SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: FOURTH DEPARTMENT

PATRICIA MARTINEZ,

Plaintiff-Appellant,

- against -

COUNTY OF MONROE, MONROE COMMUNITY COLLEGE, TRUSTEES OF MONROE COMMUNITY COLLEGE and MONROE COMMUNITY COLLEGE DIRECTOR OF HUMAN RESOURCES SHERRY RALSTON, in her Individual and Official Capacity,

Defendants-Appellees.

Docket No. 06-2591
Monroe County
Index No. 433-05

BRIEF OF THE ATTORNEY GENERAL OF THE STATE OF NEW YORK AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

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PRELIMINARY STATEMENT

The Attorney General of the State of New York submits this brief amicus curiae in support of plaintiff-appellant Patricia Martinez. Martinez appeals an order of Supreme Court, Monroe County (Galloway, J.), dated July 27, 2006, that dismissed Martinez's complaint and granted summary judgment to defendants-appellees Monroe Community College, its trustees, its director of human resources, and Monroe County. Supreme Court denied Martinez's cross-motion for summary judgment and granted defendants a declaratory judgment that Martinez's Canadian marriage was not entitled to recognition in New York and that defendants acted lawfully when they refused to recognize Martinez's Canadian marriage and give health benefits to her spouse.

This should be a simple case. Under well-settled New York common law, marriages validly performed in other jurisdictions are recognized in New York, even if they could not have been validly performed in New York. This marriage-recognition rule applies unless a law explicitly prohibits recognition or recognition would be "abhorrent" to public policy. In contrast to many other States, New York has no law barring the recognition of same-sex marriages validly performed in other jurisdictions. And far from being abhorrent to public policy, recognizing same-sex marriages validly performed elsewhere is the declared policy of the State, as reflected in the pronouncements of the Department of Civil Service,

the Office of the Comptroller, and the Office of the Attorney General. That should be the end of the analysis.

Supreme Court incorrectly concluded that recognizing a same-sex partnership as a marriage would be contrary to New York public policy and would constitute "an end-run around . . . the will of the New York State Legislature, which currently defines marriage as limited to the union of one man and one woman" (A. 253). Recognition of a marriage that could not be performed in New York is not "an end-run around" the Domestic Relations Law's criteria for who may marry, but rather is a standard application of the marriage-recognition rule, which is designed to address marriages that could not be solemnized in New York. While the New York Legislature has not authorized the performance of same-sex marriages, it has passed no law limiting the definition of "marriage" for purposes of the marriage-recognition rule to the union of one man and one woman. Nor did the Court of Appeals fashion such limits in Hernandez v. Robles, 7 N.Y.3d 338 (2006), which merely held that the Domestic Relations Law's restriction of New York marriage licenses to opposite-sex couples passed rational-basis scrutiny. Accordingly, Supreme Court's order should be reversed.

INTEREST OF THE AMICUS CURIAE

As New York's chief law enforcement officer, the Attorney General is responsible for protecting the rights of New York citizens and ensuring the correct interpretation of New York law. New York's broad marriage-recognition rule provides continuity and certainty to New York citizens, as well as to all other parties whose rights and duties are affected by the legal status of that relationship. Applying this longstanding rule to this case would also further New York's interest in preventing discrimination on the basis of sexual orientation.

In addition, the Attorney General currently is litigating the question presented in this appeal on behalf of two state entities. The Department of Civil Service and the Office of the State Comptroller recognize same-sex marriages validly performed in other jurisdictions, and their authority to do so is being challenged in pending lawsuits. This Court's resolution of the instant lawsuit could well have implications for the outcome of those cases.

QUESTIONS PRESENTED

1. Does New York's marriage-recognition rule compel the recognition of a same-sex Canadian marriage, where recognition of same-sex marriages is not expressly barred by statute or otherwise inconsistent with state policy, and in fact <u>is</u> the policy of the State and many of its subdivisions?

Supreme Court answered in the negative.

2. If Martinez's marriage is recognized as valid in New York, is the College liable for failure to meet its contractual obligation to provide healthcare coverage for all "spouses" of employees?

Supreme Court did not reach this question.

This brief does not address the other issues raised by Martinez, which this Court need not reach if it applies the marriage-recognition rule correctly.

