciary Committee, and Member of the Judiciary Committees (Nov. 29, 2005) (on file with Wisconsin Legislative Council).

[70] *See*, Dane County Board Resolution 89, 05-06; and, Memorandum from Kristi Gullen, Assistant Corporation Counsel, to Kathleen Falk (March 8, 2004) (both items are attached to Memorandum from Kathleen M. Falk, Dane County Executive, to Senator David Zien, Chairman, Senate Judiciary Committee, Representative Mark Gundrum, Chairman, Assembly Judiciary Committee, and Member of the Judiciary Committees (Nov. 29, 2005) and on file with Wisconsin Legislative Council).

[71] *See*, pages 4-10 for analysis behind this conclusion.

On February 28, 2006, the Marriage Amendment passed its second consideration. (2005 SJR 53 Bill History.) Shortly thereafter, Rep. Suder, Rep. Gundrum, and Rep. Karl Van Roy each issued press releases specifically noting that that the Marriage Amendment would not prohibit the state, local government and private entities from providing health insurance to unmarried persons. (1/6/09 Knight Aff., Ex. N.) Finally, the Milwaukee Journal Sentinel, the Wisconsin State Journal and The Capital Times each ran articles leading up to the November 7, 2006, elections in which voters were told that the Marriage Amendment would have no affect on domestic partner benefits. (1/6/09 Knight Aff., Ex. O-Q, in which Rep. Gundrum, Sen. Fitzgerald and Appling, Executive director of the Family Research Institute of Wisconsin, assured voters that the provision would not affect domestic partner benefits.)

Thus, the Marriage Amendment's legislative history clearly demonstrates that the issue of domestic partner benefits and the Amendment's effect thereon, was raised, discussed and addressed. Bother legislators *and* voters were assured that the Marriage Amendment would not affect domestic partner benefits and cast their ballots with that understanding. Any ruling by a court contrary to that assurance will unavoidably undermine both the legislature's and the voting public's intent.

The plain language of the Marriage Amendment, and the extrinsic sources interpreting it, demonstrate that offering health insurance benefits, sick leave conversion benefits and family medical leave to same-sex domestic partners does not amount to recognition of a legal status substantially similar to that of marriage for unmarried individuals and would not violate the Wisconsin Constitution.[72] Consequently, the Marriage Amendment is inapplicable to the case at bar.

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[72] This conclusion is supported by other authority. Attorney General Peggy A. Lautenshlager's December 27, 2006 opinion regarding the affect of the Marriage Amendment on the City of Madison's domestic partner registry. (1/6/09 Knight Aff., Ex. U.) Note, current Attorney General J.B. Van Hollen reportedly agrees with that opinion. (1/6/09 Knight Aff., Ex. S, p. 3.)

C. Conclusion

As Plaintiffs stated in their reply brief, "[i]f the State, or a subdivision of it, can offer domestic partner benefits to lesbian and gay employees without violating the Marriage Amendment, then the Amendment does not immunize the State from the equality claim made by the Plaintiffs in this case." (Plfs. 3/2/09 Brief, pp. 4-5.) If, as Defendants argue, the Marriage Amendment permits differing treatment of same-sex couples, it does so only in the limited arena of marriage. Same-sex couples may not marry or achieve a legal status substantially similar to marriage. However, the Marriage Amendment does not, as Defendants suggest, prohibit same-sex couples from obtaining *any* benefit that married couples also enjoy.

Moreover, courts in other jurisdictions have reached similar conclusions in addressing the propriety of domestic partnership benefits. *See, e.g.*, Alaska Civil Liberties Union v. State, 122 P.3d 781, 786 (Alaska 2005) (nothing in Alaska's constitutional amendment banning same-sex marriage prohibits public employers from offering same-sex domestic partner benefits; therefore, amendment could not foreclose plaintiff's claims that denial of such domestic partner benefits was equal protection violation under Alaska's constitution); State v. Carswell, 871 N.E.2d 547, 554 (Ohio 2007) (domestic violence statute that recognized "person living as a spouse" did not violate Ohio's same-sex marriage amendment because "[i]t does not create or recognize a legal relationship that approximates the designs, qualities, or significance of marriage...."); Leskovar v. Nickels, 166 P.3d 1251, 1255-57 (Wash. Ct. App. 2007) (executive order from Seattle Mayor requiring all city departments to recognize same-sex marriages of city employees for purposes of granting employment benefits did not conflict with State's same-sex marriage law); Knight v. Superior Court, 26 Cal. Rptr. 3d 687, 698-99 (Cal Ct. App. 2005) (decision by California Legislature to grant registered domestic partners some of benefits associated with marriage did not amount to creation of marriage by another name and, therefore, did not violate California's defense of marriage initiative); Devlin v. City of Philadephia, 862 A.2d 1234, 1246 (Penn. 2004) (city's provision of benefits to life partners did not conflict with State's marriage laws); Tyma v. Montgomery Co., 801 A.2d 148, 156-57 (Md. Ct. App. 2002) (county ordinance extending employment benefits to domestic partners did not violate Maryland's same-sex marriage laws); Heinsma v. City of Vancouver, 29 P.3d 709, 713 (Wash. 2001) (city's decision to extend health insurance benefits to employees' same-sex domestic partners in no way affects legislature's regulation of marriage); Lowe v. Broward Co., 766 So.2d 1199, 1205-06 (Fla. Dist. Ct. App. 2000) (extension of limited employment benefits to domestic partners did not create marriage-like relationship in contravention of statute prohibiting same-sex marriage); Crawford v. City of Chicago, 710 N.E.2d 91, 98-99 (Ill. App. Ct. 1999) (city ordinance extending employee benefits to unmarried, same-sex partners of city employees does not violate Illinois marriage laws); Schaefer v. City & County of Denver, 973 P.2d 717, 721 (Colo. Ct. App. 1999) (city and county did not violate State's marriage law when extended dental and health benefits to employees' same-sex domestic partners); and, Slattery v. City of New York, 697 N.Y.S.2d 603 (N.Y. App. Div. 1999) (city, by extending benefits to domestic partners, did not transform domestic partnership into a form of common law marriage).

