THE COMMONWEALTH OF MASSACHUSETTS
COMMISSION AGAINST DISCRIMINATION

MASSACHUSETTS COMMISSION
AGAINST DISCRIMINATION AND
ANNETTE WHITEHEAD-PLEAUX,
Complainants

v.

MCAD Docket No. **04-BEM-01593**
MCAD Docket No. **06-BEM-01307**

SHRINERS HOSPITAL FOR
CHILDREN,
Respondent

Appearances:

Wendy A. Cassidy, Esquire & Andrea L. Haas, Esquire for Annette Whitehead-Pleaux
Gregory Manousos, Esquire for Respondent Shiners Hospital for Children

DECISION OF THE HEARING COMMISSIONER

I. PROCEDURAL HISTORY

On June 16, 2004, Complainant, Annette Whitehead-Pleaux ("Whitehead-Pleaux" or "Complainant") filed a complainant (**04-BEM-01593)** with this Commission charging her employer, Respondent Shriners Hospital for Children ("Shriners" or "Respondent") with unlawful discrimination based upon her sexual orientation. On May 30, 2006, Complainant filed a second complaint against the Respondent (**06-BEM-01307)** charging that Respondent engaged in retaliatory conduct based upon Complainant's prior complaint of discrimination. On July 16, 2007 both charges were amended to include an additional charge of discrimination based upon associational sex discrimination in violation of Massachusetts General Laws, Chapter 151B, § 4(1) and Title VII of the Civil Right Act of 1990, as amended. The Investigating Commissioner consolidated the complaints and issued findings of probable cause on all claims. Attempts to

conciliate the case failed and the case was subsequently certified to public hearing. Prior to public hearing, Respondent filed a Motion to Dismiss based upon ERISA preemption of Complainant's claims. I denied Respondent's motion without prejudice to Respondent's assertion of its preemption defense at hearing. A public hearing was held before me on September 17 and 18, 2009.[1] After careful consideration of the entire record and the post hearing submissions of the parties, I make the following findings of fact, conclusions of law, and order.

II. FINDINGS OF FACT

1. Respondent Shriners is a charitable, non-profit hospital which specializes in providing treatment to children who have suffered serious burn injuries or who need acute orthopedic care. (Vol. I, pp. 19, 46, 211). There is no charge to patients and their families for the care they receive at Shriners. (Vol. I, p. 45). The Shriners network is comprised of twenty-two hospitals in the United States, Mexico and Canada, two of which are located in Boston and Springfield, Massachusetts. Shriners' Boston facility employs approximately three hundred employees. (Exh. J-11; Vol. I, pp. 42-43, and 185-205).

2. Each individual hospital within the Shriners network of hospitals has its own Chief Executive Officer and Chief Medical Officer. Each hospital also has its own Board of Directors. Shriners' overall administrative locus is in Tampa, Florida. The Shriners network is governed by a Board of Trustees located in Tampa, Florida. (Vol. I, p. 48).

3. Complainant Annette Whitehead-Pleaux ("Complainant") has been a resident of Massachusetts since "the early 90's." (Vol. I, p. 38). Complainant has resided in Worcester,

[1] At the time of hearing, and until September 17, 2010, the undersigned served as Chairman of the MCAD and was Hearing Officer in this matter. By way of special designation by the succeeding Chairman of the MCAD, the undersigned retained authority to issue this Hearing Officer decision.

Massachusetts with her spouse and their daughter, Eleanor, for that past five years. (Vol. I, pp. 30-31).

4. Complainant is a board certified Music Therapist (Vol. I, p. 48) who has studied and earned both a bachelor's degree and a master's degree in music therapy. (Vol. I, p. 39). Music therapy is an important part of the pain and anxiety treatment for Shriners patients and involves the use of music to accomplish a non-musical therapeutic purpose. (Vol. I, pp. 43 - 44).

5. Complainant is currently employed as a full-time Music Therapist by Shriners. (Vol. I, p. 43). Complainant was initially hired by Shriners in October 2001 to work on a part-time basis in Shriners' Boston hospital, located at 51 Blossom Street, Boston, Massachusetts. In approximately 2003 Complainant's part-time position was converted to full-time. (Exh. J-11; Vol. I, p. 40). Complainant has received several awards and commendations for her work at Shriners. (Vol. I, p. 47).