STATEMENT OF THE CASE

A. Statement of Facts

Plaintiff-appellant Patricia Martinez is employed by defendant-appellee Monroe Community College (the "College") as a word processing supervisor (A. 11). She is a member of a local unit of the Civil Service Employees Association. At all times relevant to this litigation, her unit's collective bargaining agreement ("CBA") with the College provided that full-time employees could become members of the Rochester Hospital Service Corporation's Blue Cross/Blue Shield health insurance plan (A. 63, 74). Martinez has been a member of this plan since she began working at the College in 1994 (A. 163-164).

Until January 2006, Martinez's unit's CBA did not explicitly provide for covered employees' spouses to receive health insurance (A. 15, 74-75). However, it contained provisions that assume such an entitlement — for example, one providing that surviving spouses "shall be entitled to continued fully paid Blue Cross/Blue Shield coverage" (A. 75) (emphasis added). At all relevant times, the College acted as though it was required to provide employees' spouses with health insurance (A. 12, 63, 137). The College's director of human resources, Sherry Ralston, said she was "surprised" to discover that spousal benefits were not expressly provided by the CBA (A. 137), and she admitted that she regarded the contract as having an implied right to spousal benefits (A. 191).

On July 5, 2004, Martinez married Lisa Ann Golden in Ontario, Canada (A. 24, 26-27). The validity of this marriage in Ontario is undisputed (A. 62). On July 7, 2004, Martinez informed the College of her marriage and asked that Golden be added to her health insurance coverage (A. 12).

On August 10, 2004, Martinez had a meeting with Ralston to discuss the issue (A. 190). Ralston informed her that "the county and the contract did not allow for domestic partner benefits" (A. 190). Ralston did not acknowledge that Martinez had been married and repeatedly characterized Martinez's request as one for "domestic partner benefits" (A. 190).

Several months then went by with no response from Ralston (A. 191). In the meantime, the College completed a new CBA with its faculty (a category of employees that does not include Martinez). This CBA, which went into effect on September 1, 2004, provides that faculty members' domestic partners are eligible for health care insurance. (A. 119-120)

Martinez reiterated her request in a new memorandum dated November 11, 2004 (A. 191, 237). By memorandum dated November 24, 2004, the College denied Martinez's request. The memorandum stated that Martinez's request "creates a matter of first impression at the college and is part of an emerging legal issue in the country" (A. 58). It then simply stated: "We have carefully researched the matter. Under our analysis, MCC is not required to provide benefits to Ms. Golden" (A. 58).

At her deposition, Ralston further explained that she believed she lacked "authority" to provide the sought benefits (A. 156), because the CBA did not "provide for domestic partners" and "you don't go outside what is in the contract" (A. 157). While the contract did not expressly define "spouse," she said, "[t]he implication is that spouses were of the opposite sex" (A. 160). Accordingly, she stated that she could not offer spousal benefits "to same sex couples, whether they were married or not, without having an expressed contract clause or something like that that allowed me to do that" (A. 159).

After Martinez had commenced this litigation, on January 1, 2006, the College began providing health insurance to the domestic partners of non-faculty employees such as Martinez, in accordance with a new CBA. Golden now receives health insurance from the College pursuant to this policy. However, between July 7, 2004, and January 1, 2006, Golden incurred various expenses totaling about $3,200 as a result of the College's denial of benefits (A. 178, 180, 243).

B. Proceedings Below

Martinez commenced this action in Supreme Court, Monroe County, on January 13, 2005, and filed an amended complaint on February 8, 2005 (A. 60-68, 248). Martinez sought money damages and a declaration that the defendants' failure to provide health insurance for Golden violated the New York Constitution's Equal Protection Clause and Executive Law § 296 (A. 67).

Both sides moved for summary judgment. By order dated July 27, 2006, Supreme Court granted defendants' motion, denied Martinez's motion, and entered a judgment declaring that Martinez's marriage "is not entitled to comity in New York State" (A. 246).

The court first found that the relevant CBA did not provide for health care benefits for domestic partners (A. 249-250). It then held that Martinez's claim that the failure to recognize her marriage violated New York's Equal Protection Clause was precluded

by Hernandez v. Robles, 7 N.Y.3d 338 (2006) (A. 250). Next, the court denied Martinez's claim of disparate treatment on the basis of sexual orientation, saying that the defendants "did not treat plaintiff differently on the basis of this classification, but rather, treated her as they would any unmarried person" (A. 251).

