Domestic Partner Benefits Limited to Same-Sex Couples: Sex Discrimination Under Title VII

Paul R. Lynd
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PAUL R. LYND

I. INTRODUCTION

During the 1990s, the number of employers offering domestic partnership benefits to unmarried employees exploded. The number continues to grow. As employers compete for employees by offering greater benefits and as more parts of society acknowledge committed relationships that fall outside of the traditional male-female marriage model, the number of employers with domestic partnership benefits policies should continue to grow.

In the employment context, benefits traditionally have flowed to couples through marriage. When an employer has provided benefits to an employee, the employee's spouse typically also has become eligible to receive the same benefits. The definition of "spouse" has tracked the definition provided by state marriage...
laws. In other words, a lawful marriage between a man and a woman has been the qualifying criterion. The lack of a marriage—whether the reason be choice or a couple's legal inability to marry—has rendered an employee ineligible to obtain benefits covering her partner. Employees in opposite-sex couples could attain eligibility for couples' benefits by marrying. But employees in same-sex couples have faced an impossibility: no state has or presently recognizes marriage between two individuals of the same sex, so there is no legal way for a same-sex couple to attain eligibility for marriage-based couples' benefits. Marriage-based eligibility for couples' benefits results in a disparity in compensation, as employees in a particular job classification, performing the same work, and doing so at the same wage or salary can be paid different amounts in total compensation—all depending on whether an employee receives benefits for a spouse.

3. See Catherine L. Fisk, ERISA Preemption of State and Local Laws on Domestic Partnership and Sexual Orientation Discrimination in Employment, 8 UCLA WOMEN'S L.J. 267, 281 (1998) ("Many employee benefit plans that provide benefits for the spouse of an employee do not define the term spouse. Or, if the term is defined, the plan relies on state law for a determination of who is legally married."); see also Hinman v. Department of Personnel Admin., 167 Cal. App. 3d 516, 524 (Cal. Ct. App. 1985) (stating that "a homosexual's same-sex partner can never be a 'spouse'" because the California state statute defines marriage as a relationship between a man and a woman).

4. This bottom line disparity in total compensation occurs not only between employees with opposite-sex spouses and employees with same-sex partners and who cannot legally marry their partners. It also results generally between married employees and unmarried employees. All unmarried employees, regardless of whether they are in a relationship, receive less aggregate compensation for their work than do married employees who receive employer-provided benefits for spouses. See University of Alaska v. Tumeo, 933 P.2d 1147, 1149 (Alaska 1997).

"[B]y providing added health care coverage for married employees but not for unmarried employees, [the university] is compensating married employees to a greater extent than it compensates unmarried employees" and that "using marital status as a classification for determining which of its employees will receive additional compensation in the form of third-party health coverage . . . violates state laws prohibiting marital status discrimination." Id. (quoting the superior court opinion); Phillips v. Wisconsin Personnel Comm'n, 482 N.W.2d 121, 125 (Wis. Ct. App. 1992) ("[T]o the degree it allows married employees to include their spouses and dependent children in their health insurance coverage, the state may be said to offer greater health insurance benefits to its married employees than to its single employees."). Because benefits can be a significant component of an employee's compensation, the disparity in aggregate compensation can be considerable. The United States Department of Labor, Bureau of Labor Statistics reported that benefits accounted for an average of 27.5% of employers' compensation costs for civilian (private industry and state and local government) employees as of March 1999. See BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, USDL 99-173, EMPLOYER COSTS FOR EMPLOYEE COMPENSATION—MARCH 1999 tbl.1 (1999). For example, health insurance costs account for an average of 5.8% of a civilian employer's total employee compensation costs. See id. An employee and her spouse or partner thus enjoy noticeable savings, as a percentage of income, by having an employer cover insurance or other costs for the employee's spouse or partner. Even if an employer
The denial of spousal benefits to employees in same-sex relationships has been litigated, but mostly unsuccessfully, under various provisions prohibiting employment discrimination. In setting eligibility criteria for employee benefits, employers are not bound by definitions of marriage or of the terms "spouse" or "dependent" as used in state law. Given that freedom and driven by a variety of reasons including competition for employees and heightened interest in addressing discrimination against gay and lesbian and unmarried employees, a growing number of employers have voluntarily instituted domestic partnership benefits policies.

With these policies, employers have expanded the definition of "dependent" to include an employee's unmarried domestic partner for purposes of benefits eligibility. Most employers require an employee to submit an affidavit or declaration certifying the

sponsors a group benefits program but does not contribute to paying any of the costs for an employee or her dependents, an employee still likely receives a benefit from the existence of the program because group coverage typically results in lower rates.


Under most benefits policies, the term "dependent" traditionally has encompassed an employee's "spouse" under a lawful marriage and dependent children. See, e.g., Hinman, 167 Cal. App. 3d at 522 n.4 (including spouse and children in definition of term "dependent"); Rutgers, 689 A.2d at 830-31 (same); Phillips, 482 N.W.2d at 124 (same).

In some cases, however, municipal government employers may be bound by definitions in state law. Compare, e.g., Crawford v. City of Chicago, 710 N.E.2d 91, 96-100 (Ill. App. Ct. 1999) (holding that municipal government's extension of benefits to the unmarried same-sex domestic partners of employees did not contravene state law or public policy regarding marriage), with Lilly v. City of Minneapolis, 527 N.W.2d 107, 108 (Minn. Ct. App. 1995) (holding that state statute's definition of "dependents" precluded the municipal government from expanding benefits eligibility to unmarried domestic partners).

"Domestic partnership is first and foremost a workplace concept. It establishes a civil rights remedy to the pervasive practice of disproportionately providing married employees with health insurance, paid bereavement, family sick leave and other 'family' based benefits that are denied to unmarried employees and their families." Paula L. Ettelbrick, Wedlock Alert: A Comment on Lesbian and Gay Family Recognition, 5 J.L. & POLY 107, 142-43 (1996). "The term was developed and is primarily used to designate the non-spousal relationships that are appropriate for receiving employer-provided health benefits. As such ... it has little practical application outside of the workplace, but is a term of art developed within the employment benefit context." Id. at 111 n.7.
existence of a qualifying domestic partnership, and some employers require additional proof of the relationship. But once an employee qualifies her relationship and enrolls her domestic partner in her employer's benefits program, the domestic partner becomes eligible for the same, or many of the same, benefits that she would be eligible to receive as the employee's lawful spouse.

As a result of domestic partnership benefits policies allowing unmarried employees to receive couples' benefits, these policies remove a lawful marriage vel non as the criterion for determining eligibility for couples' benefits. With marital status removed, on what basis do domestic partnership benefits policies determine eligibility for benefits? As a matter of employment discrimination law, the answer can be significant because the basis may be an impermissible criterion under applicable employment discrimination statutes.

Many policies open benefits to all employees with unmarried domestic partners, and impose only general requirements designed to establish that two individuals have a mutual and exclusive commitment to each other. Some policies, however, limit eligibility for domestic partnership benefits to employees in same-sex or,
in at least one case, "gay or lesbian" domestic partnerships. Employees in unmarried opposite-sex (or, as mentioned, under at least one policy, "heterosexual") domestic partnerships are ineligible. Employers with such limited policies justify them on the ground that those policies "level the playing field" by remedying the legal inability of employees in same-sex couples to marry their partners and thereby obtain spousal benefits. Under that rationale, every employee who is part of a couple conceivably is eligible to obtain couples' benefits: employees in opposite-sex couples may marry their partners and obtain spousal benefits, while employees in same-sex couples may declare domestic partnership and receive domestic partnership benefits. This reasoning has an undeniable equitable appeal. Nonetheless, in a somewhat paradoxical twist, limited policies—which are designed to remedy the discrimination that results when an employer dispenses couples' benefits in accordance with state definitions of marriage—themselves give rise to a new question of discrimination. By basing eligibility for domestic partnership benefits on an unmarried couple's gender composition or on sexual orientation, limited policies may violate employment discrimination laws.

This Article examines, under employment discrimination statutes, the legality of limited domestic partner benefits policies. Part II considers the reasons motivating employers to provide domestic partnership benefits and, if they do so, perhaps to limit them to only certain domestic partnerships. Part III discusses the legality of limited policies under state and local employment discrimination laws. It first notes the very limited, if any, applicability of state and local laws to domestic partnership benefits because the federal Employee Retirement Income Security Act of 1974 (ERISA) largely preempts state and local regulation of employee benefits. Next, assuming no ERISA preemption in a particular circumstance, that part considers whether limited policies may constitute marital status or sexual orientation discrimination under state or local laws. It reviews Ayyoub v. City of Oakland, an administrative decision which held that a limited policy constituted sexual orientation discrimination in violation of

12. See infra Part III.C.
13. This Article uses the term "limited" to refer generally to domestic partnership benefits policies that are limited to some domestic partnerships based on the gender composition of the couple or on sexual orientation.
15. Federal law does not prohibit employment discrimination on either basis.
California law. The decision is the only ruling to hold a limited policy illegal.

Due to the fact that ERISA largely preempts state and local regulation of employee benefits, Part IV turns to federal law and examines limited policies under Title VII of the Civil Rights Act of 1964. This part reviews two recent federal district court cases rejecting sex discrimination claims brought against employers with policies limited to employees in same-sex domestic partnerships. In those cases, the plaintiffs essentially contended that their employers discriminated based on the sex of the employee and the sex of the employee's domestic partner—i.e., if the sex of the employee or her domestic partner had been different so that the two domestic partners were of the same sex, the employer would have granted domestic partnership benefits. The argument amounts to a claim of discrimination based on the sex of a person with whom an individual associates. Although the courts in the two cases dismissed such a claim, Title VII authority not considered by those courts supports the claim and undermines the analysis in those cases and their conclusions that same-sex-only policies comply with Title VII. A clear, but little-noticed, line of Title VII cases holds that disparate treatment based on the race of a person with whom an individual associates constitutes discrimination because of the individual's race. Other Title VII authority supports recognition of an analogous rule under Title VII's prohibition of sex discrimination. Applying such a rule and applicable Title VII sex discrimination case law, this Article concludes that domestic partnership benefits policies limited to employees in same-sex domestic partnerships discriminate on the basis of sex in violation of Title VII.

II. COMPETITION, COSTS, AND DIFFERING CONCEPTIONS OF DOMESTIC PARTNERSHIP: WHY EMPLOYERS MAY OFFER DOMESTIC PARTNER BENEFITS, YET MAY LIMIT THEM TO EMPLOYEES IN SAME-SEX COUPLES

Domestic partner benefits give recognition and economic support to committed relationships that fall outside of the traditional male-female marriage model. The proliferation of these benefits represents a significant change in social policy and attitudes.17 Given the progressive nature of domestic partner

benefits, a particularly striking aspect of their development and growth is the degree to which they have been an instrument of the marketplace and private sector. Whereas some state and local governments have established domestic partnership registries for couples to register their relationships and offered benefits to their own employees, government generally has not imposed any mandate on private employers to provide domestic partner benefits. Accounting for the majority of the employers with domestic partner benefits policies, private employers mostly have acted on their own accord in instituting them. Domestic partner benefits thus largely have been a private sector innovation.

Competitive and economic considerations influence private employers' decisions about whether to initiate such benefits and how far to extend them. Considerations about costs and the belief that such benefits serve only to fill the gap created by marriage-based eligibility for couples' benefits, as well as competing conceptions of domestic partnership, may prompt employers to limit domestic partner benefits to employees in same-sex relationships.

18. See id. at 340-41.
19. The reluctance of government to impose a mandate on private employers to provide domestic partner benefits most likely is attributable to the federal Employee Retirement Income Security Act (ERISA), which largely preempts state and local regulation of employee benefits. See infra Part III.A. Two jurisdictions have imposed some form of mandate upon private employers to provide domestic partner benefits. Hawaii required that employers provide specified benefits to an employee's "reciprocal beneficiary" if the employer provides those benefits to the spouses of married employees. The City and County of San Francisco enacted an ordinance requiring that contractors doing business with the local government not discriminate between the employees' spouses and domestic partners in providing benefits. Federal district courts held that ERISA preempted both laws in substantial part, insofar as the statutes applied to benefit plans covered by ERISA. See Fink, supra note 3, at 270-71.
20. See Knauer, supra note 17, at 337-38. "The debate over domestic partnership benefits is taking place in the strange surroundings of the corporate board room, the union hall, and the personnel manager's office." Id. at 338 (citations omitted). "On a firm by firm basis, the marketplace has responded to the demand for innovation in the case of same-sex relationships. . . . The marketplace is now setting the terms of the debate." Id. at 352.
21. See id. at 357 ("The growing consensus among employers is that domestic partnership benefits are a 'low cost way to draw top talent.'" (citations omitted)).
22. Public employers, although not in business to earn a profit, also face the same pressures and considerations. They compete with each other and with private employers for employees and also face pressure to control their benefits costs. Additionally, political considerations can cause them to limit the scope of domestic partnership policies. See infra note 41 (describing the legislative history of California's domestic partner policy). Some public employers have limited their domestic partner benefits plans to employees in same-sex domestic partnerships. See, e.g., Cleaves v. City of Chicago, 68 F. Supp. 2d 963, 966 (N.D. Ill. 1999); American Ass'n for Single People, Governments Extending Health Benefits to Domestic Partners (visited Feb. 26, 2000) <http://www.singlesrights.com/dp-hlth.html> (identifying 13 such public employers, including the cities of Chicago, Denver, New Orleans, Baltimore, Philadelphia, and Tucson).
One of the key motivations behind the adoption of domestic partner benefits has been competition for employees in the labor marketplace. Employers recognize that more comprehensive compensation packages, including domestic partner benefits, are essential to attracting or retaining current employees. Domestic partner benefits are increasingly a key hiring or retention incentive. The role of labor market competition in spurring employers to offer domestic partner benefits is especially evident in the industry groups in which these benefits are most common. High technology companies, entertainment and media industry employers, financial and insurance firms, academia, and law firms have proven the most likely to offer domestic partner benefits.