The Michigan Supreme Court, whose constitution states that "the union of one man and one woman in marriage shall be the only agreement recognized as a marriage or similar union for any purpose," has held that such language "prohibits public employers from providing health-insurance benefits to their employees' qualified same sex partners." Nat'l Pride at Work, Inc. v. Governor of Michigan, 748 N.W.2d 524, 529 (Mich. 2008). However, Michigan's constitutional ban appears to go father than Wisconsin's in its prohibition.

The language, though broad, is nonetheless limited in its application to cases where marriage or a substantially similar legal construct is at issue. Having concluded that offering health insurance benefits, sick leave conversion benefits and family medical leave to same-sex domestic partners does not rise to the level of recognition prohibited by the Amendment, the court is free to examine whether the denial of these benefits violates Wisconsin's Equal Protection Provision.

IV. EQUAL PROTECTION AND HEALTH INSURANCE

"The Equal Protection Clause ensures that people will not be discriminated against with regard to 'a statutory classifications and other governmental activity.'" Thorp v. Town of Lebanon, 2000 WI 60, ¶37, 235 Wis. 2d 610, 612 N.W.2d 59 (citation omitted). "Both the United States Constitution and the Wisconsin Constitution guarantee equal protection of the laws." State v. Lynch, 2006 WI App 231, ¶11, 297 Wis. 2d 51, 724 N.W.2d 656 (citing U.S. Const. amend. XIV, §1 and Wis. Const. art. I, §1).

"Although no express guaranty of equal protection of the laws is found in the Wisconsin Constitution, it has long been recognized that art. I, sec. 1 of that document implies the same equal protection guarantees as are found in the United States Constitution." Phillips v. Wisconsin Pers. Comm'n, 167 Wis. 2d 205, 224, 482 N.W.2d 121 (Ct. App. 1992). "And 'the same legal analysis will be applied to test ... constitutionality ... under the equal protection guarantees of either Constitution.'" Phillips, 167 Wis. 2d at 224 (citation omitted). The question of whether the statutes at issue here violate the Equal Protection Provision is a question of law and, therefore, appropriate for summary judgment review. Lynch, 2006 WI App 231, ¶10.

A. Classification

"Not all disparate treatment is discriminatory." Phillips, 167 Wis. 2d at 219. "It is only where similarly situated persons are treated differently that discrimination is an issue." Phillips, 167 Wis. 2d at 220. The parties here agree that the statutes at issue create classes for

differential treatment; they disagree, however, as to whether this differential treatment amounts to discrimination.

Defendants contend that the statutes raise the question of marital status discrimination in employment, which the Wisconsin Court of Appeals addressed in Phillips. (Defs. 10/6/08 Br., p. 6, *citing*, Phillips, 167 Wis. 2d at 218.) Defendants argue that the statutes do not impermissibly classify Plaintiffs because Plaintiffs are treated the same as any other unmarried couple under these provisions. Plaintiffs disagree.

Plaintiffs note that, "[t]he statutes at issue classify state employees in committed intimate relationships, so that those employees who have married or can marry may receive the benefits for themselves and their spouses, while those same benefits are not available to Plaintiff state employees and their life partners." (Plfs. 1/6/09 Brief, p. 14.) Though the explicit classification set out in these statutes is marriage, Plaintiffs argue that the use of marriage to determine who may and may not receive benefits discriminates on the basis of sexual orientation.[73] This court agrees that the unavoidable effect is to discriminate, in a very substantial degree, upon the basis of sexual orientation.

Although the statutes appear to create a neutral classification, marriage is only available to heterosexual employees. Consequently, heterosexual couples can always obtain the benefits, while same-sex couples will never be able to do so. Same-sex couples are thus categorically ineligible to receive these benefits. Because the statutes classify same-sex couples for different treatment, they are intentionally discriminatory; the question for this court then is whether they violate the Equal Protection Provision.[74]

B. Standard of Review

This court's first step in resolving such a question is to determine the appropriate level of

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[73] Plaintiffs also argue that classifying by marriage discriminates on the basis of sex; however, for the reasons set forth below in Section V, the court need not address that argument.