Finally, the court rejected Martinez's assertion that her Canadian marriage should be recognized in New York pursuant to principles of comity (A. 252). Citing the federal Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (codified at 28 U.S.C. § 1738C), it stated that "same-sex marriage is contrary to current national public policy" (A. 253). Citing Hernandez, it found that "the policy in New York State is that same-sex marriage is not authorized or recognized" (A. 253). Recognizing Martinez's marriage, the Court stated, "would be to make an end-run around what the Court of Appeals has declared to be the will of the New York State Legislature, which currently defines marriage as limited to the union of one man and one woman" (A. 253). Because "neither Federal nor New York policy is consistent with permitting same-sex marriage, it would appear to be contrary to the nature of the principle to afford comity to plaintiff's Canadian marriage" (A. 253).

This appeal followed (A. 255).

ARGUMENT

POINT I

NEW YORK'S MARRIAGE-RECOGNITION RULE REQUIRES RECOGNITION OF A SAME-SEX CANADIAN MARRIAGE

This case presents a simple application of New York's marriage-recognition rule, pursuant to which a marriage that was validly performed in another jurisdiction must be recognized in New York even if it could not have been solemnized in New York. The only exceptions to this rule are where recognition of the marriage is specifically barred by statute or where it otherwise would be "abhorrent" to New York policy. Neither of these exceptions applies here. Indeed, far from conflicting with any New York policy, recognition of same-sex marriages is the stated policy of New York State and many of its subdivisions. Therefore, there is no basis in New York law or policy for denying recognition to Martinez's marriage.

A. New York Recognizes a Marriage That Was Valid Where Performed Even If It Could Not Have Been Performed in New York.

One of the most enduring principles in New York law is that a marriage considered valid in the jurisdiction where it was executed is valid in New York. See In re Estate of May, 305 N.Y. 486, 490 (1953) ("[I]n the absence of a statute expressly regulating within the domiciliary State marriages solemnized abroad, the legality of

a marriage between persons sui juris is to be determined by the law of the place where it is celebrated."); Van Voorhis v. Brintnall, 86 N.Y. 18, 25 (1881) ("[T]he rule recognizes as valid a marriage considered valid in the place where celebrated."); Decouche v. Savetier, 3 Johns. Ch. 190, 211 (N.Y. Ch. 1817) ("There . . . [is] no doubt of the general principle that the rights dependent upon nuptial contracts are to be determined by the lex loci."). Indeed, this principle predates the founding of the nation. See, e.g., Scrimshire v. Scrimshire, 161 Eng. Rep. 782, 790 (Consistory Ct. 1752).

Under this rule, New York recognizes a marriage that was valid where performed even if it would have been invalid if performed in New York. See, e.g., Mott v. Duncan Petroleum Trans., 51 N.Y.2d 289, 292 (1980); Estate of May, 305 N.Y. at 491-93; Shea v. Shea, 294 N.Y. 909 (1945); Carpenter v. Carpenter, 208 A.D.2d 882, 883 (2d Dep't 1994); Fernandes v. Fernandes, 275 A.D. 777 (2d Dep't 1949); In re Will of Valente, 18 Misc. 2d 701, 704-05 (Sur. Ct. Kings County 1959). The only exceptions to this rule are where the Legislature has expressly prohibited recognizing a particular kind of out-of-state marriage or where the out-of-state marriage would be "offensive to the public sense of morality to a degree regarded generally with abhorrence." Estate of May, 305 N.Y. at 493.

These exceptions are construed narrowly. For example, the Court of Appeals recognized a Rhode Island marriage between an

uncle and his niece, even though New York Domestic Relations Law § 5(3) expressly voids such a marriage if performed in New York. See Estate of May, 305 N.Y. at 491-93. The Court explained that the Legislature had not also expressly voided such a marriage that was "solemnized in a foreign State where such marriage is valid," although "examples of such legislation are not wanting." Id. at 492. It concluded that the Domestic Relations Law's prohibition on performing such marriages in New York "should not be extended by judicial construction." Id.

Similarly, although New York statute expressly prohibits common-law marriages, see Domestic Relations Law § 11 (stating that "[n]o marriage shall be valid unless solemnized"), the Court of Appeals has recognized such marriages under other States' laws liberally. For example, in Mott, a New York couple's brief visit to Georgia was sufficient to confer common-law marital status under that State's law, even though no Georgia court or agency had declared them married. See 51 N.Y.2d at 292.