Competition for employees in some of these segments of the labor market, which either have experienced large growth in the number of jobs or compete for highly skilled and educated employees, has been intense in some circumstances. The existence or absence of domestic partner benefits can be, respectively, an incentive or a deterrent to an individual accepting or continuing employment with an employer.

An employer that considers whether to initiate domestic partner benefits must factor the cost of such benefits. As it is, employee benefits are a substantial portion of an employer's total compensation costs. Concerns about large increases in the cost of benefits may cause employers to limit their domestic partner benefits costs by limiting eligibility to employees in same-sex relationships because, most likely, an employer has fewer employ-

23. See, e.g., Pamela Burdman, UC Partner Policy May Hit Snag, S.F. Law Requires System to Include Straight Couples, SAN FRANCISCO CHRON., June 6, 1997, at A21, available in 1997 WL 6698940 (reporting that the issue of domestic partner benefits arises at the University of California at Berkeley in "at least 10 percent of recruitment decisions").

24. A 1999 survey of 279 human resources professionals in 19 industries completed by the Society for Human Resources Management and the Commerce Clearing House found that domestic partners benefits are the top-ranked hiring incentive for executives and the third-ranked incentive for managers and line workers. See id.; see also Domestic Partner Benefits for Employees' Same-Sex Partners, in HOLLYWOOD SUPPORTS—SAME-SEX PARTNER HEALTH COVERAGE, SUMMER 1997, at 1, 1 (on file with author) ("[In the entertainment industry, domestic partners benefit are] increasingly a competitive issue.... To recruit and retain valuable employees, the policy of most large employers in the entertainment industry is to provide benefits competitive with others offered in the industry."); Planet Out, Citigroup Plans Partner Benefits, Feb. 9, 2000 (visited Feb 10, 2000) <http://www.planetout.com/pno> (reporting that Citigroup Inc. announced it would offer domestic partner benefits in furtherance of its "competitive goal of becoming the employer of choice in the financial services industry"); Planet Out, Partner News in Brief: DP Effective Hiring Incentive, Aug. 20, 1999 (visited Mar. 17, 2000) <http://www.planetout.com/pno>.

25. In the high technology industry, an estimated 20% of employers offer domestic partner benefits. See KORN, supra note 1, app. at 49.

ees in same-sex domestic partnerships than employees in opposite-sex relationships. Costs under a policy open equally to employees in a same-sex or opposite-sex domestic partnership would be higher than under a plan limited to same-sex couples. As long as the relationship meets the employer's eligibility criteria, every employee conceivably would be eligible to add a domestic partner without the requisite of marriage. Nonetheless, employers with benefits available to employees in same-sex and opposite-sex couples incur low domestic partner benefits expenses as a percentage of total benefits costs. In any event, once sex discrimination has been shown, under Title VIII, cost is not an available defense.

By taking the lead in establishing and advancing domestic partner benefits, employers—especially private-sector employers—have assumed a role in shaping and influencing social policy. Employers have led the way in providing economic support to unmarried relationships to which the law still grants little official

27. For instance, when the San Francisco Board of Supervisors considered legislation to require contractors doing business with the City and County of San Francisco to provide employees in domestic partnerships with the same couples' benefits that they provide to married employees, employers lobbied the board to limit the requirement to employees in same-sex couples. The employers feared that including opposite-sex couples would significantly increase the cost of complying with the ordinance. See Editorial, Room to Compromise on Domestic Partners, SAN FRANCISCO CHRON., Apr. 11, 1997, at A24, available in 1997 WL 6695316; Yumi Wilson, Partners Law Won't Exclude Straights, SAN FRANCISCO CHRON., Apr. 9, 1997, at A13, available in 1997 WL 6695418. As enacted, San Francisco's ordinance applies to same-sex and opposite-sex couples. See id.

28. A report by Hewitt Associates, a benefits consulting firm, found that employees in opposite-sex relationships account for approximately two-thirds of the participants in domestic partner benefits programs when employers open domestic partner benefits to all employees. See Jonathan Marshall, Domestic Partners Benefits Unused, SAN FRANCISCO CHRON., May 31, 1995, at B1, available in 1995 WL 5283839. Overall, domestic partner benefits have a low usage rate. When employers offer the benefits to all employees, the participation rate has averaged about 3% of an employer's workforce. See id. When an employer provides benefits only to employees in same-sex domestic partnerships, the usage rate has been about 1% of an employer's workforce. See id.

29. The City of Berkeley, California, which enacted its domestic partner benefits policy in December 1984 reported that 120, or 8.9%, of its employees participated in the plan, and that only 16% of the participating employees were in same-sex relationships. See Kohn, supra note 1, app. at 42. Berkeley's total participation rate is high among domestic partner benefits programs, although domestic partner benefits accounted for only 2.8% of Berkeley's total benefits costs. See id. In the City of Los Angeles, 925, or 2.31%, of approximately 40,000 city employees enrolled domestic partners. See id. Sixteen percent of the enrollees were same-sex domestic partners, and domestic partner benefits represented 1.2% of total benefits costs. See id. The State of New York Health Insurance Program had 1,842, or 0.94%, of approximately 195,000 covered employees enroll a domestic partner. See id. app. at 48. Twenty-two percent of the participants were involved in same-sex domestic partnerships. See id. Domestic partner benefits totaled 0.24% of benefits costs. See id.

recognition or support.\textsuperscript{31} As a result, in addition to competitive considerations and costs, employers designing domestic partner benefits policies must consider a number of issues concerning domestic partnership. If domestic partnership is an alternative to marriage, then what is the role of domestic partnership? A domestic partnership may be seen as (1) a permanent relationship that is an alternative to marriage and open to any couple, with some or all of the benefits that are consequent to a lawful marriage; (2) a temporary alternative to marriage for same-sex couples that fills a gap in marriage laws, but which would be superseded by lawful marriage if a state ever allows same-sex couples to marry legally; or (3) a permanent parallel institution existing only for same-sex couples that is essentially a de facto marriage with many or all of the benefits consequent to a lawful marriage, but without a marriage license or the designation “marriage” conferred by law. Among these possibilities, the notion of domestic partnership held by an employer (or any policymaker) can determine whether benefits are open to all unmarried employees or only to employees in same-sex relationships.

Within the above notions of domestic partnership, two conceptions exist: the alternative family structure concept and the parallel institution concept. The alternative family structure conception of domestic partnership regards it as a family structure that is an alternative between lawful marriage and singlehood. This conception regards domestic partnership as a “third social category of family: people who are neither married nor single.”\textsuperscript{32} It recognizes an expanded definition of family that includes individuals who form a unit serving the functions of a family, although the unit is not based on a lawful marriage.\textsuperscript{33} For various social, legal, financial, or religious reasons, a formal marriage may not be an option for two persons who form a couple—despite the fact that they, for all functional purposes, constitute a family unit. The alternative family structure conception of domestic partnership confers family benefits to those family units even in the absence of a marriage through which to channel family benefits.\textsuperscript{34} As a result

\textsuperscript{31.} See, e.g., Kohn, supra note 1, app. at 49 (explaining reasons why corporations are better able than employers in the public sector to enact domestic partner benefits).

\textsuperscript{32.} Ettelbrick, supra note 8, at 144.

\textsuperscript{33.} See id.

\textsuperscript{34.} The problem is not so much that lesbian and gay couples cannot marry. Rather, it is that all of the legal and social benefits and privileges constructed for families are available only to those families joined by marriage or biology. ... Singular pursuit of same-sex marriage serves to reinforce the primacy of marriage in family definitions, rather than furthering the...
of the alternative family structure conception looking only to the
functional purpose of a family unit rather than its composition,
employers following that concept would make domestic partner
benefits available to all employees in domestic partnerships
regardless of the sexes or sexual orientations of the partners.

The parallel institution conception of domestic partnership, on
the other hand, would limit benefits to only same-sex (or gay and
lesbian, depending on the definition in an employer's policy) couples. Since the time of the first domestic partnership ordinances,
Domestic partnership has been viewed as a "parallel institution" to
marriage. Under this view, domestic partnership serves for the
most part to accord some recognition and a modicum of benefits to
same-sex couples as consolation for their legal inability to marry.
Limited domestic partner benefits policies reflect the parallel
institution conception. In initiating a limited policy, the Lotus
Development Corporation encapsulated the rationale behind the
parallel institution conception. In 1991, the firm became the
largest employer at that time to offer domestic partner
benefits,
but it limited such benefits to employees in same-sex couples.
Lotus justified its limited policy as "trying to level the playing field"
because same-sex couples cannot marry and obtain spousal
benefits. In accordance with the parallel institution view, limited
policies thus seek to equalize benefits by providing couples who

the door to family benefits for those who function as family as well as for those
who have formalized their relationships.

Id. at 122.
35. The City of Oakland, California, limited eligibility for its domestic partner health
benefits program to "gay" and "lesbian" couples, explicitly basing eligibility on sexual
orientation rather than sex. See infra text accompanying note 97.
36. See Editorial, Domestic Partners, SAN FRANCISCO CHRON., Nov. 2, 1989, at A32,
available in 1989 WL 7161363.
37. See Davis Stripp, Lotus Extends Company Benefits to Cover Domestic Partners of
38. See id.
U.S. law same-sex domestic partners cannot marry, while opposite sex partners can. In view
of this, coverage for Domestic Partners is offered only to same sex domestic partners, not to
heterosexual partnerships." (quoting a letter denying request of employee for domestic
partners benefits for his female domestic partner)); David W. Dunlap, Gay Partners of I.B.M.
Workers to Get Benefits, N.Y. TIMES, Sept. 20, 1996, at A18 (reporting that IBM's policy does
not cover opposite-sex couples because "heterosexual couples have the option of getting
married"); MGM to Offer Benefits to Homosexual Partners, WALL ST. J., Jan. 3, 1996,
available in 1996 WL-WSJ 3003329 (explaining that domestic partnership benefits would be
limited to same-sex couples because "heterosexuals have the option to marry, when
homosexuals cannot" (quoting a spokesperson for Metro Goldwyn Mayer, Inc.).
cannot marry—but who presumably would do so40—a way to obtain the couples' benefits that they would receive if they could marry and did so. This reasoning, of course, presupposes without any basis that employers are bound in the first place to follow state definitions of marriage in determining eligibility for couples' benefits.

Under the parallel institution conception, domestic partnership represents a substitute for marriage and an institution limited to certain couples based on their gender composition and its resulting legal inability to marry. A couple is either (1) of the opposite sex and able to legally marry to obtain spousal benefits, and therefore ineligible for domestic partner benefits, or (2) of the same sex and unable to legally marry to obtain spousal benefits, so therefore eligible for domestic partner benefits. A couple would be eligible for only one type of benefits, so marriage and domestic partnership are parallel institutions that never merge. In that respect, the parallel institution conception and limited policies are efficient because they reach only as far as necessary to fill a gap in current law.41

40. Oracle limits its domestic partner benefits to same-sex couples. In its affidavit of domestic partnership, Oracle requires an employee and her domestic partner to declare:
Neither of us is legally married. We would legally marry each other if we could, and we intend to do so if marriage becomes available in our state of residence.
We are not related by blood to a degree of closeness that would prohibit legal marriage in our state of residence.
Oracle Statement of Domestic Partnership, in Kohn, supra note 1, app. at 56. Similarly, Northwestern University requires an employee and her domestic partner to certify that they "would marry or establish a legally recognized Domestic Partnership if it were available to us under the laws of the state in which we live." Northwestern University Declaration of Same-Sex Domestic Partnership, in Kohn, supra note 1, app. at 115.

41. California's domestic partnership scheme demonstrates this point. It limits domestic partner registrations to couples in which either (1) "both persons are members of the same sex" or (2) both persons are of opposite sexes and over the age of 62 and satisfy the eligibility criteria for old-age benefits under the Social Security Act. CAL. FAM. CODE § 297(b)(6)(A)-(B) (West Supp. 2000). Both provisions fill gaps in other laws that prevent or deter couples from marrying: same-sex couples cannot legally marry, and elderly couples may avoid marrying because a marriage would result in a decrease in Social Security benefits. Employees or retirees of state or local agencies covered by the California Public Employees Retirement System must fall within either of the above two classes in order to qualify to receive health benefits for domestic partners. See CAL. GOV'T CODE § 22868 (West Supp. 2000). As introduced, the legislation that established California's domestic partnership arrangement defined domestic partnership without reference to sex. See A.B. 26, § 1, 1999-2000 Leg., 1st Reg. Sess. (Cal. 1999) (as introduced Dec. 7, 1998). The legislation advanced through the California legislature, but, at the insistence of Governor Gray Davis, the author inserted amendments limiting domestic partnership to same-sex couples. Davis believed that opposite-sex couples can choose to marry instead. See Robert Salladay, Governor Forces Weaker Bill on Domestic Partners, San Francisco Examiner, July 8, 1999, at A6, available in LEXIS, News Library, San Francisco Examiner File. When it approved legislation creating domestic partnership eligibility for same-sex and elderly opposite-sex couples, the California Legislature simultaneously approved a second bill creating a domestic partnership
Because the parallel institution conception treats domestic partner benefits for same-sex couples as a substitute for unattainable spousal benefits, it would eliminate those benefits if same-sex couples become able to marry legally. Each employee then would be equally able to marry her chosen partner, regardless of her sex and the sex of her partner. At that point, as a device designed to fill a gap in marriage laws that prohibit same-sex partners from marrying and obtaining spousal benefits, domestic partner benefits would cease to have a gap to fill.

scheme open to same-sex and opposite-sex couples regardless of the sexes of their members. See S.B. 75, 1999-2000 Leg., 1st Reg. Sess. (Cal. 1999). The Governor vetoed that bill as "overly broad." See Letter from Gray Davis, Governor of California, to the Members of the Senate (Oct. 2, 1999) ("I am returning Senate Bill 75 without my signature because it is overly broad.") (on file with author).