[74] Defendants' argument regarding the affect of Phillips is addressed separately in Section V below.

judicial scrutiny to be applied. Ferdon v. Wisconsin Patients Comp. Fund, 2005 WI 125, ¶59, 284 Wis. 2d 573, 701 N.W.2d 440. Here, Plaintiffs contend that §40.02(2) Wis. Stats. violates the Equal Protection Provision because it excludes same-sex couples and their families from qualifying for the same benefits that heterosexual married couples do. Plaintiffs argue that the statute should be subject to strict scrutiny because it discriminates against Plaintiffs on the basis of their sexual orientation. Defendants, however, claim that the rational basis test applies because access to government-supplied health care benefits is not a fundamental right, and sexual orientation does not constitute a suspect class.

"Generally, two levels of judicial scrutiny are applied to equal protection challenges." Thorp, 2000 WI 60, ¶38. "The first level of scrutiny applies to statutes . . . that involve fundamental interests or rights, ... suspect classifications or discrete and insular minorities." Thorp, 2000 WI 60, ¶38 (citation and internal quotations omitted). "Strict scrutiny applies if a statute challenged on equal protection grounds 'impermissibly interferes with the exercise of a fundamental right or operates to the peculiar disadvantage of a suspect class.'" Ferdon, 2005 WI 125, ¶61 (citation omitted). [75].

"When the courts speak of a 'suspect' class, they look to 'traditional indicia of suspectness.'" State v. Martin, 191 Wis.2d 646, 652, 530 N.W.2d 420 (Ct. App. 1995) (citation omitted). "Traditional indicia are found when there is a history of such purposeful unequal treatment, political powerlessness or imposition of special disabilities such that the courts command extraordinary protection from the majoritarian political process." Martin, 191 Wis.2d at 652. "Persons generally are placed in these suspect classes by accident of birth." Martin, 191

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[75] "Other, 'intermediate' levels of scrutiny are applied to legislative classifications based on gender, which must be 'substantially related to a sufficiently important governmental interest,' and illegitimacy, which must be 'substantially related to a legitimate state interest.'" Phillips, 167 Wis. 2d 205, 224, fn. 12 (*citing*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440-441 (1985)). "Under intermediate scrutiny, the classification 'must serve important governmental objectives and must be substantially related to achievement of those objectives.'" Ferdon, 2005 WI 125, ¶63.

Wis.2d at 652. "Examples of suspect classes are race, alienage and national origin. Martin, 191 Wis.2d at 652.

"If a statute or governmental activity applies to one of the protected classes, a reviewing court applies a strict scrutiny test." Thorp, 2000 WI 60, ¶38. "For a statute or ordinance to pass constitutional muster under strict scrutiny, a governmental entity "must prove that the classification is necessary to promote a ' compelling governmental interest'...." Thorp, 2000 WI 60, ¶38 (citation omitted). "Further, the classification must be carefully tailored so that the statute or ordinance uses the least drastic means to achieve the compelling state interest." Thorp, 2000 WI 60, ¶38. "Courts apply strict scrutiny sparingly...." Ferdon, 2005 WI 125, ¶62.

The second level of scrutiny applies "[w]here a suspect class or fundamental interest is not involved...." Thorp, 2000 WI 60, ¶39 (citation omitted). "This level of scrutiny involves a rational basis test, wherein classifications are upheld "if they are in any way rationally related to the asserted purpose of the legislation." Thorp, 2000 WI 60, ¶39 (citation omitted). "The statute . . . must only meet a legitimate state interest." Thorp, 2000 WI 60, ¶39. The Wisconsin Supreme Court has "also stated the test in terms of whether a legislative enactment is 'reasonable and practical' in light of the government's objective in creating the legislation." Thorp, 2000 WI 60, ¶39.

"A person challenging a statute on equal protection grounds under the rational basis level of scrutiny bears a heavy burden in overcoming the presumption of constitutionality afforded statutes." Ferdon, 2005 WI 125, ¶67. "Statutes are afforded the presumption of constitutionality '[b]ecause statutes embody the economic, social, and political decisions entrusted to the legislature....'". Ferdon, 2005 WI 125, ¶67 (citation omitted).

The longstanding rule set forth by the Wisconsin Supreme Court is that "all legislative acts are presumed constitutional, that a heavy burden is placed on the party challenging constitutionality, and that if any doubt exists it must be resolved in favor of the constitutionality of a statute." Ferdon, 2005 WI 125, ¶68 (citation omitted). "A challenger must demonstrate that a

statute is unconstitutional beyond a reasonable doubt." Ferdon, 2005 WI 125, ¶68. "Nevertheless, when a legislative act unreasonably invades rights guaranteed by the state constitution, a court has not only the power but also the duty to strike down the act." Ferdon, 2005 WI 125, ¶69.