The abhorrence exception is so narrow that only marriages involving polygamy or incest have been found to fall within it. Estate of May, 305 N.Y. at 491; see also Bell v. Little, 204 A.D. 235, 237 (4th Dep't 1922), aff'd, 237 N.Y. 519 (1923); Earle v. Earle, 141 A.D. 611, 613-14 (1st Dep't 1910); People v. Ezeonu, 155 Misc. 2d 344, 345-46 (Sup. Ct. Bronx County 1992). Although those courts characterized their decisions as in part based on "the laws

of nature," they also relied on the statutes that render polygamous and incestuous marriages both void and criminal. See, e.g., Earle, 141 A.D. at 613; see also Domestic Relations Law § 6; Penal Law §§ 255.20, 255.25. Thus, the courts have never refused to recognize a marriage that was not explicitly condemned by positive state law.

The marriage-recognition rule is a specific application of the general principle of comity that New York courts "apply the laws of other States where the application of those laws does not conflict with New York's public policy." Crair v. Brookdale Hosp. Med. Ctr., 94 N.Y.2d 524, 528-29 (2000). The very existence of the rule makes it clear that, contrary to Supreme Court's statement, recognizing a marriage solemnized in another jurisdiction does not violate or conflict with the public policy of New York merely because the Domestic Relations Law does not authorize the performance in New York of the marriage in question. See Mott, 51 N.Y.2d at 292-93; Estate of May, 305 N.Y. at 491-93; Shea, 294 N.Y. at 911. The benefit of this rule, as courts have acknowledged, is that it promotes certainty by avoiding the "infinite mischief and confusion" that would otherwise arise "with respect to legitimacy, successions, and other rights" and responsibilities of parties to marriages performed outside the jurisdiction, as well as with respect to the rights of their children. Scrimshire, 161 Eng. Rep. at 790; see also Van Voorhis, 86 N.Y. at 26; Haviland v. Halstead,

34 N.Y. 643, 647 (1866); Joseph Story, Commentaries on the Conflict of Laws § 121 (Isaac F. Redfield ed., Boston, Little, Brown & Co., 6th ed. 1865).

B. Recognizing a Same-Sex Marriage Would Not Conflict With New York Public Policy, And Therefore Would Not Be Abhorrent to It.

Applying the above principles to this case is easy work, as recognition of Martinez's marriage would not be contrary to any New York policy. See Godfrey v. Spano, 15 Misc. 3d 809, 816 (Sup. Ct. Westchester County 2007) (finding "no positive law to interdict recognition" of Canadian marriage between partners of same sex). Although same-sex marriages cannot currently be performed in New York, see Hernandez, 7 N.Y.3d at 356-57, that says nothing about whether such marriages — if validly performed elsewhere — should be recognized here. The recognition rule applies regardless of whether the out-of-state marriage in question would have been valid if executed in New York. Indeed, only when the out-of-state marriage could not have been validly performed in New York is there a need to apply the rule at all.

While New York does not authorize the performance of same-sex marriages, see id. at 357, the New York Legislature has never prohibited the State from recognizing same-sex marriages performed in other jurisdictions. In this respect, New York is quite unlike other states that have modified their marriage-recognition

doctrines to exclude the recognition of same-sex marriages. See, e.g., Ga. Code Ann. § 19-3-3.1 (declaring it "to be the public policy of this state to recognize the union only of man and woman," and declaring void "[a]ny marriage entered into by persons of the same sex pursuant to a marriage license issued by another state or foreign jurisdiction"); see generally National Conference of State Legislatures, Same Sex Marriage, http://www.ncsl.org/programs/cyf/samesex.htm (last visited Aug. 15, 2007) (listing states that have enacted statutory or constitutional provisions to same effect). While similar bills have been introduced in every New York legislative session since 1998, not one has even been reported out by a committee. See, e.g., S. 2800/A. 4978, 230th Sess., Reg. Sess. (introduced Feb. 12, 2007); Erin Duggan, Legislature Weighs Joining Gay Marriage Fray, The Albany Times Union, Mar. 22, 2004, at A1 (discussing the lack of political support for such a measure).

Thus, contrary to Supreme Court's conclusion, the Legislature has deliberately declined to circumscribe the definition of marriage in a way that would preclude the recognition of Martinez's marriage. Indeed, one house of the Legislature recently passed a bill authorizing the performance of same-sex marriages in New York. See A. 8590, 230th Sess., Reg. Sess. (delivered to Senate June 19, 2007).