6. Complainant testified that she likes her job and articulated a number of reasons therefor. Included among those reasons are the types of treatment provided by Shriners to its patients, Shriners' philosophy of care, the opportunities for her to perform clinical research, Complainant's freedom to design the music therapy practice, the opportunities for her to "go out and guest lecture at colleges," and "the staff there are unlike anywhere else in … the friendships we have." (Vol. I, p. 46).

7. Complainant has performed her job in a satisfactory manner. Her annual evaluations reveal no criticism about her job performance and no one at Shriners has disputed that she was performing her job in a satisfactory manner. (Vol. I, p. 49).

8. Shriners offers a national PPO plan that is offered at each hospital within its system, and each hospital also has its own local HMO for its local network. (Vol. I, p. 186). In 2004

Shriners' medical benefit package included Harvard Pilgrim HMO, Tufts HMO, and Blue Cross Blue Shield PPO. Shriners also offered its Massachusetts employees an Aetna Dental Plan and a Davis Vision Discount Plan. (Vol. I, pp. 52, 186 - 192).

9. A PPO is a self-insured plan where the employer, in this case Shriners, is the insurer. Accordingly, Shriners holds the risk and pays the claims for employees enrolled in the PPO plan. Thus, although Blue Cross Blue Shield is the third-party administrator of Shriners' PPO plan, Blue Cross Blue Shield does not pay claims for Shriners. (Vol. I, p. 189). In contrast, the local HMOs are fully insured and pay the risk themselves. A local HMO is essentially an insurance product purchased by Shriners. In 2004 both Harvard-Pilgrim HMO and Tufts HMO defined what dependents, including spouses, were eligible for coverage. Shriners did not make that determination. (Vol. I, p. 187).

10. Both the PPO and HMOs offered by Shriners provide comprehensive health coverage for Shriners' employees. (Vol. I, p. 190). Employees covered under a HMO can chose only from doctors within a network. (Vol. I, p. 191). Out of pocket cost for HMOs are lower than PPO's because HMOs use a co-pay rather than a deductible payment system. (Vol. I, p. 190). Employees covered under a PPO have a wider selection of doctors. (Vol. I, p. 190). Generally, more Shriners' employees, approximately eighty percent, choose to be enrolled in the HMO plan over PPO plan. (Vol. I, p. 191).

11. Starting at least in 2004, Complainant was eligible for benefits afforded by Shriners to full-time employees. (Vol. I, p. 41). Upon commencement of her employment, Complainant was enrolled in the Harvard-Pilgrim HMO and the Aetna Dental Plan. (Vol. I, p. 52).

12. In April 1999 Complainant commenced a romantic relationship with Amy Jo Whitehead, the person who would become her spouse. ("Spouse"). (Vol. I, p. 32). Although not

specifically stated in testimony, based upon the evidence presented and the nature of this dispute, the Hearing Officer takes administrative notice that Complainant's Spouse is another female.[2]

13. Complainant and her spouse met in a gay marching band and maintained a dating relationship followed by a series of ceremonies, including a March 2001 civil union ceremony in Vermont and a "blessing of [their] union" at a Newton, Massachusetts church in October 2001. (Vol. I, pp. 31 – 33).

14. On May 17, 2004, Complainant, Annette Pleau,[3] married Amy Jo Whitehead in Massachusetts. Both changed their last names to Whitehead-Pleaux. (Exh. J-13 and J-11; Vol. I, pp. 33, 154). The marriage between Annette Whitehead-Pleaux and Amy Whitehead-Pleaux is a legally recognized marriage within the Commonwealth of Massachusetts. (Exh. J-11).[4] The couple's marriage occurred on the first day that same sex marriages were allowed to be performed in Massachusetts. (Exh. J-13). The Complainant testified that she and her spouse got married because of the emotional and spiritual commitment that they felt towards each other and to receive the "the protections that marriage afforded." (Vol. I, pp. 33-34). I credit that testimony. The Complainant and her spouse are parents to one child, Eleanor (also known as Ellie), who is adopted. (Vol. I. pp. 31, 35).