C. Application

As Defendants note, access to government supplied health care benefits is not a fundamental right; thus, the question is whether sexual orientation constitutes a suspect class. Defendants point out that neither Wisconsin nor federal courts have held that sexual orientation constitutes a suspect class;[76] and, contend that both the United States Supreme Court and the Seventh Circuit Court of Appeals have declined to find a suspect or quasi-suspect class

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[76] Defendants cite a 2008 Tenth Circuit Court of Appeals case, which attempts to summarize the relevant case law as follows:

> In the district court, Price-Cornelison also alleged lesbians comprise a suspect class, warranting strict scrutiny. Price-Cornelison does not reassert that claim now on appeal. In any event, this court, like many others, has previously rejected the notion that homosexuality is a suspect classification. *See Walmer v. Dep't of Defense*, 52 F.3d 851, 854 (10th Cir.1995); *see also Scarbrough v. Morgan County Bd. of Educ.*, 470 F.3d 250, 261 (6th Cir.2006) (noting homosexuality is not suspect classification in the Sixth Circuit); *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859, 866 (8th Cir.2006) (noting Supreme Court has never held that sexual orientation is a suspect classification for equal protection purposes); *Johnson v. Johnson*, 385 F.3d 503, 532 (5th Cir.2004) (noting neither Supreme Court nor Fifth Circuit has recognized sexual orientation as a suspect classification); *Lofton v. Sec'y of Dep't of Children & Family Servs.*, 358 F.3d 804, 818 & n. 16 (11th Cir.2004) (en banc) (noting that all circuits that have addressed the issue have held that homosexuals are not a suspect class); *Holmes v. Cal. Army Nat'l Guard*, 124 F.3d 1126, 1132 (9th Cir.1997) (noting homosexuals do not constitute a suspect class); *Nabozny v. Podlesny*, 92 F.3d 446, 458 (7th Cir.1996) (declining to decide whether homosexuals are a suspect or quasi-suspect class, but noting that, in military context, Seventh Circuit has subjected discrimination on the basis of sexual orientation to rational basis test instead of applying strict scrutiny); *Thomasson v. Perry*, 80 F.3d 915, 928 (4th Cir.1996) (holding military personnel who engage in, or have a propensity to engage in, homosexual acts are not a suspect class); *Woodward v. United States*, 871 F.2d 1068, 1076 (Fed.Cir.1989) (holding homosexuality is neither a suspect nor a quasi-suspect class); *Padula v. Webster*, 822 F.2d 97, 101-04 (D.C.Cir.1987) (same). *See generally Romer v. Evans*, 517 U.S. 620, 631-33, 116 S.Ct. 1620, 134 L.Ed.2d 855 (1996) (discussing amendment precluding enactment of laws prohibiting discrimination on basis of sexual orientation using rational basis test rather than applying strict scrutiny).

Price-Cornelison v. Brooks, 524 F.3d 1103, 1113-1114, fn. 9 (10th Cir. 2008)

premised on sexual orientation. Romer v. Evans, 517 U.S. 620, 631-32 (1996) (amendment to Colorado Constitution that prohibited all legislative, executive, or judicial action designed to protect homosexual persons from discrimination could not survive even the rational basis test); Nabozny v. Podlesny, 92 F.3d 446, 458 (7th Cir. 1996) (court need not consider whether homosexuals are suspect class because already held otherwise in context of the military).[77] Defendants also cite a variety of state court decisions in which courts declined to find a suspect class or engage in strict scrutiny.[78] Though these cases are certainly relevant to this court's decision, Defendants' reliance on them is misplaced.

First of all, neither the United States Supreme Court cases nor the Seven Circuit case cited by Defendants actually addressed the question of whether sexual orientation constitutes a suspect class. The Court has held, however, that legislative classifications based on gender call for a heightened standard of review. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985).

Moreover, three recent state court decisions hold that sexual orientation does constitute a suspect or quasi-suspect class. *See, e.g.*, Varnum v. Brien, No. 07-1499, ___ N.W.2d ___, 2009 WL 874044, at *49 (Iowa filed April 3, 2009) ("Accordingly, we hold that legislative classifications based on sexual orientation must be examined under a heightened level of scrutiny under the Iowa Constitution."); Kerrigan v. Comm'r of Pub. Health, 957 A.2d 407, 431-32 (Conn. 2008) (sexual orientation meets of all the requirements of a quasi-suspect classification); In re Marriage Cases, 183 P.3d 384, 401 (Cal. 2008) (classifying on the basis of sexual orientation constitutes a suspect class).

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[77] Defendants also cite the United States Supreme Court's recent decision in Lawrence v. Texas, 539 U.S. 558 (2003). While Lawrence employed rational basis review, the Court addressed the validity of a sodomy statute under the due process clause, not the equal protection clause, which the Court specifically declined to apply. 539 U.S. at 574-75.