Supreme Court's reliance on Hennefeld v. Township of Montclair, 22 N.J. Tax 166 (N.J. Tax Ct. 2005) (A. 253), was entirely misplaced, for two reasons. First, Hennefeld relied on a New Jersey statute that it construed as barring the recognition of same-sex marriages entered into outside of New Jersey. See 22 N.J. Tax at 184. No such statute exists in New York. Second, New Jersey has a much weaker marriage-recognition rule than does New York, leading its courts to deny recognition even where New York courts already have granted recognition on similar facts. For example, a New Jersey court refused to recognize an Italian marriage that would be prohibited as incestuous in New Jersey, acknowledging that a New York had ruled differently on similar facts. Bucca v. State of New Jersey, 43 N.J. Super. 315, 322 (N.J. Super. Ct. Ch. Div. 1957). For both these reasons, Hennefeld has no application here.

Not only does recognition of same-sex marriages validly performed in other jurisdictions not conflict with any policy of New York, but such recognition now is the official policy of much of New York. It is the policy of the Attorney General. See 2004 Op. Att'y Gen. (Inf.) No. 2004-1. It is also the policy of the Comptroller. See Letter from Alan Hevesi, State Comptroller, to Mark Daigneault (Oct. 8, 2004), (available at http://www.osc.state.ny.us/press/releases/sept06/marriageopinion.pdf). And it is the policy of the Department of Civil Service.

See Press Release, Department of Civil Service, Civil Service Recognizes Same-Sex Marriages for Spousal Coverage Under New York State Health Insurance Program (Apr. 27, 2007), available at http://www.cs.state.ny.us/pio/pressrel/nyship_samesexspousalcoverage.cfm. At the local level, recognition of same-sex marriages from other jurisdictions is now the stated policy of, inter alia, (1) New York City, see Opinion of Corporation Counsel, Nov. 17, 2004, attached as Exh. A; (2) Westchester County, see Executive Order 3 of 2006, attached as Exh. B; (3) Buffalo, see Mayoral Statement of March 5, 2004, attached as Exh. C; (4) Albany, see Statement by Mayor Gerald D. Jennings of October 1, 2005, attached as Exh. D; and (5) Rochester, see Letter of April 28, 2004, attached as Exh. E.

Moreover, New York law recognizes the legitimacy of committed same-sex relationships in many ways, undermining any claim that recognizing same-sex marriages would be inconsistent with, let alone abhorrent to, this State's public policy. For example, through adoption, the unmarried same-sex partner of a child's biological parent can become the child's second parent. See In re Jacob, 86 N.Y.2d 651 (1995); see also 18 N.Y.C.R.R. § 421.16(h)(2) (providing that qualified adoption agencies shall not reject applicants "solely on the basis of homosexuality"). New York also protects unmarried same-sex partners from eviction. See Braschi v. Stahl Assocs. Co., 74 N.Y.2d 201, 211-14 (1989) (the long-term

interdependent relationship between same-sex partners rendered the plaintiff a "family member" of tenant for purposes of 9 N.Y.C.R.R. § 2204.6(d), which prohibits eviction of "any member of the tenant's family" under specified circumstances); cf. Levin v. Yeshiva Univ., 96 N.Y.2d 484, 494-95 (2001) (same-sex couples may challenge exclusion from housing set aside for married couples). Similarly, domestic partners (in either same-sex or opposite-sex relationships) are authorized to make decisions about the disposition of their partners' bodily remains. See Public Health Law § 4201.

Accordingly, the recognition of same-sex marriages validly performed in other jurisdictions is not inconsistent with New York's public policy at all. It certainly is not abhorrent to "a degree regarded generally as within the prohibition of natural law," as would be required for the abhorrence exception to apply. Estate of May, 305 N.Y. at 491.

Supreme Court detected a conflict only by erroneously conflating the law as to who may marry in New York with the law as to which marriages will be recognized in New York. Specifically, it held that recognizing Martinez's marriage would be inconsistent with what it perceived to be Hernandez's holding that New York law "defines marriage as limited to the union of one man and one woman" (A. 253). But Hernandez construed the Domestic Relations Law, not New York's marriage-recognition rule. See 7 N.Y.3d at 357. The

implicit definition of "marriage" at issue was the statutory definition — that is, the requirements for obtaining a New York marriage license. Hernandez merely held that the Domestic Relations Law authorizes marriage licenses to be issued only to opposite-sex couples, and it found no constitutional defect in that statute. Id. at 357, 361.