42. We need only look to the present in order to predict the future. . . . Once marriage is available, gay and lesbian couples will most certainly be required to marry in order to receive benefits. Gay couples, like straight couples now, will be forced to marry in order to get the benefits.

Ettelbrick, supra note 8, at 129-30. Oracle's domestic partner benefits policy explicitly contemplates and provides for such a development. The Oracle Statement of Domestic Partnership includes the following acknowledgment by an employee and her domestic partner: "We understand that Oracle domestic partner benefits are available to us only when legal marriage is not available to us in our state of residence." See Oracle Statement of Domestic Partnership, in KOHN, supra note 1, app. at 57.

43. State constitutional challenges to laws barring same-sex marriage, while successful in varying respects, ultimately have not yielded the right of same-sex couples to marry. A Hawaii circuit court held Hawaii's statute limiting the issuance of marriage licenses to opposite-sex couples unconstitutional as sex discrimination under the Equal Protection clause of the Hawaii Constitution. See Baehr v. Miike, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 3, 1996). Before that decision was final, Hawaii voters ratified an amendment to the Hawaii Constitution allowing the Hawaii legislature to reserve marriage to opposite-sex couples. See HAW. CONST. art. I, § 23. As a result, the Hawaii Supreme Court reversed the circuit court judgment and dismissed the case as moot. See Baehr v. Miike, No. 20371, 1999 Haw. LEXIS 391, at *8 (Haw. Dec. 9, 1999). An Alaska superior court ordered Alaska to establish a compelling state interest at trial to support the denial of marriage licenses to same-sex couples under the Alaska Constitution’s guarantee of the right to privacy. See Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1996 WL 58743 (Alaska Super. Ct. Feb. 27, 1998). Later in that same year, Alaska voters approved a state constitutional amendment to overturn that decision. See ALASKA CONST. art 1, § 25 ("To be valid or recognized in this State, a marriage may exist only between one man and one woman."). More recently, the Vermont Supreme Court held that the Common Benefits Clause of the Vermont Constitution requires that the state "extend to same-sex couples the common benefits that flow from marriage under Vermont law." Baker v. State, 744 A.2d 864, 867 (Vt. 1999). The court, while holding that an equality of outcomes is required, declined to order that same-sex couples be given the legal right to marry. See id. Instead, it deferred to the Vermont legislature for determination of a remedy: "Whether this ultimately takes the form of inclusion within marriage laws themselves or a parallel 'domestic partnership' system of some equivalent statutory alternative, rests with the legislature." Id. In response, the Vermont legislature has declined to extend marriage to same-sex couples, but has moved to establish a system of "civil unions" for same-sex couples. See Carey Goldberg, Vermont Houses Backs Wide Rights For Gay Couples, N.Y. TIMES, Mar. 17, 2000, at A1. A "civil union" would involve virtually all of the rights, privileges, and responsibilities associated
III. CHALLENGING DOMESTIC PARTNERSHIP BENEFITS POLICIES UNDER STATE AND LOCAL EMPLOYMENT DISCRIMINATION STATUTES

Limited domestic partnership benefits policies may violate federal, state, or local employment discrimination statutes. Several variables emerge in analyzing benefits under those provisions. Laws vary by jurisdiction, with certain types of discrimination illegal in some states and localities but not in other jurisdictions. Also, the type of discrimination at issue can vary depending on the terms of a particular policy.44 Most significantly with respect to state and local discrimination laws, the federal Employee Retirement Income Security Act (ERISA) may preempt the application of those laws to a benefits plan.

This part first traces the steps in determining whether ERISA preempts. It demonstrates how ERISA largely preempts the application of state and local laws to benefits plans. Next, this part considers whether state and local statutes prohibiting marital status or sexual orientation discrimination—assuming that ERISA does not preempt them—may preclude limited benefits policies. It concludes that those statutes have little or no applicability because they are narrow in scope and do not address the type of discrimination (sex) presented by the terms of most limited policies. With respect to sexual orientation, this part examines the decision in Ayyoub v. City of Oakland,45 which held that a domestic partnership benefits policy available only to “gay and lesbian” employees constituted illegal sexual orientation discrimination.

A. The Employee Retirement Income Security Act (ERISA) Preempts State and Local Discrimination Laws in Most Cases

In many jurisdictions, state and local employment discrimination laws prohibit more types of discrimination than does federal law. Some jurisdictions, for instance, prohibit discrimination based on marital status or sexual orientation, whereas such discrimina-

44. Compare infra Part III.C.2 (discussing the terms of the domestic partnership policy at issue in Ayyoub v. City of Oakland) with infra text accompanying notes 125, 132, 158 (discussing the more common terms of domestic partner policies).
tion in employment remains legal under federal law. State and local laws prohibiting marital status or sexual orientation discrimination may be viewed by some parties as bases on which to challenge limited domestic partnership benefits policies. Even if those types of discrimination occur in a policy, ERISA most likely preempts the application of state and local discrimination laws to most benefits plans. It therefore forces parties to rely on federal law in raising discrimination claims. As a result of its broad preemptive effect, ERISA preemption should be the starting point in any analysis of domestic partnership benefits.

With only a few exceptions, ERISA preempts “any and all State laws insofar as they may now or hereafter relate to any employee benefit plan.” This provision preempts application of state and local laws to a benefit provided as part of employment if that benefit is part of a benefit plan covered by ERISA. The first determination in the preemption analysis should be whether ERISA covers a particular type of benefit provided by what the statute defines as a covered “employee benefit plan.” It defines “employee benefit plan” as “an employee welfare benefit plan or an employee pension benefit plan.” The definitions of these terms list the types of benefits covered by ERISA. An “employee pension benefit plan” provides retirement or deferred income. An “employee welfare benefit plan” provides “through the purchase of insurance or otherwise . . . medical, surgical, or hospital care or benefits, or . . .

46. For instance, in Foray v. Bell Atlantic, the plaintiff initially filed suit in a New York supreme court contending that his employer’s domestic partnership benefits policy discriminated against him based on marital status and sexual orientation as prohibited by state and local laws. See Foray v. Bell Atl., 56 F. Supp. 2d 327, 329 (S.D.N.Y. 1999). Bell Atlantic removed the case to federal court on the ground that ERISA covered the plan and preempted the state and local laws, so that the case involved federal subject matter jurisdiction. See id. Foray voluntarily dismissed the case pursuant to Federal Rule of Civil Procedure 41(a)(1)(i). He later filed a new complaint in federal court alleging sex discrimination under Title VII. See id.

47. 29 U.S.C. § 1144(a)(1994). ERISA further defines state laws as “laws, decisions, rule, regulations, or other State action having the effect of law.” Id. § 1144(c)(1). It also provides that “[t]he term ‘State’ includes any State of the United States, the District of Columbia, Puerto Rico, the Virgin Islands, American Samoa, Guam, Wake Island, and the Canal Zone.” Id. § 1002(10). Although the statute refers only to “State laws,” and the definition of “State” only includes states and United States territories, courts have interpreted the preemption provision to include local ordinances. See Air Transp. Ass’n of Am. v. City and County of San Francisco, 992 F. Supp. 1149, 1177-80 (N.D. Cal. 1998); see also Bond v. Trustees of STA-ILA Pension Fund, 902 F. Supp. 650, 655 (D. Md. 1995) (holding a local ordinance prohibiting marital status discrimination preempted with respect to ERISA-covered plan as “well within the type of provision which ERISA’s framers intended to pre-empt”).

48. 29 U.S.C. § 1144(a) (emphasis added).

49. Id. § 1002(3).

50. Id. § 1002(2).
benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services.  

Health-related benefits, such as medical, dental, and vision care coverage, are the types of benefits most commonly included in domestic partnership benefits policies. The above list clearly encompasses those benefits, as well as the main—and most valuable—types of benefits offered by employers that provide any benefits. Overall, the types of benefits covered by ERISA are numerous. Despite ERISA's breadth, it does not cover all types of benefits. A type of benefit not listed within the statute's definitions of employee benefit plans is not covered by ERISA, and state and local law can apply to that benefit.

ERISA preemption does not arise merely because a benefit falls within the statute's broad list of types of covered benefits. Preemption results only if an ERISA-covered benefit also is part of a benefit plan and that plan, in turn, is covered by ERISA. The next analytical step thus concerns whether the benefit is part of a benefit "plan." The term "plan" has been construed by the Supreme Court.  

Holding that Congress intended ERISA's preemption provision "to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations . . . . [and that] [o]nly a plan embodies a set of administrative practices vulnerable to the burden that would be imposed by a patchwork scheme of regulation," the Supreme Court concluded that Congress's concern implicated only "benefits whose provision by nature requires an ongoing administrative program to meet the employer's obligation." The definition of "plan" therefore reduces to whether an employer operates an "ongoing administrative program" to provide a covered type of benefit. The number of

51. Id. § 1002(1). The definition also includes any benefit described in 29 U.S.C. § 186(c) (1994). See id. That section describes essentially the same benefits as does 29 U.S.C. § 1002(1).

52. See Air Transp. Ass'n of Am., 992 F. Supp. at 1173-74. For example, "membership or membership discounts, moving expenses and travel benefits are not among those benefits listed in [ERISA's] definitions of employee benefit plans." Id. at 1173 (citations omitted).

53. See Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 7 (1987) ("ERISA's pre-emption provision does not refer to state laws relating to 'employee benefits,' but to state laws relating to 'employee benefit plans,' . . . .")

54. See id. at 8 ("[T]he terms 'employee benefit plan' and 'plan' are defined only tautologically in the statute . . . .")

55. Id. at 11-12.

56. Id. at 12 (emphasis added).

57. "An employer that makes a commitment systematically to pay certain benefits undertakes a host of obligations, such as determining the eligibility of claimants, calculating
benefits that do not require an "ongoing administrative program"—i.e., a plan—most likely is small.\footnote{58}

Due to the fact that benefits covered by ERISA most likely are part of a “plan” as that term has been construed, the final question is whether a plan is covered by ERISA. Most types of plans are covered, as the statute exempts only a few types.\footnote{59} Of those exemptions, the exception for governmental plans is particularly significant.\footnote{60} State and local governments employ considerable numbers of people, and a noticeable number of governmental employers have adopted domestic partnership benefits policies.\footnote{61} As governmental plans are not covered by ERISA, state and local laws may be applied to those plans.

If, as is most likely the situation, a type of benefit is covered by ERISA and it exists under an ERISA-covered plan, the final step in benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records..." Id. at 9. \textit{Fort Halifax Packing Co. v. Coyne} concerned a state law mandating that employers pay a one-time severance payment to employees in the event of closing or relocation of operations. \textit{See id.} at 3-4. The Supreme Court held that the mandated severance pay benefit did not result in the operation of a plan under ERISA. "The requirement of a one-time, lump-sum payment triggered by a single event requires no administrative scheme whatsoever to meet the employer's obligation...To do little more than write a check hardly constitutes the operation of a benefit plan." \textit{Id.} at 12 (citations omitted).

\footnote{58} In \textit{Air Transportation Association of America v. City and County of San Francisco}, a local ordinance mandated that city contractors not discriminate between spouses and domestic partners in providing benefits. \textit{See Air Transp. Ass'n of Am. v. City and County of San Francisco}, 992 F. Supp. 1149, 1157 (N.D. Cal. 1998). The ordinance provided a "non-exclusive illustrative" list of benefits that included bereavement leave, family medical leave, health benefits, membership and membership discounts, moving expenses, pension and retirement benefits, and travel benefits. \textit{See id.} Among those benefits, the court concluded that only moving expenses—which are not even a benefit covered by ERISA—"appear" to fall into the category of benefits that do not require an "ongoing administrative program." \textit{Id.} at 1169.

\footnote{59} See 29 U.S.C. § 1003(a) (1994). The five main exceptions are: (1) governmental plans; (2) church plans; (3) plans maintained solely to comply with workers' compensation, unemployment compensation, or disability insurance laws; (4) plans maintained outside of the United States primarily for the benefit of persons substantially all of whom are nonresident aliens; and (5) excess benefit plans that are unfunded. \textit{See id.} § 1003(b); \textit{see also id. §§} 1051, 1081, 1101 (exempting additional types of plans from specific sections of the statute).

\footnote{60} "The term 'governmental plan' means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by an agency or instrumentality of any of the foregoing." \textit{Id.} § 1002(32).

\footnote{61} \textit{See supra} note 2. Several public employers that provide domestic partnership benefits have limited those benefits to employees in same-sex partnerships. \textit{See, e.g.}, American Association for Single People, \textit{Governments Extending Health Benefits to Domestic Partners} (visited May 12, 2000) \texttt{<http://www.singlesrights.com/dp-hlth.html>} (identifying 13 public employers, including the cities of Chicago, Denver, New Orleans, Baltimore, Philadelphia, and Tucson).
determining whether state and local laws can be applied to that benefit is whether the law "relate[s] to" the plan. In nearly all circumstances, state and local discrimination laws most likely "relate to" a plan and therefore would be preempted by ERISA. In *Shaw v. Delta Air Lines, Inc.*, the Supreme Court broadly interpreted the "relate to" phrase in ERISA's preemption provision. The Court held that ERISA preempted the application of New York's Human Rights Law to require employers not to discriminate in their ERISA-covered plans on the basis of pregnancy. The Court concluded that the antidiscrimination law "clearly" related to ERISA plans because it mandated how employers structured their benefit plans and required "employers to pay employees specific benefits." The Supreme Court's broad interpretation of ERISA's preemption provision continued in subsequent cases. In recent years, the Court has rejected a "strictly literal reading" of that provision and adopted a more flexible approach. Yet, even in shifting to its current more flexible approach, the Court reaffirmed its holding in *Shaw*. The application of state and local discrimination laws to compel ERISA-covered plans to provide benefits to additional employees with domestic partners would

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64. See id. at 96-97 ("A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." (citations omitted)). Such "connection with or reference to" an ERISA plan need not be direct. "[A] state law might produce such acute, albeit indirect, economic effects, by intent or otherwise, as to force an ERISA plan to adopt a certain scheme of substantive coverage . . . and that such a state law might indeed be pre-empted . . . ." New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645, 668 (1995).
66. See DeBuono v. NYSA-ILA Med. and Clinical Serv. Fund, 520 U.S. 806, 813 (1997). The Court's current approach begins with the presumption that Congress does not intend to supplant state law in fields of traditional state regulation unless it clearly manifests the intent to do so. *See Travelers, 514 U.S. at 654-55.* If this presumption is overcome, whether a law relates to an ERISA plan depends on "if it 1) has a connection with or 2) a reference to [the] plan." California Div. of Labor Standards Enforcement v. Dillingham Constr., N.A., Inc., 519 U.S. 316, 324 (1997) (citations omitted). The ultimate inquiry is "whether the state law at issue, although clearly within the scope of traditional state police powers, so directly and substantially regulates the content of employee benefit plans as to run afoul of ERISA's goals of national uniformity." *Fisk, supra note 3,* at 291.
67. See *Travelers*, 514 U.S. at 657. Although the Supreme Court has retreated from a literal application of ERISA's preemption provision, only two justices have declared their willingness to abandon entirely the approach employed in *Shaw*. See *Dillingham*, 519 U.S. at 334-36 (Scalia, J., concurring, joined by Ginsburg, J.).
result in "mandat[ing] employee benefit structures." Therefore, ERISA still most likely preempts the application of state and local discrimination statutes to ERISA-covered plans, and those laws then could not be used to challenge discrimination in domestic partnership benefits provided through ERISA-covered plans.