[78] *See e.g.*, Conaway v. Deane, 932 A. 2d 571, 605-616 (Md. 2007) (lengthy discussion of why statute that discriminates on the basis of sexual orientation does not trigger strict or heightened scrutiny); Andersen v. King County, 138 P.3d 963, 974-76 (Wash. 2006); State v. Limon, 122 P.3d 22, 29-30 (Kan. 2005); Hernandez v. Robles, 805 N.Y.S.2d 354, 360 (N.Y. App. Div. 2005); Standhardt v. County of Maricopa, 77 P.3d 451, 463 (Ariz. Ct. App. 2003).

Finally, and perhaps most importantly, while Defendants may be correct in their assertion that no Wisconsin court has ever found that the Equal Protection Provision provides greater protection than its federal counterpart, "[i]t is plain that United States Supreme Court interpretations of the United States Constitution do not bind the individual state's power to mold higher standards under their respective state constitutions." State v. Knapp, 2005 WI 127, ¶57, 285 Wis. 2d 86, 700 N.W.2d 899. "Indeed, the United States Supreme Court, through both majority and dissenting opinions, has explicitly extended invitations to the states to adopt different rules should they deem it appropriate." Knapp, 2005 WI 127, ¶57.

The Wisconsin Supreme Court has stated that when interpreting the Wisconsin Constitution, decisions from the United States Supreme Court interpreting analogous provisions in the federal constitution "are eminent and highly persuasive, *but not controlling*, authority." Knapp, 2005 WI 127, ¶57 (citation omitted, emphasis added). As Plaintiffs note, "[t]he fact that no court in Wisconsin has found that sexual orientation is a suspect class does not provide a justification for avoiding the question . . . rather, it means that there is no binding precedent preventing this Court from reaching this question. " (Plfs. 3/2/09 Br., p. 5.) Therefore, the court is free to examine the question of whether the Equal Protection Provision demands that a higher level of scrutiny be applied to Wisconsin Statutes that contain sexual orientation-based classifications.

1. Determination of the appropriate level of scrutiny

Courts generally look to four factors in determining whether a classification constitutes a suspect class, which triggers a heightened level of judicial scrutiny: (1) a history of invidious discrimination against the class at issue; (2) whether the common characteristic upon which the distinction is made bears any relationship to the class members' ability to perform or function in society; (3) whether the distinguishing characteristic is immutable; and, (4) the political power of the suspect class. Martin, 191 Wis. 2d at 652; Varnum, 2009 WL 874044, at *34-35; Kerrigan, 957 A.2d at 426. This court will address each in turn.

a. History of invidious discrimination

Plaintiffs contend that gay and lesbian individuals have experienced a history of purposeful unequal treatment; and, Defendants concede that gay and lesbian people whose sexual identities have been known or suspected have, as a general rule, suffered a history of discrimination. Wisconsin, recognizing the problem of such discrimination, became the first state in the country to prohibit sexual orientation discrimination in 1982. Turner, *supra*, (introduction).

As both Plaintiffs and the Iowa Supreme Court note "[t]he long and painful history of discrimination against gay and lesbian persons is epitomized by the criminalization of homosexual conduct in many parts of this country until very recently." Varnum, 2009 WL 874044, at *37 (*citing*, Lawrence, 539 U.S. at 578-79). In fact, gay and lesbian persons are victims of hate crimes at rates similar to other suspect classes. *See*, Criminal Justice Information Servs. Div., FBI, *Hate Crime Statistics 2007*, available at http://www.fbi.gov/ucr/hc2007/victims.htm (of the 9,535 victims of hate crimes, 15.9% were targeted because of sexual orientation, while 17.1% were targeted based on religious beliefs and 14.1% were targeted because of their ethnicity/national origin).[79]

b. The class members' ability to perform or function in society

Plaintiffs also argue, and Defendants do not contend otherwise, that sexual orientation is not related to one's ability to participate in society. This fact has been acknowledged by many courts, including Varnum, 2009 WL 874044, at *39-41 (none of the same-sex marriage decisions from other state courts have found a person's sexual orientation to be indicative of their ability to contribute to society); and, Kerrigan, 957 A.2d at 434-35 (many courts have acknowledged that sexual orientation does not affect ability to participate in society). The State of Wisconsin recognized as much when, in 1981, the legislature passed a law prohibiting discrimination on the basis of sexual orientation. Turner, *supra*, (introduction).

[79] Statistics for 2008 are not yet available.

c. Immutability of the distinguishing characteristic

As noted above, Plaintiffs here do not believe they can change their sexual orientation. However, Defendants, citing a lack of agreement among "experts," challenge the suggestion that sexual orientation immutable. "It is defendants' position that . . . the immutability factor is not determinative as the United States Supreme Court held in *City of Cleburne, Tex. V. Cleburne Living Center*, 473 U.S. 432, 441 (1985)." (Defs. 2/16/09 Br., pp. 17-18.)

While immutability may not be the determinative factor in this analysis, it is a relevant one. The United States Supreme Court has indicated that an "immutable" characteristic is one determined solely by accident of birth. Frontiero v. Richardson, 411 U.S. 677, 686 (1973) (plurality opinion). In explaining why classifications based on immutable characteristics are subject to strict scrutiny, the Court explained the imposition of special disabilities upon these classes would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility." Frontiero, 411 U.S. at 686.