The marriage-recognition rule, on the other hand, is neither a creature of the Domestic Relations Law nor tied to any statutory definition of "marriage." Its very purpose is to address situations in which a union validly solemnized elsewhere does not fall within the Domestic Relations Law's definition of marriage. Supreme Court found it significant that Martinez and Golden "traveled to Ontario, Canada for the express purpose of entering into marriage, but intending to reside in New York" (A. 253). But recognizing Martinez's marriage no more constitutes "an end-run around . . . the will of the New York State Legislature" (A. 253) than did recognizing the marriages involved in Estate of May and numerous other applications of the marriage-recognition rule. New York courts have consistently recognized marriages between New York domiciliaries who travel to other jurisdictions specifically to enter into marriages that could not have been performed in New York. See, e.g., Estate of May, 305 N.Y. at 489 (couple spent two weeks in Rhode Island and then returned to New York); Fisher v.

Fisher, 250 N.Y. 313 (1929) (recognizing marriage performed on high seas to evade New York bar on remarrying).

Hernandez, then, has nothing to do with New York's marriage-recognition rule. See Godfrey, 15 Misc. 3d at 818 (finding unpersuasive reasoning of Supreme Court in this case that Hernandez somehow "changed the law with respect to comity"). Not a single judge of the Court of Appeals expressed the opinion that a same-sex union could not be a marriage. The Hernandez majority held only that the Constitution permits the Legislature to restrict marriage licenses to opposite-sex couples — even while suggesting that it would be at least as permissible for the Legislature to change that policy. See 7 N.Y.3d at 366, 379.

Contrary to Supreme Court's belief, the federal Defense of Marriage Act ("DOMA"), 28 U.S.C. § 1738C, also has no relevance to this analysis. DOMA simply provides that the federal Constitution's Full Faith and Credit Clause will not require states to recognize same-sex marriages performed in other states. DOMA does not ban New York from recognizing such a marriage under the normal operation of its own common-law jurisprudence, which recognizes marital decrees beyond what is mandated by the Full Faith and Credit Clause. See, e.g., Glaser v. Glaser, 276 N.Y. 296, 301 (1938). Indeed, DOMA is entirely silent as to the recognition of marriages performed in other countries, which is not required by the Full Faith and Credit Clause, see U.S. Const. Art.

IV, § 1. Rather, it applies only to acts of "any other State, territory, possession, or tribe." 28 U.S.C. § 1738C. Similarly inapplicable is In re Kandu, 315 B.R. 123 (Bank. W.D. Wash. 2004), which held that same-sex marriages could not be recognized for purposes of federal bankruptcy law. As Kandu specifically stated, DOMA's restrictions on marriage recognition apply only to federal law. Id. at 132.

In short, it is settled law that a marriage must ordinarily be recognized in New York if validly performed elsewhere even if it could not have been performed in New York. Accordingly, there is no conflict between Hernandez and the recognition of Martinez's marriage. Just as any change in the requirements for a New York marriage license must come from the Legislature, Hernandez, 7 N.Y.3d at 361, so any refusal to recognize a marriage validly performed in another jurisdiction must be justified by express state policy. Estate of May, 305 N.Y. at 492-93. Absent such a policy, there was no basis for defendants to fail to recognize Martinez's marriage or for Supreme Court to find that decision lawful.

POINT II

BECAUSE NEW YORK LAW RECOGNIZES MARTINEZ'S MARRIAGE, THE COLLEGE IS LIABLE FOR ITS FAILURE TO MEET ITS CONTRACTUAL OBLIGATIONS

Because New York law recognizes Martinez's Canadian marriage, Golden is her "spouse" as a matter of law, and the College violated its contractual obligation to provide health care coverage for Golden. The only reasonable interpretation of the CBA in effect at the relevant time is that it required the College to cover employees' spouses, inasmuch as it contained provisions that would be ineffective without such a requirement and the parties intended for such coverage to be provided. See Excess Ins. Co. v. Factory Mut. Ins. Co., 3 N.Y.3d 577, 582 (2004) (in interpreting contracts, "the intention of the parties should control" and "the court should construe the agreements so as to give full meaning and effect to the material provisions").