When ERISA preempts state and local discrimination laws, federal law delimits the types of prohibited discrimination. An individual then must look to federal employment discrimination statutes, such as Title VII, for protection from discrimination by an ERISA-covered plan. The only other possible provisions that may prohibit discrimination by an ERISA-covered plan are the terms of the plan itself.

B. Marital Status Discrimination

Statutes that prohibit employment discrimination because of marital status at first may appear to offer a strong basis for challenging the denial of domestic partner benefits to employees in unmarried opposite-sex relationships. Employers with limited benefits policies justify the limitation on the ground that employees in opposite-sex relationships have the ability to marry in order to receive couples' benefits. Any employee in a domestic partnership could argue plausibly that she suffers marital status discrimination when her employer denies couples' benefits to her and her partner because they have the status of being legally unmarried to each other. In the case of opposite-sex couples, employers may be perceived as essentially penalizing an employee for the decision of

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68. Travelers, 514 U.S. at 658. Under the Supreme Court's more flexible approach to ERISA preemption, state regulations have escaped preemption even if they had a relation to an ERISA plan as long as they did not "bind plan administrators to any particular choice and thus function as a regulation of an ERISA plan itself." Id. at 659; see also Dillingham, 519 U.S. at 332 ("The apprenticeship portion of the prevailing wage statute does not bind ERISA plans to anything. No apprenticeship program is required by California law to meet California's standards.").

69. Federal employment discrimination statutes serve as a baseline standard. State and local discrimination laws may be applied to an ERISA-covered plan insofar as the same discrimination is illegal under federal law. See Shaw, 463 U.S. at 105-06.

70. See Rovira v. AT&T, 817 F. Supp. 1062, 1071 (S.D.N.Y. 1993) (refusing to apply an employer's nondiscrimination policy on marital status and sexual orientation discrimination to sickness death benefits under an ERISA plan because those provisions were not part of the terms of the plan). ERISA does not mandate any particular benefits, nor does the statute contain any prohibitions against discrimination in benefits. See Shaw, 463 U.S. at 91; see also McCann v. H & H Music Co., 946 F.2d 401, 407 (5th Cir. 1991) ("Congress did not intend that ERISA circumscribe employers' control over the content of benefits plans they offered to their employees.").

her and her partner not to marry. Yet, regardless of how clear the case of marital status discrimination may seem, several obstacles hinder—and likely foreclose—the use of marital status discrimination statutes to challenge discrimination in domestic partner benefits.

The first obstacle is that limited domestic partner policies do not classify employees in domestic partnerships as eligible or ineligible for domestic partner benefits based on marital status. Domestic partnership is a substitute for marriage or an alternative to it. Accordingly, any couple in a domestic partnership—regardless of legal ability or inability to marry—is unmarried. As all employees in domestic partnerships have the same marital status, discrimination based on marital status is not present. Limited domestic partner benefits policies take the class of unmarried employees in domestic partnerships and, for purposes of domestic partner benefits eligibility, divide that class into eligible and ineligible groups on some basis other than marital status. The distinguishing characteristic can vary between different employers’ policies, but most likely it is either sex or sexual orientation.

Even assuming that opposite-sex couples suffer disparate treatment based on marital status, other factors limit the applicability of marital status discrimination protections. Most significantly, as discussed above, ERISA most likely preempts the application of state and local marital status discrimination statutes to private employers’ ERISA-covered benefits plans. 72

In addition, employment discrimination on the basis of marital status remains legal in most jurisdictions. At present, only twenty-one states and the District of Columbia prohibit such discrimination to some degree. 73 Furthermore, even if a jurisdiction has a statute prohibiting marital status discrimination, the statute by its terms

72. See supra Part III.A (discussing ERISA preemption).

DOMESTIC PARTNER BENEFITS may not cover employee benefits. Some marital status discrimination statutes exempt employee benefits. Finally, even if a law is not preempted by ERISA and does not exempt benefits, it still may not provide protection with respect to a domestic partnership.

C. Sexual Orientation Discrimination

Statutes that prohibit sexual orientation employment discrimination are unlikely to provide a basis for challenging limited domestic partner benefits policies. As will be discussed below, however, all of the factors that could prevent the application of sexual orientation discrimination statutes to such policies were absent in *Ayyoub v. City of Oakland*. *Ayyoub* is the only decision thus far to find illegal discrimination based on sexual orientation in a domestic partner benefits policy.

1. The Limited Utility of Sexual Orientation Discrimination Statutes

As discussed above, the primary obstacle to using sexual orientation discrimination statutes is that ERISA most likely preempts their application to private employers' ERISA covered benefits plans. Another difficulty is the limited reach of sexual orientation discrimination statutes. Presently, only twelve states and the District of Columbia prohibit sexual orientation discrimination in employment. Additionally, even if a statute prohibits sexual


75. "We do not find that a domestic partnership is a 'marital status' within [the New York State Human Rights Law]." *Funderburke v. Uniondale Union Free Sch. Dist.*, 676 N.Y.S.2d 199, 200 (N.Y. App. Div. 1998). *Funderburke* rejected a claim of marital status discrimination against a public school district that refused to provide domestic partner benefits to employees in unmarried relationships. See *id*.


78. *See supra* Part III.A.

orientation discrimination, employee benefits may be exempt from the statute. 80

In any event, in most cases, sexual orientation is not the proper basis on which to base a claim of discrimination in domestic partner benefits. As individuals in opposite-sex relationships are most likely heterosexual and individuals in same-sex relationships are most likely gay or lesbian, the exclusion of employees in opposite-sex relationships from eligibility for domestic partnership benefits may appear at first to be sexual orientation discrimination. 81 This assumption is not necessarily correct for two reasons. First, the existence of a domestic partnership (or, for that matter, a lawful marriage) and the respective sexes of the parties do not ipso facto accurately indicate the respective sexual orientations of the parties. Sexual orientation refers to sexual desire or conduct, whereas domestic partnership denotes a committed relationship founded upon a living arrangement. A sexual, or even romantic, relationship may not be an element of a domestic partnership, just as a sexual or romantic relationship may not be part of a marriage. Thus, "same-sex" and "gay" or "lesbian" are not necessarily synonymous terms, just as "opposite-sex" and "heterosexual" are not interchangeable terms. 82 Second, looking to the eligibility terms.
of domestic partner benefits policies, most plans fail to make any
direct reference to sexual orientation. The eligibility criteria of
most limited policies simply require that the members of a couple be of the same sex. The explicit terms of a benefits policy can
provide the direct evidence to establish a claim of disparate
treatment. Therefore, when a policy’s terms explicitly reference sex
in limiting eligibility but make no reference to sexual orientation,
a claim of sex discrimination affords the strongest basis for
challenging discrimination in the domestic partner benefits policy.

2. Ayyoub v. City of Oakland

Ayyoub v. City of Oakland was a rare case that overcame all of
the obstacles to the application of a state sexual orientation
discrimination statute to a domestic partner benefits policy. First,
the case arose in a state with a statute prohibiting employment
discrimination on the basis of sexual orientation. Second, the case
involved a local government as the employer, so ERISA did not
preempt state employment discrimination law. Furthermore, the
benefits policy expressly based eligibility on an employee’s actual or
perceived sexual orientation. Ayyoub is instructive as the only
case to find sexual orientation or any other type of prohibited
discrimination in a domestic partner benefits policy. The decision
also is significant for its rejection of the argument that limited
domestic partner benefit policies are legally justifiable because they

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“homosexual” person is defined as “one sexually attracted to another of the
same sex.” Webster's Encyclopedic Unabridged Dictionary of the English
one of the opposite sex,” Taber's Cyclopedic Medical Dictionary at 827, or
“sexual feeling or behavior directed toward a person or persons of the opposite
sex.” Webster's Encyclopedic Unabridged Dictionary for the English Language
at 687. Parties to a “a union between a man and a woman” may or may not be
homosexuals. Parties to a same-sex marriage could theoretically be either
homosexuals or heterosexuals.

Id. See generally BRENDA MADDOX, MARRIED AND GAY (1982) (describing the lives of
homosexual people living in opposite-sex marriages). Additionally, the possibility remains
that a member of any opposite-sex or same-sex couple may be bisexual.

83. See KOHN, supra note 1, app. at 39-111 (providing copies of 26 employer policies, none
of which have any reference to sexual orientation).
84. See infra text accompanying notes 125, 132, 158.
87. See supra note 59.
88. See Ayyoub, No. 99-02937, slip op. at 3.
simply serve to "level the playing field" and cure discrimination in marriage laws.\textsuperscript{89}

\textit{Ayyoub} was an administrative decision by the California State Labor Commissioner\textsuperscript{90} under the Commissioner's law enforcement authority to enforce provisions of the California Labor Code that prohibit discrimination in employment.\textsuperscript{91} In 1993, the City of Oakland extended vision and dental benefits plans to the domestic partners of city employees.\textsuperscript{92} The terms of the policy defined a domestic partnership as

"a relationship between two cohabitating, unmarried and unrelated people, \textit{regardless of gender}, who, being over 18 years of age, have resided together for at least six . . . months prior to the filing of a Declaration of Domestic Partnership form, and who share responsibility for the common living expenses of food, shelter, and medical care."\textsuperscript{93}

The express terms of this policy were neutral as to the sexes of the members of a domestic partnership and the terms made no reference to sexual orientation.

Effective January 1, 1997, Oakland extended health benefits to the domestic partners of city employees, with the City contributing toward the premiums for such coverage.\textsuperscript{94} But, unlike the sex-neutral and sexual orientation-neutral eligibility criteria established earlier for dental and vision benefits, Oakland limited health benefits to only some domestic partners.\textsuperscript{95} The resolution approved

\begin{itemize}
  \item \textsuperscript{89} See \textit{id.} at 2.
  \item \textsuperscript{90} The decision was administrative and not reviewed by any court, so the decision is not binding law. It is, however, persuasive authority.
  \item \textsuperscript{91} At the time of \textit{Ayyoub}, the California State Labor Commissioner had authority to investigate complaints of sexual orientation discrimination. See \textsc{CAL. LAB. CODE} §§ 98.7, 1102.1 (West Supp. 2000) (repealed 2000). The California Labor Code prohibited "discrimination of different treatment in any aspect of employment . . . based on actual or perceived sexual orientation." \textit{Id.} § 1102.1. Effective January 1, 2000, California repealed that provision, but continued its prohibition on sexual orientation discrimination in employment within the California Fair Employment and Housing Act. See \textsc{CAL. GOV'T CODE} § 12900 (West 1992); 1999 Cal. Stat. 592 §1 (expressing legislative intent to incorporate the Labor Code provision within the California Fair Employment and Housing Act and to deem any conduct that violated the Labor Code provision a violation of the successor provision). Jurisdiction over complaints of sexual orientation employment discrimination under California law now rests with the California Department of Fair Employment and Housing. See \textsc{CAL. GOV'T CODE} § 12930(1)(1) (West 1992).
  \item \textsuperscript{92} See \textit{Ayyoub}, No. 99-02937, slip op. at 1.
  \item \textsuperscript{93} \textit{id.} (emphasis added) (quoting City of Oakland's 1993 domestic partner benefits policy).
  \item \textsuperscript{94} See \textit{id.}
  \item \textsuperscript{95} See \textit{id.} at 3-4.
\end{itemize}
by the City Council was clear as to how employees in domestic partnerships would be classified for eligibility. It stated that the City would provide medical coverage “for the domestic partners and eligible dependents of gay and lesbian employees.” The policy thus expressly based eligibility on sexual orientation. As far as determining the sexual orientation of an employee who applied for domestic partner benefits, the City apparently relied only on the respective sexes of an employee and her domestic partner as conclusive proof. California law prohibits an employer from inquiring into an employee’s sexual orientation. Yet, under the policy’s explicit

96. See id.

97. Oakland City Council Resolution No. 73024 (Oct. 29, 1996) (emphasis added). The resolution also declared that “the City wishes to provide benefits of employment for its gay and lesbian employees equal with those benefits extended to heterosexual employees who are afforded the legal opportunity to marry.” Id. (emphasis added). Most likely, the City would be unable to demonstrate how marriage laws facially deny any individual the ability to marry because of sexual orientation. Marriage laws require that the parties to a marriage be of opposite sexes; the law does not know nor care about their sexual orientations in granting or denying an individual the ability to marry a particular person. See Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998) (recognizing that prohibition on same-sex marriage involves an obvious sex-based classification); Baehr v. Lewin, 852 P.2d 44, 60 (Haw. 1993) (holding that Hawaii’s marriage law “on its face” based the ability to marry on sex by denying same-sex couples access to the marital status); Baker v. State, 744 A.2d 864, 880 (Vt. 1999) (holding that Vermont law classifies couples based on sex by distinguishing between “opposite-sex couples” and “same-sex couples” in providing benefits and protections incident to marriage); see also Baehr, 852 P.2d at 51 n.11 (“Homosexual” and ‘same-sex’ marriages are not synonymous; by the same token, a ‘heterosexual’ same-sex marriage is, in theory, not oxymoronic . . . Parties to ‘a union between a man and a woman’ may or may not be homosexuals. Parties to a same-sex marriage could theoretically be either homosexuals or heterosexuals.”).