Plaintiffs here believe, as many others do, that they cannot change their sexual orientation. To punish them for that belief runs counter to the "basic concept" described by the Court. And this court agrees with the holdings of Varnum and others, that "the immutability prong of the suspectness inquiry surely is satisfied when . . . the identifying trait is so central to a person's identity that it would be abhorrent for government to penalize a person for refusing to change [it]." Varnum, 2009 WL 874044, at *44 (*quoting*, Kerrigan, 957 A.2d at 438) (internal quotation marks omitted); *see also*, In re Marriage Cases, 183 P.3d at 442.

d. Political Power of the Suspect Class

Finally, Plaintiffs argue that lesbian and gay individuals have been relegated to a position of political powerlessness. Defendants disagree. Defendants point to Wisconsin statutes that prohibit discrimination based on sexual orientation in employment, housing and education and contend that Plaintiffs do not lack political power, which the United States

Supreme Court requires as a prerequisite for suspect consideration. Defendants misinterpret the standard.

As the Iowa Supreme Court recently noted, "absolute political powerlessness is not necessary to subject legislative burdens on a certain class to heightened scrutiny." Varnum, 2009 WL 874044, at *45. For example, in 1973, the United States Supreme Court remarked that while "women do not constitute a small and powerless minority," they were, nonetheless vastly underrepresented "in this Nation's decision making councils" and entitled to strict scrutiny. Frontiero, 411 U.S. at 688 & fn. 17. Moreover, as both the Iowa and California Supreme Courts note *current* political powerlessness is not required to obtain strict scrutiny review. Varnum, 2009 WL 874044, at *46; In re Marriage Cases, 183 P.3d at 443. If this were the case, sex, race and religion would no longer be suspect classifications.

One need look no farther than Wisconsin's own constitution to see evidence of gay and lesbian individuals' lack of political power; the Marriage Amendment clearly demonstrates that these individuals constitute a political minority in our state. This lack of political power, in addition to the above factors, supports the conclusion that Plaintiffs are indeed part of a suspect class. Because the statutes at issue classify on the basis of sexual orientation, which this court finds is a suspect class, they are subject to strict scrutiny review.

2. Constitutionality of §40.02(20) Wis. Stats.

Wisconsin Statutes require the GIB to establish a standard health insurance plan for state employees that includes a family coverage option and §40.02 Wis. Stats. determines who qualifies for the family coverage option. §40.52(1) Wis. Stats. Section 40.02 defines "dependant" for state employee insurance benefit purposes as follows:

> "Dependent" means the spouse, minor child, including stepchildren of the current marriage dependent on the employee for support and maintenance, or child of any age, including stepchildren of the current marriage, if handicapped to an extent requiring continued dependence.

§40.02(20) Wis. Stats. Section 40.02(20) Wis. Stats. could not survive strict scrutiny because Defendants have not demonstrated that the classification is necessary to promote a compelling governmental interest or that the classification is carefully tailored so as to use the least drastic means to achieve that interest.[80]

Defendants "assert that the statutory health benefit limitation to spouses reflects the state's desire to control and contain employee health care costs and to promote administrative efficiency." (Defs. 10/6/08 Br., p. 14.) Defendants contend that including same-sex domestic partners in the plan would necessarily create real cost increases, as well as, expand the administrative burdens associated with the program.

The relevant facts here are undisputed. To be sure, all parties recognize that if the state ceases to deny equal benefits to a small minority of its employees, there will be a cost associated with that change. The state's estimate of that cost, at between one quarter and three quarters of one percent is a consequential matter in today's economy. . It is undisputed that adding same-sex domestic partners to the plan would require developing new definitions of "dependant", making necessary legislative and/or administrative code changes, designing new forms and setting up new systems. Because domestic partner benefits are not recognized by the federal government for tax deduction purposes, providing health care benefits would also need to be included as additional income to qualifying employees. Finally, in addition to the potential administrative costs of commencing the same-sex domestic partner program, DETF may need to add additional staffing to monitor the program on an on-going basis.

However, the parties also agree that the cost of including same-sex domestic partners is the same as the cost for spouses. As Plaintiffs note, the denial of health insurance benefits to same-sex domestic partners is not based on any substantial distinction between same-sex couples and married couples; indeed the two groups are similarly situated with respect to family

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[80] Defendants, relying on the Marriage Amendment and Phillips, do not attempt to assert a compelling state interest. Instead, Defendants offer legitimate state interests and contend that the statute is rationally related thereto.

health insurance benefits. The parties agree that Plaintiffs are in committed relationships and have made binding promises of mutual support to one another. The parties also agree that Plaintiffs' lives are emotionally, and financially, intertwined and that Plaintiffs would marry if that were possible.