The defendants suggest that spousal benefits, rather than being a contractual entitlement, were provided to employees as a matter of "past practice" that extended only to "heterosexual married couples." See Appellees' Br. at Point III (emphasis added). To the extent that their argument is that the College was entitled to provide coverage for some spouses and not others, the CBA does not authorize such distinctions.

Furthermore, even if the CBA did not create a contractual right to spousal health insurance coverage, the College acted

unlawfully in providing health insurance benefits to opposite-sex spouses but not to same-sex spouses in valid marriages. This constituted disparate treatment of gay and lesbian employees in violation of the Sexual Orientation Non-Discrimination Act ("SONDA"), which bars discrimination "in terms, conditions or privileges of employment" on the basis of sexual orientation. See Executive Law § 296(1)(a). Supreme Court held that the College's failure to treat Martinez as it would a person in an opposite-sex marriage was justified because Martinez was not, in its view, in a marriage recognized by New York law. Because, as explained above, Supreme Court's premise was incorrect, Martinez is distinguishable from a person in an opposite-sex marriage only by her sexual orientation. Accordingly, defendants violated SONDA. Contrary to the defendants' argument, finding such a violation would not "create, add, alter or abolish any right to marry," see Act of Dec. 17, 2002, ch. 2, § 1, 2002 N.Y. Laws 46, 46, as Martinez does not claim the right to marry in New York, but rather the right to have her valid marriage treated the same as any other valid marriage. In any event, this Court need not reach that question if it gives the CBA its most reasonable interpretation.

There is no merit to defendants' claim that municipal immunity shields them from liability here, see Defendants' Br. at Point I, because this immunity doctrine applies only to tort liability, which is not at issue here. See Tango v. Tulevich, 61 N.Y.2d 34,

40 (1983). The College had no lawful discretion as to whether to honor its contractual obligations pursuant to the CBA, see Haddock v. City of N.Y., 75 N.Y.2d 478, 484 (1990). It cannot evade its contractual obligation simply by arguing that it was uncertain whether Martinez qualified for a contractual entitlement, unless it can point to a clause in the CBA limiting liability under such circumstances. Cf. Kalisch-Jarcho, Inc. v. City of N.Y., 58 N.Y.2d 377, 380 (1983) (contract with city included clause limiting claims for damages for delay in performance).

In any event, even if the College's obligation arose from tort law rather than contract law, the doctrine of municipal immunity still would not apply. The defendants have not established that the decision not to provide Golden with spousal benefits was ever viewed as an exercise of discretion, as is required to invoke municipal immunity. See Haddock, 75 N.Y.2d at 485. Indeed, defendant Ralston specifically denied exercising discretion, but rather made the contradictory claim (apparently since abandoned) that she lacked authority to provide the benefits at issue (A. 156-157). In any case, as set forth above, following the clear dictates of New York's marriage-recognition rule is not discretionary, but is a "ministerial act . . . with a compulsory result." Id. at 484.

Nor can the defendants support their claim that the applicable law was unclear at the time when the decision was made to deny

benefits to Golden. As of November 24, 2004, when that decision was made, the Attorney General and the Comptroller had issued opinions stating that same-sex marriages from other jurisdictions should be recognized. Other municipalities had followed suit. The defendants point to no contrary authority on which they could have relied at the time they made their decision, nor have they even disclosed the basis of their contrary legal conclusion.

The Attorney General's letter to Monroe County, on which the defendants heavily rely, is irrelevant to the question before this Court. First, the College did not rely on this letter. The letter is addressed not to the College but to Monroe County (A. 77). While it is dated November 24, 2004 — the day on which the College made the decision at issue — it was not received by the County until November 29, 2004 (A. 77). Unsurprisingly, there is no evidence in the record that this letter played any part in the College's decision. To the contrary, Ralston specifically denied ever having seen the letter before she made her decision, and stated that it was a coincidence that the dates were the same (A. 153-154). Second, the letter does not address the question at issue here, i.e., whether a Canadian same-sex marriage must be recognized in New York. Instead, it states that the County had requested an opinion as to whether "the County is legally required to provide health and other benefits to domestic partners of county

employees and, if so, what criteria should be used in determining whether an employee is in a domestic partnership" (A. 77).

Accordingly, the defendants must compensate Martinez for the College's failure to meet its contractual obligation to provide health care coverage for her spouse.

CONCLUSION

Supreme Court's judgment should be reversed.

Dated: New York, New York
August 16, 2007

Respectfully submitted,

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