98. “Complainant applied for coverage for his domestic partner, but was denied the coverage because his partner was not of the same gender as he. (The City's) position is that the policy extending medical benefits only applies to same-sex domestic partners.” Ayyoub, No. 99-02937, slip op. at 1 (emphasis added). In a bulletin to employees announcing the availability of the domestic partnership health benefits, the City of Oakland's Administrative Services Agency stated that the new benefits “will allow active employees to cover their same-sex domestic partners.” CITY OF OAKLAND, ADMINISTRATIVE BULLETIN ON MEDICAL OPEN ENROLLMENT FOR NON-PERS PRUDENTIAL PRUCARE HMO 1 (effective Nov. 1, 1996) (emphasis added) (on file with author). As proof of eligibility for enrollment, the bulletin stated, “[e]mployees must provide a Certificate of Domestic Partnership in order to enroll their same-sex domestic partner in the medical plan.” Id. at 2 (emphasis added). In other words, a male plus a male equaled "gay," a female plus a female equaled "lesbian," and a male and a female equaled "heterosexual." Oakland’s policy discriminated on the basis of sex in the application of that policy by providing benefits only to employees in same-sex couples.

terms limiting benefits to "gay and lesbian employees," an employee's "actual or perceived sexual orientation"100 (however the City determined it) was the basis for determining whether an employee could receive health benefits for her domestic partner.

Majid (Mickey) Ayyoub, a city public works engineer, submitted a Declaration of Domestic Partnership in 1995 for himself and his female domestic partner, Sandra Washburn.101 The City extended dental and vision care benefits to Washburn.102 After the City extended health benefits to domestic partners, Ayyoub applied for medical coverage for Washburn. The City denied the application because Ayyoub's "partner was not the same gender as he."103

After pursuing a complaint through the City's internal discrimination complaint process, Ayyoub filed a discrimination complaint with the Labor Commissioner alleging discrimination on the basis of his sexual orientation.104 The City responded to Ayyoub's complaint with the "level the playing field" argument typically used to justify the exclusion of opposite-sex couples from domestic partnership policies.105 By enacting a policy limited to gay and lesbian employees, the City argued,

Now all employees who have intimate life partners have the opportunity to have the City pay the medical premium for that partner: the distinction between heterosexuals and homosexual employees is that heterosexual employees, having the right to marry, must exercise that right demonstrating the long-held social approbation of marriage as an index of commitment and presumed familial stability. Homosexuals, denied the opportunity to marry, have no right to exercise: however, they are no longer penalized by the City for being denied an opportunity to marry based on their sexual orientation. The bottom line is that the City's practice ... remedies discrimination rather than creates it.108

1999 Cal. Stat. 592 § 1 ("As was the intent of Section 1102.1 of the Labor Code, as that section read on December 31, 1999, this act is intended to codify the court decision[] in ... Soroka v. Dayton Hudson Corp. ... prohibiting discrimination based on sexual orientation.").
100. CAL. LAB. CODE § 1102.1.
101. See Ayyoub, No. 99-0237, slip op. at 1.
102. See id. at 1.
103. Id.
104. See Discrimination Complaint of Majid Yacoub Ayyoub to the Cal. State Labor Comm'., Ayyoub v. City of Oakland (No. 99-0237) (filed Apr. 24, 1997) (on file with author). As remedies, Ayyoub requested that the Labor Commissioner order Oakland to "[p]rovide equal access to employment benefits and reimburse additional costs I have incurred to provide medical benefits for my domestic partner as of 1/1/97." Id.
105. See Ayyoub, No. 99-0237, slip op. at 2.
106. Id. (quoting the City of Oakland's response to Ayyoub's complaint).
Ayyoub, on the other hand, contended that the policy denied him a benefit available to “other similarly-situated employees, solely because of his sexual orientation.” The similarly situated employees would be the entire class of legally unmarried employees in domestic partner relationships.

The Labor Commissioner concluded that Oakland’s domestic partner health benefits policy constituted discrimination based on sexual orientation. There was no dispute that sexual orientation was the criterion for determining eligibility. The City, however, offered two justifications that it claimed rendered its policy non-discriminatory. First, as mentioned, it argued that “the policy was enacted to remedy historic discrimination against gay and lesbian employees, who cannot ordinarily obtain insurance coverage for their partners because they cannot legally marry.” Second, the City asserted that “[Ayyoub] and other heterosexual employees can obtain equal benefits simply by exercising their right to marry their partners.”

The Labor Commissioner rejected both arguments as failing to address the discriminatory force of Oakland’s benefits policy. The decision stated,

The fact that [the City] enacted the policy in order to address historic discrimination against gay and lesbian workers, while laudable, has no bearing on the question of whether the policy, as enacted and applied, does in itself discriminate on the basis of sexual orientation. And [the City’s] contention that heterosexual employees could marry, and thereby obtain equivalent benefits, begs the question. [Ayyoub’s] argument is that he should not have to be married to obtain the same employment benefits as an unmarried co-worker of a different sexual orientation.

The Labor Commissioner noted that Oakland had created a domestic partnership registration scheme that was “neutral with respect to sexual orientation” and defined domestic partners “as

107. Id.
108. See id. at 3-4.
109. See id. at 3. (“[The City] acknowledges that sexual orientation is a factor—indeed, the determining factor—in determining whether an employee is eligible for employer paid medical insurance benefits covering a domestic partner.”).
110. Id.
111. Id.
112. Id. (emphasis added).
113. Id.
two cohabitating people, *regardless of gender*, who meet certain criteria." The City also provided vision and dental benefits to all registered domestic partners of employees for several years "in a manner which does not differentiate based on the sexual orientation of the partners." The decision concluded: "Having created the gender and orientation-neutral category of 'domestic partner,' [the City] has offered no legitimate explanation for offering certain employment benefits to some domestic partners and not others." The Labor Commissioner therefore concluded that Oakland's policy of providing domestic partner benefits only to "gay and lesbian" employees (at least as perceived by the City based on the fact that an employee and her domestic partner were of the same sex) constituted illegal sexual orientation discrimination under California law. Although only an administrative decision and based only on California law, *Ayyoub* is instructive. It is the only decision thus far to hold that a limited domestic partner benefits policy constituted illegal employment discrimination. In its analysis, *Ayyoub* precisely identified the class of similarly situated employees at issue with respect to domestic partners benefits policies. The relevant class is all unmarried employees in domestic partnerships, not simply the subclass of those employees who cannot legally marry their

114. *Id.*
115. *Id.*
116. *Id.* at 3-4.
117. *See id.* at 4. As a remedy, the Labor Commissioner ordered Oakland to extend health benefits to "all registered domestic partners" of city employees. *See Order, Ayyoub v. City of Oakland, No. 99-02837 (Cal. State Labor Comm'rs Oct. 27, 1997).* As permitted by the California Labor Code, Oakland filed an administrative appeal with the Director of the California Department of Industrial Relations. *See CAL. LAB. CODE § 98.7(e) (West 1989).* The Director summarily affirmed the Labor Commissioner's decision as supported by substantial evidence. *See Ayyoub v. City of Oakland, No. 99-02837 (Cal. Dir. of Industrial Relations Nov. 14, 1997).* Afterward, Oakland refused to comply with the Labor Commissioner's decision and order, causing the Labor Commissioner to threaten legal action to compel compliance. *See Pamela Burdman, Oakland Faces Legal Fight Over Partners Benefits, SAN FRANCISCO CHRON., Dec. 3, 1997, at A17, available in 1997 WL 6712250.* Finally, acknowledging that challenging the Labor Commissioner's decision would be "protracted, costly, and not conducive to harmonious labor relations," the Oakland City Council amended the City's policy and extended health benefits paid by the City to all domestic partners of city employees effective July 1, 1998. *See Oakland City Council Resolution No. 74174 (Apr. 21, 1998).* The Labor Commissioner determined that this modification brought Oakland into compliance with the California Labor Code. *See Letter from Anne Hipshman, Staff Counsel to Labor Commissioner, to Wendy P. Roeder, Deputy City Attorney, City of Oakland 2 (Oct. 2, 1998) (on file with author). Subsequently, Oakland complied with the order to reimburse Ayyoub for costs incurred as a result of the denial of medical benefits. *See Settlement Agreement Between City of Oakland and Majid Ayyoub and Release of Claims Against City by Majid Ayyoub (Dec. 17, 1998) (on file with author).*
domestic partners under state law.\textsuperscript{118} Once an employer ceases to use the existence of a legal marriage as the \textit{sine qua non} for eligibility for particular benefits, marriage or the ability to marry ceases to be the basis for classifying employees as eligible or ineligible for the benefits at issue. All domestic partners, by definition and regardless of the legal ability to marry, are unmarried. As \textit{Ayyoub} demonstrates, when an employer segregates the broad class of unmarried domestic partners by the sexes or the actual or perceived sexual orientations of the members of domestic partnerships, illegal discrimination can result. Thus, an effort to correct discrimination in marriage laws can itself create a new type of discrimination.

As a matter of California employment discrimination law, \textit{Ayyoub} rejected the idea of the “level the playing field argument” as a legitimate reason for providing domestic partnership benefits to only some employees in unmarried domestic partnerships.\textsuperscript{119} Instead of focusing on whether a policy can be said to remedy historic discrimination in society,\textsuperscript{120} \textit{Ayyoub} properly refocused the inquiry on whether an individual employer’s policy—or “remedy”—itself discriminates against employees on a particular impermissible basis. As for the argument that opposite-sex (or, under the Oakland policy, “heterosexual”) couples can simply get married to obtain benefits, \textit{Ayyoub} cast that argument as an evasion of the real question at hand, which is why some unmarried employees are eligible for couples’ benefits while other unmarried employees are not. \textit{Ayyoub} looked at the basis for such discrimination rather than any asserted justification, however praiseworthy it may be. Discrimination based on sexual orientation was still illegal discrimination, as it relied on a factor that California intended to eliminate as a factor in employment decisions. The result in \textit{Ayyoub} left opposite-sex couples eligible to obtain spousal benefits or domestic partnership benefits and same-sex couples eligible for domestic partnership benefits. Opposite-sex couples may be eligible for two types of benefits now, but the result is equal because both types of couples are eligible for couples’ benefits—and without any discrimination on the basis of actual or perceived sexual orientation or sex.

\textsuperscript{118} See \textit{Ayyoub}, No. 99-02937, slip op. at 3-4.
\textsuperscript{119} See id.
\textsuperscript{120} After all, an employer has no obligation to follow marriage laws in providing couples’ benefits, so it therefore need not impose the discrimination found in those laws and then have a need to “remedy” it.
IV. DOMESTIC PARTNER BENEFITS PLANS LIMITED TO SAME-SEX COUPLES UNDER TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

As discussed above, federal law occupies the field as far as prohibiting discrimination in ERISA-covered plans. It also may be applied to other employee benefits as well. Federal employment discrimination statutes prohibit fewer types of discrimination than do many state or local laws. The main federal employment discrimination statute, Title VII of the Civil Rights Act of 1964, prohibits an employer from discriminating "against any individual with respect to... compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex, or national origin." This provision applies to employee benefits.

Domestic partner benefits policies that are limited to employees in same-sex relationships, in basing eligibility on an employee's sex as it compares to the sex of her respective domestic partner, constitute sex discrimination under Title VII. Nearly all domestic partner benefits policies that limit eligibility to employees in same-sex couples expressly require that an employee and her partner be "the same sex" or "the same gender." These criteria base eligibility for domestic partner benefits on an employee's sex vis-à-vis the sex of her domestic partner. Sex is unmistakably the determinative factor in deciding eligibility. A change in the sex of an employee's domestic partner changes the result. Under policies limited to employees in same-sex couples, an employee would be granted domestic partner benefits if the employee is a male and has a male domestic partner, or if the employee is a female and has a

122. See supra Part III.A
123. Id. § 2000e-2(a)(1).
124. "Health insurance and other fringe benefits" constitute "compensation, terms, conditions, or privileges of employment" under Title VII. Newport News Shipbuilding & Dry Dock Co. v. EEOC, 462 U.S. 669, 682 (1983). Pension or deferred compensation benefits, even though received after employment ends, also are covered by the statute. See Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1079 (1983). Because Title VII prohibits sex discrimination, a state or local statute prohibiting sex discrimination also can be applied to an employee benefits plan covered by ERISA. See supra note 69.
125. See, e.g., Affidavit of Domestic Partnership, John Hancock Mutual Life Insurance Company, in Kohn, supra note 1, app. at 68 ("We are of the same sex . . . ."); American Express Company Affidavit of Domestic Partnership, in Kohn, supra note 1, app. at 61 ("We are the same gender."); Apple Computer Domestic Partner Affidavit, in Kohn, supra note 1, app. at 53 ("I certify that the person named below is my domestic partner of the same sex . . . ."); Lotus Development Corporation Affidavit of Spousal Equivalency, in Kohn, supra note 1, app. at 54 ("We are of the same sex . . . ."); The New York Times Certificate of Domestic Partnership, in Kohn, supra note 1, app. at 85 ("[W]e are the same sex . . . ."). None of these policies make any reference to sexual orientation.
female domestic partner. But, change the combinations so that the male employee has a female domestic partner, or so that the female employee has a male domestic partner. With the latter couples, the sexes of the employees are the same, but the sexes of the employees' respective domestic partners have changed. The latter couples would be denied domestic partner benefits because the domestic partners are of opposite sexes. In sum, domestic partner benefits are granted based on the sex of an employee's domestic partner.