15. On May 12, 2004, prior to her Massachusetts marriage, Complainant notified Shriners that she would be married to Amy Whitehead on May 17, 2004 and, further, requested that Shriners add her new Spouse to Complainant's existing health, dental, and vision plans. (Exh. J-11; Vol. I, pp. 36, 53, 58). Complainant believed that she and her Spouse were eligible

[2] Although not entirely clear, the parties' Joint Exhibit 13 appears to also identify Amy Jo Whitehead as female.
[3] Joint Exhibit 13 identifies the Complainant's pre-marriage surname as "Pleau."
[4] Complainant notes, and the Hearing Officer takes administrative notice that in November 2003, the Massachusetts Supreme Judicial Court issued its decision in the case of Goodridge v. Department of Public Health and another, 440 Mass. 309 (2003) recognizing the Constitutional right of same sex couples to marry.

to receive spousal coverage under the medical, dental, and vision plans Complainant received through her employment at Shriners. (Vol. I, pp. 36-37).

16. In May 2004, Complainant's Spouse was employed as a private contractor for Rosie's Place in Boston where she received health benefits through her employment. Complainant's Spouse cancelled her own employer provided health coverage in anticipation of joining Complainant's Shriners provided medical coverage. (Vol. I, pp. 50-51).

17. Complainant properly followed Shriners' procedure for adding a spouse to her Harvard Pilgrim medical, Aetna Dental, and Davis Vision benefit plans. Complainant submitted her new marriage certificate, a change of life form, and insurance change form. (Exh. J-11, ¶ 7; Vol. I, pp. 35-36, 53, 54, 58).

18. Complainant submitted her paperwork for spousal benefit coverage to Donna Dozier, a staff member of Shriners' Human Resources Department. Ms. Dozier was very excited for the Complainant, congratulated the Complainant on her upcoming marriage, and informed the Complainant that there was nothing further that she needed to do. (Vol. I, pp. 53, 54).

19. At the time she requested to add her spouse to the Harvard-Pilgrim plan, Complainant was pleased with the Harvard-Pilgrim HMO. Complainant did not seek to add her Spouse to a PPO medical coverage plan at that time. (Vol. I, p. 112).

20. On May 18, 2004, the day after her marriage to her Spouse, Complainant received an email from Mary Jo Baryza, Boston Shriners Hospital Manager of Therapeutic Services. The email was originally sent to Ms. Baryza by Margaret Gazzara on May 13, 2004. (Vol. I, pp. 55-56). In May, 2004, Margaret Gazzara was the Director of Human Resource at the Boston Shriners Hospital for Children. (Vol. I, pp. 57-58, 254).

21. Ms. Gazzara's May 13, 2004 email advised Complainant that Shriners acknowledged the impending legalization of "same sex marriage in Massachusetts" but, despite their efforts, the Massachusetts Shriners hospitals did not "have an update regarding the organization's position." The email further advised that the Boston and Springfield Shriners hospitals were "beginning to get questions from employees as to whether or not married same sex couple can access [Shriners'] benefit programs." Finally, the email advised that Shriners was working on the issue but did not yet have any "guidelines and policies." (Exh. J-5).

22. Complainant testified that she became worried and was surprised by the email since she had no prior indication of any questions about her eligibility to obtain spousal coverage. (Vol. I, p. 56). I credit that testimony.

23. On June 16, 2004, Complainant received notification that approval of her request for spousal coverage was being held up at "headquarters" and that she should meet with Ms. Gazzara to obtain additional details. Complainant met with Ms. Gazzara on June 16, 2004. (Vol. I, p. 56-58).

24. Complainant testified that during the meeting with Ms. Gazzara on June 16, 2004 Ms. Gazzara informed her that Shriners had denied her request for spousal coverage. (Vol. I, pp. 58-62, 122-124). I credit that testimony.

25. Complainant testified that during the meeting she became worried because her Spouse had already cancelled coverage under her own employment plan. Complainant felt "crushed and unfit for work" and requested the remainder of her work day off from work. (Vol. I, p. 62). I credit that testimony.

26. During the meeting Complainant also requested a written documentation of the denial to provide to her Spouse's employer. Complainant hoped to have her Spouse reinstate

medical coverage through the Spouse's own employment. (Vol. I, pp. 63-64). Among other things, the letter from Ms. Gazzara stated "[c]urrently our legal department is analyzing same sex marriage and benefit determination has not been assigned yet." (Exh. J-4).