Plaintiffs face the same financial hardships due to disability, illness and accident as heterosexual state employees do and cost savings alone cannot justify discrimination. The United States Supreme Court, in discussing the government's interest in cost-savings, has stated:

> We recognize that a State has a valid interest in preserving the fiscal integrity of its programs. It may legitimately attempt to limit its expenditures, whether for public assistance, public education, or any other program. But a State may not accomplish such a purpose by invidious distinctions between classes of its citizens.

Shapiro v. Thompson, 394 U.S. 618, 633 (1969), *overruled in part on other grounds by* Edelman v. Jordan, 415 U.S. 651 (1974). Defendants must articulate an independent reason, beyond cost-savings, to justify the exclusion. However, the only other interest asserted here is administrative efficiency.

Defendants contend that limiting the benefit to marriage "provides a bright-line distinction that is easily applied by defendants when determining family health insurance coverage." (Defs. 10/6/08 Br., p. 16.) Plaintiffs reject this argument, citing to the domestic partner benefits offered by the Regents, and contending that the administrative scheme for administering these benefits is already in place.[81] Though the parties disagree about who, exactly, is responsible for administering these supplemental benefits, it is not necessary for the court to resolve that argument here. The point is that *some* same-sex domestic partners of state employees can, and do, receive *some* benefits. Who determines the qualifying criteria and collects the applicants' information is irrelevant.

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[81] As noted above, the Regents offer life insurance, accidental death and dismemberment insurance and vision care insurance to same-sex domestic partners.

To survive strict scrutiny, the classification must be necessary to promote a compelling governmental interest and carefully tailored to use the least drastic means to achieve that interest. Assuming, without deciding, that administrative efficiency could be a compelling governmental interest, disqualifying same-sex domestic partners from receiving health insurance because it involves more paperwork is certainly not the least drastic means of achieving that interest. This is particularly evident in light of the fact that numerous insurers, including those who offer the state employee's supplemental insurance benefits, have managed to offer coverage in an administrative efficient manner.

Upon a careful review of the fact presented and the applicable law, this court, in the absence of the controlling decision of Phillips, supra, would find that §40.02(20) Wis. Stats. violates the Equal Protection Provision because it neither furthers a compelling governmental interest, nor uses the least drastic means to achieve that interest. Under the doctrine of stare decisis, this court does not possess authority to render such a ruling.

V. The Phillips Decision

In Phillips, the plaintiff argued that "provisions in the statutes and administrative code limiting dependent health insurance coverage to an employee's spouse and children denies equal protection of the law to persons of her sexual orientation since same-sex couples may not legally marry." 167 Wis. 2d at 212. The plaintiff was a lesbian in a committed relationship, who sought to change her health insurance from an individual to a family policy, but was prohibited from doing so because the definition of "dependant" found in §40.02(20) Wis. Stats. allowed only spouses or children to qualify. Phillips, 167 Wis. 2d at 214.

The plaintiff argued that the statutes discriminated on the basis of sexual orientation and gender; and, claimed that sexual orientation was a suspect classification subject to strict scrutiny; Phillips, 167 Wis. 2d at 223, 225-26. The Wisconsin Court of Appeals disagreed. 167 Wis. 2d at 227. Instead, the court determined that it need not reach the "the threshold of an

equal protection analysis" because the provisions at issue did not classify by sexual orientation. Phillips, 167 Wis. 2d at 227. The court then went onto to note:

> Phillips's claim of improper classification based on gender meets a similar fate. While, as we have indicated, classifications based on gender are subject to an elevated level of scrutiny, her claim must fail at the very outset because, again, dependent insurance coverage is unavailable to unmarried companions of both male *and* female employees. A statute is only subject to a challenge for gender discrimination under the equal protection clause when it discriminates on its face, or in effect, between males and females. *In re Baby Girl K*, 113 Wis.2d 429, 448, 335 N.W.2d 846, 856 (1983). Because the rule does not classify by gender, that ends our inquiry.

Phillips, 167 Wis. 2d at 227. The Court of Appeals thus concluded that the statutes did not violate the Equal Protection Provision because they were "keyed to marriage" and applied equally to hetero- and homosexual employees. Phillips, 167 Wis. 2d at 212-13.

Defendants, relying on footnote one of the Phillips decision, contend that the court of appeals has held "unequivocally" that this a matter for the legislature, "beyond the powers of this or any court." (Defs. 2/16/09 Br., p. 5) Defendants, however, are relying on language that the court of appeals itself recently held was dicta, noting:

> it is plain that the text in footnote one of *Phillips* is neither a controlling ruling establishing binding law, nor does it abrogate in any way the well-established law of judicial review establishing the judiciary, not the legislature, as the proper branch of government for reviewing the constitutionality of laws.
>
> Helgeland, 2006 WI App 216, ¶13.

Plaintiffs, on the other hand, contend that Phillips should be reconsidered in light of recent legal and factual developments. Plaintiffs note that the case at bar differs from Phillips in that Plaintiffs here seek sick leave carryover and family medical leave, as well as, health insurance. The Plaintiffs present a strong challenge to the Phillips decision but the reality here is that the court is constrained by stare decisis, Attorney General ex rel. Caleb Cushing v. Charles Lum, 2 Wis. 507 (1853).