The notion that discrimination based on the sex composition of a couple amounts to sex discrimination against the individuals comprising the couple has found recognition in cases that challenged the denial of marriage licenses to same-sex couples as sex discrimination. 126 Those cases, however, were based on state constitutions rather than Title VII. 127 Yet, as shall be discussed, Title VII law supports a similar rule in employment context. It protects an individual from discrimination based on the individual's association with another person of a particular sex. Thus, for instance, an employee denied domestic partner benefits because she is a female and her domestic partner is a male—but who otherwise would be granted domestic partner benefits if her domestic partner were female—could assert a cognizable claim under Title VII that she suffered sex discrimination because of the sex of the domestic partner with whom she maintains an association.

To date, two federal district courts have considered, and rejected, claims of sex discrimination under Title VII with respect to same-sex-only domestic partner benefits. 128 This part reviews and analyzes those decisions. This part then reviews Title VII authority which apparently was not considered by or presented to the courts in those two cases, that recognizes claims of discrimina-

126. See Brause v. Bureau of Vital Statistics, No. 3AN-95-6562 CI, 1998 WL 88743, at *6 (Alaska Super. Ct. Feb. 27, 1998) ("[I]f twins, one male and one female, both wished to marry a woman and otherwise met all of the Code's requirements, only gender prevents the twin sister from marrying under the present law. Sex-based classification can hardly be more obvious."); Baehr v. Lewin, 852 P.2d 44, 60 (Haw. 1993) ("It is the state's regulation of access to the status of married persons, on the basis of the applicants' sex that gives rise to the question whether the applicant couples have been denied the equal protection of the laws . . ."); Baker v. State, 744 A.2d 464, 880-86 (Vt. 1999) (holding that Vermont law classified couples based on their sex composition and unconstitutionally excluded same-sex couples from benefits and protections incident to marriage).

127. See Baehr, 852 P.2d at 60 (relying on the Equal Protection Clause of Hawaii Constitution); Baker, 744 A.2d at 867 (relying on the Common Benefits Clause of the Vermont Constitution); see also Brause, 1998 WL 88743, at *6 (discussing, in dicta, the Equal Protection Clause of the Alaska Constitution).

tion based on the protected characteristics of a person with whom an individual associates. Next, it demonstrates how such a claim is cognizable under Title VII's prohibition on sex discrimination. Finally, applying Title VII authority concerning sex discrimination, this part concludes that domestic partner benefits policies limited to employees in same-sex couples constitute illegal sex discrimination under Title VII.

A. Cleaves v. City of Chicago

In Cleaves v. City of Chicago, the District Court for the Northern District of Illinois held that a domestic partner benefits policy limited to same-sex couples did not involve sex discrimination at all. Instead, in a short but puzzling discussion, the court ultimately determined that the policy discriminated on the basis of marital status—without ever explaining how the policy treated any employee or couple disparately on that basis. The court in Cleaves reached its conclusion despite the express language of the city ordinance, which based eligibility on the respective sexes of the members of a domestic partnership. 

The City of Chicago enacted a domestic partner ordinance that provided “the same benefits, including but not limited to health coverage, as are available to the spouse of an individual employed by the city of Chicago” to qualifying employees in domestic partnerships who meet certain criteria, including that “the partners are the same sex.” This policy allowed an employee to take leave when a member of a domestic partner’s family died. Cleaves, who had a female domestic partner, took leave to attend the funeral of his domestic partner’s stepfather. Cleaves represented the decedent to be his “father-in-law.” After the City discovered the actual relationship, it terminated Cleaves’s employment for absence without leave and for a false statement. Due to the fact that Cleaves would have been eligible for leave to attend the funeral if his sex had been female (because he and his domestic partner then

130. See Cleaves, 68 F. Supp. 2d at 967.
131. See CHICAGO, ILL. CODE § 2-152-072 (effective May 16, 1997).
132. Id. The eligibility criteria in the ordinance make no mention of sexual orientation.
133. Id. See Cleaves, 21 F. Supp. 2d at 966 n.2.
134. See Cleaves, 68 F. Supp. 2d at 966; Cleaves, 21 F. Supp. 2d at 861.
would have been "the same sex" as required by the ordinance), Cleaves sued the City for sex discrimination under Title VII.136

The district court produced two opinions in Cleaves' case. In Cleaves I, instead of addressing the factual basis of the claim as involving sex discrimination, the court discussed it as alleging marital status or sexual orientation discrimination.137 The court explained that

Mr. Cleaves argues . . . that, since non-married homosexual partners receive City benefits, non-married heterosexual partners should receive City benefits. Drawing all inferences in favor of Mr. Cleaves, it appears he is claiming that unmarried homosexual couples are permitted sick days or leave when an "in-law" dies but that unmarried heterosexual partners are not. Marital status is not a protected classification under Title VII. . . . While sex discrimination is cognizable, the facts in Mr. Cleaves' claim . . . do not indicate any discrimination occurred due to his gender. Mr. Cleaves' claim could be read to state a claim for discrimination based on his heterosexual orientation; that is, as a heterosexual in a relationship he does not have the same rights as a homosexual in a relationship. Sexual orientation, however, also is not protected under Title VII.138

Finding no aspect of the claim to allege discrimination based on sex, the court dismissed the sex discrimination claim.139

The opinion in Cleaves I was based on a pro se complaint.140 After that decision, the court granted a motion for reconsideration, received an amended complaint from the plaintiff along with supplemental filings, and issued a new opinion.141 In Cleaves II, the court acknowledged that the case did not involve sexual orientation discrimination as an issue.142 It confronted the issue of sex discrimination:

136. See Cleaves, 68 F. Supp. 2d at 965; Cleaves, 21 F. Supp. 2d at 860.
137. See Cleaves, 21 F. Supp. 2d at 861.
138. Id. (emphasis added).
139. See id.
140. See id. at 860.
141. See Cleaves, 68 F. Supp. 2d at 966 n.1.
142. See id. at 966 n.2.

The Ordinance was passed to give quasi-marital benefits to gay and lesbian couples, although it does not mention sexual orientation. The City argues that sexual orientation is not a protected category under Title VII, but this is irrelevant, since Mr. Cleaves does not argue that he was discriminated against because he was heterosexual.

Id. (emphasis added).
Mr. Cleaves claims that, in view of [the] Ordinance, if he had been a woman and everything else in his situation had been the same, he would not have been terminated for taking bereavement leave when his partner's father died. This, he avers, shows he was fired because of sex, that is, merely because he was a man and not a woman.143

Yet, even though Cleaves adduced the City's ordinance that specifically required that domestic partners be of the same sex,144 the court was not persuaded. It rejected Cleaves's sex discrimination argument as "creative and clever but incorrect."145

The court reasoned that Chicago's policy amounted to marital status, and not sex, discrimination. First, the court correctly summarized that "Mr. Cleaves' contention, in effect, is that if the City extends bereavement benefits to unmarried same-sex couples who cohabit, then Title VII requires those same benefits to be extended to unmarried opposite-sex couples who cohabit."146 At a glance that statement—which was the court's own encapsulation of the claim presented—should make clear that marital status discrimination was not involved. After all, both same-sex couples and opposite-sex couples who cohabit are unmarried and therefore similarly situated in terms of marital status. The only difference between the two types of couples is their sex composition. The court's analysis, however, took an abrupt turn into a discussion of marital status and "sex plus" discrimination. The court stated, "Title VII, like most federal civil rights laws, is 'silent on the issue of marital-status discrimination.'"147 But it noted that "discrimination on the basis of marriage plus sex violates Title VII."148 It concluded:

However, the Ordinance does not involve treating men less favorably than women on the basis of marital status, but only treating unmarried same-sex couples differently from unmarried opposite-sex couples. It treats men and women exactly the same: if Mr. Cleaves' nonmarital partner were male and they otherwise met the criteria for domestic partnership, he would have been eligible for any benefits available to same-sex female couples, including bereavement benefits if these were included.

143. Id. at 966.
144. See id.
145. Id. at 967.
146. Id. (emphasis added).
147. Id. (quoting Thomas v. Anchorage Equal Rights Comm'n, 165 F.3d 692, 716 (9th Cir. 1999)).
148. Id. (citing Sprogis v. United Airlines, 444 F.2d 1194 (7th Cir. 1971)).
The Ordinance is therefore legal discrimination on the basis of marital status, not sex discrimination involving discrimination against men (or women) because of marital status.\footnote{149. Id.}

Accordingly, once again, the court dismissed Cleaves’s claim for failure to state a cause of action for sex discrimination under Title VII.\footnote{150. See id.}

The court in Cleaves II had two bases for dismissing the sex discrimination claim. First, it determined that the same-sex-only domestic benefit policy amounted to marital status, but not sex, discrimination. Second, it concluded that there was no sex discrimination because the policy treated men and women the same. The court’s analysis and conclusion with respect to marital status discrimination is puzzling. The court never expounded upon how treating two types of couples, both of which it recognized as “unmarried,” differently constituted discrimination because of marital status.\footnote{151. See id.}

The basis for the court’s unexplained conclusion that the policy amounted to marital status discrimination most likely is the City’s motion to dismiss Cleaves’ complaint.\footnote{152. See Defendant’s Revised Memorandum in Support of Defendant’s Partial Motion to Dismiss Plaintiff’s First Amended Complaint at 2-3, Cleaves v. City of Chicago, 68 F. Supp. 2d 963 (N.D. Ill. 1999) (No. 98-C-1219).} The City defended its ordinance against the sex discrimination claim by arguing that the distinction between same-sex and opposite-sex couples “are based upon marital status, and the capacity to be married, and not upon gender.”\footnote{153. Id. at 3.} But if this argument was the basis for the court’s determination that the same-sex-only policy amounted to marital status discrimination, the court offered no such indication. Cleaves II, therefore, may have held that same-sex-only domestic partner policies constitute marital status discrimination, but the opinion left that holding completely unreasoned and unsupported. With respect to sex discrimination, the court in Cleaves II concluded that there was no sex discrimination because the policy treated men and women the same. The court noted that Mr. Cleaves, if he had a male domestic partner, would have had the same eligibility for domestic partner benefits as a female employee with a female domestic partner.\footnote{154. See Cleaves, 68 F. Supp. at 967.} The policy thus “treats men and women
both male and female employees alike were eligible to receive benefits with respect to same-sex domestic partners, and both male and female employees were equally ineligible to receive benefits for opposite-sex domestic partners. Therefore, male and female employees were treated equally as individuals, and, according to the law, there was no sex discrimination.156

B. Foray v. Bell Atlantic157

In Foray, the employer instituted an employee benefits plan that included an employee's "same-sex domestic partner" in the definition of "eligible dependent."158 Paul Foray, an employee of Bell Atlantic's NYNEX subsidiary, submitted a request to add his female domestic partner, Jeanine Muntzner, to the benefits plan.159 NYNEX denied the request on the ground that Foray's "opposite-sex domestic partner did not meet the eligibility criteria to qualify as a Domestic Partner." The denial letter sent by NYNEX added that it offers domestic partner benefits only to employees in same-sex relationships because those employees cannot legally marry their partners, whereas opposite-sex couples can do so.161 In Foray's complaint, he contended that "all things being equal, if Foray's gender were female, he would be entitled to claim his domestic partner as an eligible dependent under the benefits plan."162

155. Id. The Cleaves court was able to distinguish the situation in Sprogis v. United Airlines, 444 F.2d 1194 (7th Cir. 1971). See Cleaves, 68 F. Supp. at 967. In Sprogis, the employer applied different marital status standards to male and female flight attendants. See Sprogis, 444 F.2d at 1197-98. In Cleaves, however, the court found that the Chicago policy applied equally to male and female employees. See Cleaves, 68 F. Supp. at 967.
156. Cf. DeSantis v. Pacific Tel. & Tel. Co., 608 F.2d 327, 331 (9th Cir. 1979). In that case, plaintiffs alleged that the employer applied different employment criteria for men and women in violation of Title VII. See id. The plaintiffs claimed that "if a male employee prefers males as sexual partners, he will be treated differently from a female who prefers male partners." Id. The court rejected the argument as an effort to extend Title VII's prohibition on sex discrimination to include sexual orientation. See id. In any event, it noted that there was no sex discrimination: "[W]hether dealing with men or women the employer is using the same criterion: it will not hire or promote a person who prefers sexual partners of the same sex. Thus this policy does not involve different decisional criteria for the sexes." Id.
158. Id. at 328.
159. See id. The NYNEX domestic partner benefits plan provided employees' domestic partners with medical, dental, and vision care coverage. The policy also included beneficiary designations, leaves, relocation, life insurance, and adoption reimbursement. See id.
160. Id.
161. See id.
162. Id. at 329.
The court in Foray, however, did not recognize Foray's claim of sex discrimination as cognizable under Title VII.\textsuperscript{163} The court noted that Foray's claim—that "but for" his sex he would have been treated differently—"is supported by legal theorists and a decision in a different context by the Hawaii Supreme Court."\textsuperscript{164}

It read Title VII, however, as imposing a different standard. The Foray court conducted a sex discrimination analysis based on the treatment accorded to individual male and female employees as they are compared to each other.\textsuperscript{165} The court articulated the applicable standard under Title VII as whether an individual "was treated differently from 'similarly situated' persons of the opposite sex."\textsuperscript{166} It qualified "similarly situated" as "similarly situated in all material respects."\textsuperscript{167}

As a result of Foray's claim that "he was treated differently from similarly situated persons of the opposite sex," the court held that his claim depended "on the assumption that a similarly situated woman is one who has a female domestic partner."\textsuperscript{168} At that point, the sex-based discrimination inherent in current marriage laws destroyed Foray's sex discrimination claim under the "similarly situated in all material respects" standard. The court held that "a woman with a female domestic partner is differently situated from plaintiff in material respects because under current law, she, unlike plaintiff, is unable to marry her partner."\textsuperscript{169} Accordingly, "[a] woman and her same-sex domestic partner, unlike plaintiff and [his female domestic partner] Ms. Muntzner, will never be eligible for a host of benefits available to opposite-sex couples who are able to marry,"\textsuperscript{170} with such benefits including "those extended to married couples under defendant's employee benefits plan."\textsuperscript{171} The court determined that the "difference in the ability to marry"\textsuperscript{172} between men and women involved in relationships with a female domestic partner "is material in the context of a compensation plan which grants benefits to employees' chosen

\textsuperscript{163} See id. at 330.
\textsuperscript{164} Id. at 329 (citing Baehr v. Lewin, 852 P.2d 44, 60 (Haw. 1993), Andrew Koppelman, Why Discrimination Against Lesbians and Gay Men is Sex Discrimination, 69 N.Y.U. L. Rev. 197, 208 (1994), and Samuel A. Marcosson, Harassment on the Basis of Sexual Orientation: A Claim of Sex Discrimination Under Title VII, 81 GEO. L.J. 1, 3-4 (1992)).
\textsuperscript{165} See id.
\textsuperscript{166} Id. at 329-30.
\textsuperscript{167} Id. (citing Shumway v. United Parcel Serv., Inc., 118 F.3d 60, 64 (2d Cir. 1997)).
\textsuperscript{168} Id. at 330.
\textsuperscript{169} Id.
\textsuperscript{170} Id.
\textsuperscript{171} Id.
\textsuperscript{172} Id.
partners.” It continued: “NYNEX's policy of distinguishing between unmarried opposite-sex couples and unmarried same-sex couples reflects and remedies differences between these persons which are material in this particular context, and does not discriminate between similarly situated men and women.” Therefore, the Foray court concluded that the plan discriminated on the basis of the ability to marry, and not on the basis of sex. The court dismissed the complaint for failure to state a claim of sex discrimination.

C. Same-Sex-Only Domestic Partner Benefits as Sex Discrimination Based on the Sex of an Employee's Domestic Partner

Cleaves II and Foray remain the only court decisions to consider whether same-sex only domestic partner benefit policies constitute sex discrimination under Title VII. Those cases both involved policies that expressly limited eligibility to employees in same-sex relationships, and they presented identical sex discrimination claims. Whereas both courts concluded that the policies did not amount to sex discrimination, they analyzed the same claim differently. The court in Cleaves II concluded that the policy amounted to marital status discrimination and treated all men and all women equally. Foray held that the same-sex-only policy did not constitute sex discrimination because a male is not similarly situated to a female in terms of the legal ability to marry a female domestic partner. Given that only two district courts have considered the issue and applied different analyses, the law cannot be considered settled on the question of whether domestic partner benefits that are available only to employees in same-sex couples

173. Id.
174. Id. The holding that domestic partner benefits limited to same-sex couples “remedies” their inability to marry and obtain spousal benefits accepts an argument rejected by the California State Labor Commissioner in a case of sexual orientation discrimination. See Ayyoub v. City of Oakland, No. 99-02937 (Cal. State Labor Comm'r Oct. 27, 1997). In that case, the Labor Commissioner held that a purported remedy for discrimination in marriage laws may itself be discriminatory and illegal. See supra Part III.C.
175. See Foray, 56 F. Supp. 2d at 330.
As with plaintiff's Title VII claim, plaintiff has not been treated differently from a woman with an opposite-sex partner, and there is no reason to conclude that plaintiff has been treated differently from an unmarried woman with a female domestic partner "on the basis of sex," instead of on the basis of his ability to marry.

Id.
176. See id.; see also FED. R. CIV. P. 12(b)(6). Foray did not appeal the dismissal of his complaint.
amount to sex discrimination in violation of Title VII. As shall be discussed, Title VII—in case law apparently not considered by the courts in Cleaves II and Foray—protects an individual from discrimination based on the protected characteristic of a person with whom that individual associates.\textsuperscript{177} Title VII's authority supports recognition of this rule under Title VII's prohibition on sex discrimination, so that the statute prohibits discrimination based on the sex of an employee's domestic partner. Under that rule and because Title VII's statutory defenses to sex discrimination are not applicable with respect to same-sex-only domestic partner benefits, policies that limit domestic partner benefits to employees in same-sex couples constitute illegal sex discrimination under Title VII.

Title VII's protection from discrimination extends beyond an individual's own protected characteristics of race, color, religion, sex, and national origin. Federal courts "have broadly construed Title VII to protect individuals who are the victims of discriminatory animus towards third persons with whom the individuals associate."\textsuperscript{178} Under Title VII's prohibition on race discrimination, a number of courts have held that the statute protects an individual from discrimination by an employer because of that individual's association with another person of a particular race. The seminal case in this line of cases was Whitney v. Greater New York Corporation of Seventh Day Adventists.\textsuperscript{179} In Whitney, a white woman claimed that she suffered racial discrimination in violation of Title VII when her employer discharged her because of her social relationship with a black man.\textsuperscript{180} The employer sought to dismiss the claim on the ground that the employee had no standing to bring a race discrimination claim, as the complaint alleged the employer had discriminated on the basis of the race of the employee's friend.

\textsuperscript{177} The papers filed on behalf of Foray did not cite any cases holding that Title VII protects an individual from discrimination based on any protected characteristic of another person with whom she associates. See generally Memorandum of Law in Opposition to Defendant's Motion to Dismiss, Foray v. Bell Atl., 56 F. Supp. 2d 327 (S.D.N.Y. 1999) (No. 98-CV-3535 (Rpp)). The same authority also was not presented to the district court in Cleaves I or Cleaves II. See generally Brief of Plaintiff in Support of Motion to Reconsider the Ruling Denying the Claim of Sex Discrimination, and to Allow Plaintiff to File and Amended Complaint as Specified in Plaintiff's Motion., Cleaves v. City of Chicago, 69 F. Supp. 2d 969 (N.D. Ill. 1998) (No. 98-C-1219). The opinions in the cases do not cite or reference any such authority.

\textsuperscript{178} Tetro v. Elliott Popham Pontiac, Oldsmobile, Buick, and GMC Trucks, Inc., 173 F.3d 988, 994 (6th Cir. 1999).


\textsuperscript{180} See id. at 1365.
and not on the basis of the employee's race. The court disagreed, holding.

Manifestly, if Whitney was discharged because, as alleged, the defendant disapproved of a social relationship between a white woman and a black man, the plaintiff's race was as much a factor in the decision to fire her as that of her friend. Specifying as she does that she was discharged because she, a white woman, associated with a black, her complaint falls within the statutory language that she was "discharge[d] . . . because of [her] race."

The Southern District of New York thus recognized as cognizable under Title VII the claim that an individual suffers racial discrimination when an employer treats her adversely because of her relationship or association with an individual of a particular race. Subsequent published cases that presented claims of racial discrimination based on association have unanimously endorsed Whitney's holding.

Title VII's text prohibits an employer from discriminating "against any individual . . . because of such individual's race, color, religion, sex, or national origin." A claim of discrimination based on the protected characteristics of a person with whom an individual associates is not directed entirely, or even at all, at the individual's own protected characteristics. Nonetheless, Title VII's language has not been read literally as applying only to an individ-

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181. See id. at 1386.
182. Id. (emphasis added).
ual herself, so that it would preclude a discrimination claim based on association with another individual. As the statutory language is not qualified by a requirement that discrimination against an individual be based "directly" on one of that individual's protected characteristics, Title VII's protection extends beyond the individual to include protecting her from discrimination against herself because of the protected characteristics of a third party with whom she has a relationship or association. An employer who discriminates against an employee on the basis of a protected characteristic of another person with whom the employee associates "reacts adversely" to the employee's own protected characteristic as it relates to the third party's protected characteristic. The "net effect" is that the employer has discriminated against the employee on the basis of her own protected characteristic.

The rule that Title VII prohibits discrimination against an individual because of the protected characteristic of individual with whom she associates has been applied mostly with respect to claims

185. See Tetro, 173 F.3d at 994-95; Parr, 791 F.2d at 892 ("It makes no difference whether the plaintiff specifically alleges in his complaint that he has been discriminated against because of his race.").

186. See Tetro, 173 F.3d at 994-95. Title VII is a broad, remedial statute enacted by Congress to eradicate prohibited bases of discrimination in employment, and "the duty of the courts [is] to make sure [that] the Act works, and that the intent of Congress is not hampered by a combination of a strict construction of the statute in a battle with semantics." Parr, 791 F.2d at 892 (quoting Culpepper v. Reynolds Metal Co., 421 F.2d 888, 891 (5th Cir. 1970)). "Title VII's plain language does not address this precise point; but, read as a whole, it does." Deffenbaugh-Williams, 156 F.3d at 588. A prohibition on discrimination based on an individual's associations is not contained in the express language of Title VII, but "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils." Oncale v. Sundowner Offshore Servs., Inc., 118 S. Ct. 998, 1002 (1998) (holding that Title VII's prohibition on discrimination because of sex extends to prohibit same-sex sexual harassment).

187. See Tetro, 173 F.3d at 905.

188. See id. "Where a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of his race." Parr, 791 F.2d at 892. In Gresham v. Waffle House, Inc., 586 F. Supp. 1442 (N.D. Ga. 1984), involving a discrimination claim that included an interracial marriage, the court held,

[i]f... the plaintiff... had been black, the alleged discrimination would not have occurred. In other words... but for [her] being white, the plaintiff[... would not have been discriminated against. This court cannot imagine what more need be alleged to bring [the plaintiff] within the plain meaning of Title VII's proscription of discrimination against an individual "because of such individual's race".

Id. at 1445; see also Rosenblatt, 946 F. Supp. at 300. In Rosenblatt, the court held, in a case involving an interracial marriage, that plaintiff stated a cognizable discrimination claim because "[i]f he had been black, his marriage would not have been interracial... [i]nherent in his complaint is the assertion that he has suffered racial discrimination based on his own race."
of racial discrimination. The question remains whether it extends to all types of discrimination prohibited by Title VII.

The Southern District of New York decided Whitney in 1975. The holding in Whitney, however, has taken root on a broader scale only more recently, as it has been recognized and adopted by multiple federal circuit courts. The Whitney line of cases remains surprisingly little known in employment discrimination law. Thus, few cases have sought to extend the rule to the other types of discrimination prohibited by Title VII. One federal district court, however, has held that the same rule applies to Title VII’s prohibition on national origin discrimination.

By simple analogy, a plausible argument can be made that the associational discrimination rule emanating from race discrimination cases applies to sex and the other types of discrimination prohibited by Title VII. The extension of the holding to Title VII’s national origin provision provides persuasive support for that argument. Still, analogizing is not necessary to conclude that the same rule prohibiting associational discrimination based on race under Title VII also applies to cases of associational discrimination based on sex. Under Title VII, the Supreme Court has held that “a distinction based on sex stands on the same footing as a distinction based on race.”

In a case alleging pregnancy discrimination, one federal district court has held that Title VII prohibits sex-based associational discrimination the same as it prohibits race-based associational discrimination. 189

189. Most of the cases recognizing and applying the rule have involved interracial marriages. See, e.g., Parr, 791 F. Supp. at 888; Rosenblatt, 946 F. Supp. at 298; Gresham, 586 F. Supp. at 1442. One case involved an employee’s claim of discrimination because he had a biracial child. See Tetro, 173 F.3d at 988. Marriage and family relationships generally receive greater deference and protection in the law than other types of relationships, but the rule in the Whitney line of cases has not been limited to marital and family relationships. For instance, Whitney involved a casual social relationship.” Whitney v. Greater New York Corp. of Seventh-Day Adventists, 401 F. Supp. 1363, 1365 (S.D.N.Y. 1975). The rule applies to any “relationship.” See Deffenbaugh-Williams, 156 F.3d at 589 (holding that the rule applies to a “relationship” alone as well as married relationships and upholding recovery in case in which plaintiff married her fiancé shortly before her discharge from her employment and could have alleged discrimination based on an interracial marriage but did not do so).

190. See supra note 183.

191. See Reiter v. Center Consolidated Sch. Dist., 618 F. Supp. 1458, 1460 (D. Colo. 1985) (“Discriminatory employment practices based on an individual’s association with people of a particular race or national origin are prohibited under Title VII.” (emphasis added)).

192. See Reiter, 618 F. Supp. at 1460.

193. Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1083-84 (1983). The only exception to this holding is when a distinction based on sex falls within one of the few defenses that Title VII provides to its prohibition on sex discrimination. Title VII does not provide these defenses with respect to racial discrimination. See id. at 1084.
discrimination. In *Nicol v. Imagematrix, Inc.*, the court concluded that a male plaintiff stated a cognizable claim when he alleged that his employer discriminated against him when it discharged him because of his wife's pregnancy. The court found the Title VII sex discrimination claim in *Nicol* "analogous to claims of discrimination based on interracial relationships." The *Nicol* court compared the plaintiff's claim to the case of "a white man who had been discriminated against because of his own race and the racial prejudices against white men who are married to a black woman." Correspondingly, the court concluded,

Mr. Nicol has stated a claim as a married man who has allegedly been discriminated against because of his own sex and the prejudices of the defendant against men who are married to pregnant women. Thus, just as the plaintiff in *Parr* was discriminated against because of his race, Mr. Nicol has been discriminated against because of his sex.

In challenging domestic partner benefits limited to employees in same-sex relationships as sex discrimination, an employee claims discrimination based on the sex of the domestic partner with whom she has a relationship, as well as based on her own sex. The above discussion demonstrates that such a claim of sex discrimination based on an employee's association with a person of a particular sex is cognizable under Title VII. This part now considers same-sex-only domestic benefits policies under Title VII authority specific to sex discrimination.