"The doctrine of stare decisis, or 'stand by things decided,' normally compels a court to follow its prior decisions.'" Ferdon, 2005 WI 125, ¶30 (citation omitted). "Fidelity to precedent ensures that existing law will not be abandoned lightly." Ferdon, 2005 WI 125, ¶30 (citation omitted). Moreover, "only the supreme court, the highest court in the state, has the power to overrule, modify or withdraw language from a published opinion of the court of appeals." In re Marriage of Cook v. Cook, 208 Wis. 2d 166, 189-90, 560 N.W.2d 246 (1997). This court does not hold authority to ignore binding precedent and, for that reason, holds that Plaintiffs' claim that §40.02(20) Wis. Stats. violates the Equal Protection Provision must be dismissed.

VI. SICK LEAVE CONVERSION BENEFITS

As noted above, Wisconsin Statutes relating to sick leave conversion state that "the department shall administer a program that provides health insurance premium credits for the purchase of health insurance for a retired employee, or the retired employee's surviving insured dependents . . . ." §40.95(1)(a) Wis. Stats. "Dependant" is defined by §40.02(20) Wis. Stats. Because the sick leave conversion program classifies eligible dependants on the same basis as the state employee health insurance program, the Phillips reasoning applies to bar Plaintiffs' constitutional challenge. That is, because the sick leave conversion plan classifies on the basis of marriage, not sexual orientation or gender, the statute does not violate the Equal Protection Provision because it is "keyed to marriage" and applies equally to hetero- and homosexual, male and female employees.

VII. FAMILY MEDICAL LEAVE

The Wisconsin Family Medical Leave Act provides, in part:

> (2) Scope. (a) Nothing in this section prohibits an employer from providing employees with rights to family leave or medical leave which are more generous to the employee than the rights provided under this section.
>
> . . .
>
> (3) Family leave.
>
> . . .
>
> (b) An employee may take family leave for any of the following reasons:

> 1. The birth of the employee's natural child, if the leave begins within 16 weeks of the child's birth.
>
> 2. The placement of a child with the employee for adoption or as a precondition to adoption under s. 48.90(2), but not both, if the leave begins within 16 weeks of the child's placement.
>
> 3. To care for the employee's child, spouse or parent, if the child, spouse or parent has a serious health condition.
>
> §103.10 (2)(a) & (3)(b) Wis. Stats.

Like the state employee health insurance plan and sick leave conversion program, spouses are included in the statute, while same-sex domestic partners are not. However, the family leave statute is *unlike* the other statutes because it permits employers to grant more generous rights to family and medical leave. Consequently, some state employers, like the Regents, permit employees to use family leave for the purpose of caring for a same-sex domestic partner.

Defendants argue that Plaintiffs' family leave claim is not ripe because the decision to offer family leave to same-sex domestic partners is left to the individual employer and Plaintiffs have not named their respective employers in this action.[82] Moreover, Defendants contend that the DWD and Gassman are not proper parties because Plaintiffs have not pursued a complaint with the DWD. Plaintiffs, however, note that ripeness generally addresses the timeliness of the claim, i.e., a claim is brought before the plaintiff has suffered, or is at risk of suffering, any harm. Plaintiffs argue that the claim is ripe because McPike and Barnett have already suffered harm; specifically, when the Department of Corrections denied McPike's 1996 request for family leave, then recently confirmed that she is not entitled to the act's protections. This court need not resolve the dispute.

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[82] Defendants initially claimed that Plaintiffs claims were not ripe because "plaintiffs did not present specific allegations showing that one or more of them requested FMLA from the Department of Corrections to care for the serious medical need of a life partner and had the request denied." (Defs.. 10/6/08 Brief, p. 22.) However, as noted in the court's factual findings above, McPike did make such a request and was denied leave. Defendants appear to have abandoned this argument in their reply brief. (*See generally*, Defs. 2/16/09 Br., pp. 19-21.)

Based solely upon the controlling authority of the Phillips' decision, it is the duty of this court to conclude that the family leave statute classifies on the basis of marriage, not gender or sexual orientation. In light of Phillips, it does not violate the Equal Protection Provision because it applies equally to unmarried individuals, hetero- or homosexual, male or female.

CONCLUSION

For the reasons set forth above, Plaintiffs' motion for summary judgment is DENIED. Defendants' motion to dismiss Plaintiffs' claim is GRANTED and Plaintiffs' complaint is DISMISSED in its entirety. This decision and order is a final order that disposes of the entire matter in litigation as to all parties and is intended by the court to be an appealable order within the meaning of sec. 808.03(1), Wis. Stats.

By the court this 29th day of May, at Madison, Wisconsin.

Judge David Flanagan

cc: Attorney Laurence Dupuis
Attorney John A. Knight
Assistant Attorney General Jennifer Lattis
Attorney Glen E. Levy
Attorney Krystal Williams-Oby
Attorney Michael D. Dean

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