In most cases, a plaintiff challenging a same-sex-only policy as sex discrimination will not face a difficult task in establishing that an employer's policy discriminates on the basis of sex. Most policies, if they limit benefits to employees in same-sex couples, do so on their face by requiring that an employer and her domestic partner be of the "same sex" or the "same gender." These policies expressly base eligibility for domestic partner benefits on an

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197. Id. at 806.
198. Id. (emphasis added).
199. See supra text accompanying notes 125, 132, 158.
employee's sex and the sex of her domestic partner, as they compare to each other. On their face, such policies discriminate on the basis of sex. They are thus direct evidence of sex discrimination. To maintain a claim of sex discrimination, an employee also must establish that she and her domestic partner otherwise satisfy an employer's other criteria for qualifying for domestic partnership benefits (e.g., duration of relationship, exclusive commitment, residing together). By presenting a facially discriminatory policy and otherwise meeting the eligibility requirements for domestic partner benefits, an employee has established that "but for" her sex or the sex of her domestic partner—as they compare—her employer would compensate her with domestic partner benefits.

Once sex discrimination has been established, the inquiry shifts to the employer to demonstrate that a policy fits within any of the statutory defenses to sex discrimination provided by Title VII. The first statutory defense is the bona fide occupational qualification (BFOQ) defense. The BFOQ defense is inapplicable.

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200. See Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 121 (1985); see also UAW v. Johnson Controls Inc., 499 U.S. 187, 197 (1991) ("Respondent's fetal-protection policy explicitly discriminates against women on the basis of their sex. The policy excludes women with childbearing capacity from lead-exposed jobs and so creates a facial classification based on gender."); Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702, 711 (1978) (concluding that employer's policy requiring female employers to pay greater pension fund contributions than male employees was discriminatory on its face).

201. Cf. Manhart, 435 U.S. at 711 (explaining that "but for" plaintiff's sex, she would not be required to contribute as much to her employer's pension fund). Some policies that provide domestic partner benefits only to employees in same-sex couples may not explicitly mention "sex" or "gender." Instead, they may base eligibility on an employee's legal ability or inability to marry her domestic partner. See, e.g., Oracle Statement of Domestic Partnership, in Kohn, supra note 1, app. at 57 (requiring an employee and her domestic partner to acknowledge that "[w]e understand that Oracle domestic partner benefits are available to us only when legal marriage is not available to us in our state of residence," and making no reference to sex). By defaulting to state marriage laws and a couple's ability or inability to marry under those laws, such domestic partner benefit policies base eligibility on sex without stating so directly. Marriage laws, as multiple courts have recognized, discriminate on the basis of sex in restricting which couple can marry. See supra note 126. Thus, if policies that extend eligibility based on a couple's inability to marry under state law are not direct evidence of sex discrimination, they most likely establish a prima facie case of sex discrimination. See McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

202. Title VII provides that an employer may discriminate on the basis of "religion, sex, or national origin in those certain instances where religion, sex, or national origin is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise." 42 U.S.C. § 2000e-2(e)(1) (1994). The bona fide occupational qualification exception is written narrowly, and the Supreme Court has read it narrowly. See Johnson Controls, 499 U.S. at 201. It involves "objective, verifiable requirements that must concern job-related skills and aptitudes." Id.
to the sex discrimination question presented here, as the terms of a benefits plan have no connection to occupational qualifications.\textsuperscript{203}

The other statutory defense incorporates within Title VII the defenses provided in the Equal Pay Act.\textsuperscript{204} The Equal Pay Act prohibits wage differentials for equivalent work performed by men and women, unless the disparity in pay is based on (1) a seniority system, (2) a merit system, (3) a system which measures earnings by quantity or quality of production, or (4) "any other factor other than sex."\textsuperscript{205} The first three defenses are generally inapplicable to domestic partner benefits. Such benefits typically do not involve a seniority system or a merit system in any way. They also do not depend upon or vary according to an employee's quantity or quality of production. Domestic partner benefits typically are provided based on the fact of employment and without regard to quantity or quality of work,\textsuperscript{206} as long as an employee's relationship satisfies an employer's domestic partner benefits criteria.

The fourth defense—"any factor other than sex"—almost certainly would be raised by an employer. An employer can be expected to argue that a domestic partner benefits policy that limits benefits to employees in same-sex couples is not based on sex but rather on sexual orientation, marital status,\textsuperscript{207} or the ability of opposite-sex couples to marry legally and obtain spousal benefits. Such arguments would not withstand scrutiny in most cases, particularly because most policies that limit eligibility to same-sex couples expressly state that the domestic partners must be of the same sex.\textsuperscript{208} A court should be skeptical when an employer, on the one hand, explicitly bases eligibility for benefits on sex in the terms of its policy but then, on the other hand, argues that the policy is based on a factor other than sex.

\textsuperscript{203} Cf. Arizona Governing Comm. v. Norris, 463 U.S. 1073, 1085 n.13 (1983) ("The exception for bona fide occupational qualifications . . . is inapplicable since the terms of a retirement plan have nothing to do with occupational qualifications.").


\textsuperscript{206} As with other types of benefits, an employer might require that an employee work a minimum number of hours in a period or be employed for a minimum period of time before becoming eligible for domestic partner benefits.

\textsuperscript{207} Despite the fact that their policies expressly required that couples be of the same sex in order to be eligible for domestic partner benefits, the employers in Cleaves and Foray defended their policies as legal discrimination based on marital status or sexual orientation. See Revised Memorandum in Support of Defendant's Partial Motion to Dismiss Plaintiff's First Amended Complaint at 2-3, Cleaves v. City of Chicago, 68 F. Supp. 2d 963 (N.D. Ill. 1999) (No. 98-C-1219). See generally Memorandum in Support of Defendant's Motion to Dismiss, Foray v. Bell Atl., 56 F. Supp. 2d 327 (S.D.N.Y. 1999) (No. 98-CV-3525).

\textsuperscript{208} See supra text accompanying notes 126, 132, 158.
With respect to sexual orientation, nearly all domestic partner benefits policies make no reference to sexual orientation. It also is extremely unlikely that employers make any inquiry into the sexual orientation of an employee or the employee’s domestic partner. Accordingly, an employer most likely cannot credibly assert that its policy is based on sexual orientation. Despite the lack of inquiry, an employer still could be expected to argue that the fact that a couple is of the same sex means that its members are gay or lesbian (and that an opposite-sex couple necessarily means that its members are heterosexual), so that the sex-based classification of couples really amounts to a classification on the basis of sexual orientation. The mere fact that a couple has a particular gender composition is not ipso facto proof of the sexual orientations of its members. Individuals in same-sex relationships likely are gay or lesbian, but individuals and relationships differ. Many possibilities exist: a member of a same-sex couple may be gay or lesbian, bisexual, heterosexual, asexual, or simply unsure or questioning, or the relationship may be non-sexual. Not only is a sweeping generalization concerning sexual orientation that is based on a couple’s gender composition possibly inaccurate, Title VII condemns such generalization based on sex. It prohibits the use of sex as a general predictor for the existence of an otherwise legal factor on which to base an employment action. When an employer considers sex in such a manner, its policy is not based on a factor other than sex.

Same-sex-only domestic partner policies also do not act based on marital status in excluding opposite-sex couples. According to the standard argument that such exclusion is based on marital status, opposite-sex couples are denied couples’ benefits simply

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210. Such inquiry may be illegal in some states. See supra text accompanying note 99.
211. The Hawaii marriage case involved a statute that facially discriminated based on a couple’s gender composition. See Baehr v. Lewin, 852 P.2d 44, 60 (Haw. 1993). The Hawaii Supreme Court rejected an effort by the state to characterize all same-sex couples as homosexual and, conversely, to cast all opposite-sex couples as heterosexual. See id. at 51-52 & n.11, 61 & n.22. The court held that the classification would be analyzed as sex discrimination because the statute facially discriminated on the basis of sex. See id. at 60-61, 64-67.
212. Cf id. at 51 n.11 (discussing how “homosexual” and “same-sex” marriages are not synonymous).
213. Title VII’s “focus on the individual is unambiguous. It precludes treatment of individuals as simply components of a racial, religious, sexual, or national class.” Los Angeles Dept of Water & Power v. Manhart, 435 U.S. 702, 708 (1978).
214. Cf. id. at 712 (holding that a scheme using sex to predict longevity was based on no other factor but sex).
because they have not exercised their legal option to marry. Hence, because of their unmarried marital status, they are denied benefits. With respect to spousal benefits, this argument is true. Spousal benefits flow to an employee and her opposite-sex spouse when there is a lawful marriage; the lack of a marriage results in the denial of benefits to that couple. Thus, the denial of spousal benefits to an unmarried opposite-sex couple is based on the couple's unmarried marital status. However, the denial of domestic partner benefits to opposite-sex couples is not based on marital status because domestic partner benefits policies remove marriage as the prerequisite for obtaining couples' benefits. Domestic partnership, by definition, is a committed relationship that is an alternative to or substitute for marriage. Irrespective of whether a couple has formed a domestic partnership because of a legal inability to marry or a choice not to do so, all couples in domestic partnerships have the same unmarried marital status simply because they have not entered into a lawful marriage. Thus, all employees in domestic partnerships are similarly situated with respect to marital status.

The chief "factor other than sex" that an employer could be expected to assert is that a same-sex-only benefits policy is based on opposite-sex couples' legal ability to marry and thereby obtain spousal benefits. This argument reflects the "level the playing field" line of reasoning. However, an examination just below the surface reveals that this asserted neutral factor of the ability to marry is, in fact, a factor based on sex. One need only ask why, under current marriage laws, opposite-sex couples have the ability

215. See Memorandum in Support of Defendant's Motion to Dismiss at 4, Foray v. Bell Atl., 56 F. Supp. 2d 327 (S.D.N.Y. 1999) (No. 98-CV-3525) ("Had [Foray] and Ms. Muntzner chosen to marry, spousal coverage for Ms. Muntzner, as [Foray's] wife, would be fully available; because they have chosen not to, spousal coverage is unavailable.").

216. See Ayyoub v. City of Oakland, No. 99-02937, slip op. at 2 (Cal. State Labor Comm'r Oct. 27, 1997) (holding that unmarried opposite-sex and unmarried same-sex couples are "similarly-situated").

217. See, e.g., Foray, 56 F. Supp. 2d at 330 (stating that because same-sex couples are unable to marry, the policy at issue "does not discriminate between similarly situated men and women"); see also Memorandum in Support of Defendant's Motion to Dismiss at 1, Foray v. Bell Atl., 56 F. Supp. 2d 327 (S.D.N.Y. 1999) (No. 98-CV-3525) ("These criteria, of course, are based on the sensible and self-evident proposition that heterosexual employees can obtain coverage for their partners by getting married, an option not available to homosexual employees."); cf. Ayyoub, No. 99-0237, slip op. at 2. (quoting employer's response to discrimination complaint, in which the employer argued that a domestic partner benefits policy limited to gay and lesbian employees aimed to remedy their inability to marry their partners and thereby obtain spousal benefits).
to marry while same-sex couples cannot. The answer is clear: because of sex. As multiple courts have recently recognized, state marriage statutes facially discriminate on the basis of sex in providing which couples can marry legally and which couples cannot do so.218 Because marriage laws base a couple’s ability or inability to marry on sex, the ability to marry is a factor based entirely on sex. Thus, the defense that same-sex-only policies discriminate based on the ability of same-sex couples to marry only proves what it seeks to disprove: that the factor on which policies limited to same-sex couples base eligibility is sex. At bottom, the argument that the ability or inability to marry is a factor other than sex presents nothing more than a difference without a distinction. As the ability to marry is not based on a “factor other than sex,” it accordingly cannot serve as a defense to policies that limit benefits to same-sex couples. Because same-sex-only domestic partner benefit policies discriminate on the basis of sex and no statutory defense to sex discrimination can be established with respect to them, such policies constitute illegal sex discrimination under Title VII.

V. CONCLUSION

The number of employers offering domestic partner benefits to employees seems almost certain to continue to grow, as employers offer enhanced compensation packages to recruit and retain employees and as committed relationships that fall outside of the traditional male-female marriage model receive greater acknowledgment. In providing domestic partner benefits, employers face the question of whether those benefits should be extended to all employees or only to employees in same-sex domestic partnerships. In addition to concern about costs, the conception in some minds of domestic partnership as a parallel institution available only to same-sex couples as consolation for their inability to marry may cause some employers to limit domestic partner benefits to employees in same-sex relationships. However, such a limitation, depending on the terms of the policy and the applicable laws, may constitute illegal employment discrimination.

In most cases, ERISA most likely preempts the application of state and local discrimination laws to employee benefits and leaves

federal law to govern employee benefits. An employee may challenge the limitation on domestic partner benefits to employees in same-sex couples as sex discrimination under Title VII. Most same-sex-only policies facially base eligibility on sex—that is, on the employee’s sex as it compares to the sex of her domestic partner. Whereas two federal district courts have held that same-sex-only domestic partner benefits policies do not violate Title VII, the courts analyzed the claims differently and did not apply relevant Title VII law concerning discrimination based on an employee’s associations. In a little-noticed line of precedent, courts have held Title VII to prohibit discrimination not just against an individual employee because of one of her protected characteristics, but also against an employee based on the protected characteristic of a person with whom the employee maintains an association. Title VII authority also supports recognition of this rule under the statute’s prohibition on sex discrimination. Thus, an employee in an opposite-sex domestic partnership who has been denied benefits for her domestic partner can present a cognizable sex discrimination claim against a same-sex-only policy under Title VII: that her employer, in denying domestic partner benefits, discriminated against her based on the sex of the domestic partner with whom she associates. If the sex of the employee’s domestic partner had been different so that it was the same as the employee’s sex, the employee would have been granted benefits for her domestic partner. The described circumstance presents a patent case of discrimination based on sex. Because domestic partner benefits policies that limit eligibility to employees in same-sex couples discriminate on the basis of sex and these policies fail to satisfy any of Title VII’s statutory defenses to sex discrimination, they constitute a violation of Title VII’s prohibition on discrimination because of sex.