27. At the conclusion of the meeting on June 16, 2004, Complainant left work and, accompanied by her Spouse, filed a charge of sexual orientation discrimination with the Massachusetts Commission Against Discrimination. Complainant alleged that Shriners' denial of her application for spousal benefits constituted discrimination based upon her sexual orientation. (MCAD –Docket No: 04-BEM-01953; Exh. J-11).

28. On June 25, 2004 Complainant received an email from Janet Mulligan, Shriners Boston Hospital Administrator. The email advised Complainant that Ms. Mulligan had requested additional information from Shriners' Tampa, Florida headquarters about the "denial of benefits." Ms. Mulligan was advised by the Tampa headquarters Director of Human Resources, Melissa Gail Brannon, that Complainant's request was not denied and is under consideration. The email also advised that the "request is going to the Board of Trustees next week" and that there will be "a definite answer" by "July 13th or so." Ms. Mulligan offered to contact Complainant with any additional information. (Exh. J-5).

29. Melissa Gail Brannon is a twenty-two year employee of Shriners and works in Shriners' Tampa, Florida headquarters. (Vol. I, pp. 180-181). Ms. Brannon has held the position of Human Resource and Benefits Manager since February 2001. (Vol. I, pp. 180-181).

30. Changes to Shriners' plans are made by the Shriner's Board of Trustees ("the Board") in Tampa, Florida. The Board meets approximately four times per year. (Vol. I, p. 183). Eligibility changes first go to the Salary and Personnel Committee which is a Board

subcommittee. (Vol. I, p. 184). Insurance changes are not made at the local hospital level. (Vol. I, p. 186).

31. Emails between Ms. Brannon and Ms. Gazzara on June 30, 2004 and July 1, 2004 indicate tacit approval of Complainant's request for spousal coverage but indicated that final determination depended on the outcome of "details" that were being analyzed by Shriners' outside counsel. (Exh. J-5, pp. RESP 274-275).

32. By email dated July 2, 2004, Complainant notified Ms. Mulligan and Ms. Baryza that she received information from Ms. Gazzara that "Tampa approved" her Spouse's placement on her health insurance, but her spouse would not be placed on her dental plan. (Exh. J-5, p. 0047).

33. By email dated July 9, 2004, Shriners Boston Hospital's Secretary, Bonnie Lassell, advised Complainant that she was notified by Harvard Pilgrim that they received and were processing Complainant's paperwork. Ms. Lassell indicated that she hoped Complainant would be in the Harvard-Pilgrim system by "next week." (Exh. J-5, p. 0048).

34. By email to Ms. Mulligan dated July 20, 2004 Complainant inquired about the "outcome of the Board of Trustees meeting." (Exh. J-5, p. 50). Ms. Mulligan responded that she had not received any information regarding the Board of Trustees' meeting. (Exh. J-5, p.51). By email dated August 6, 2004 to Ms. Mulligan and Ms. Gazzara, Complainant again inquired about the outcome of the Board of Trustees' meeting. (Exh. J-5, p.52). By email dated August 6, 2004, Ms. Mulligan informed Complainant that it was her understanding that same sex spousal benefits were approved, but that the Massachusetts same sex law would not apply to "national contract (like dental and maybe vision)." (Exh. J-5, p.53).

35. Shriners' internal review of same-sex spousal coverage included consultation and review with outside ERISA counsel, review by Shriners' internal legal department and Board of

Trustee review and approval. (Vol. I 214, pp. 9-14). Ms. Brannon testified that Shriners received Complainant's request for coverage "right at the time they were changing the law in Massachusetts" which occurred in May, 2004. (Vol. I, p. 213). Confusion followed within Shriners' administrative ranks. (Vol. I, pp. 223-224). Ms. Brannon testified that since Massachusetts "was the first state to adopt gay marriage … it was very new for [Shriners]." (Vol. I, p. 214). "[Shriners] had to go through a consult with outside ERISA counsel … [and] go through a consult with our board to make a determination of how this affects Shriners and their plans and their employees in Massachusetts." Id. Several individuals, including the Vice President of Human Resources, Kathy Dean, weighed in to determine what would constitute an appropriate course of action.

36. During the second week of July 2004, the Shriners' Board of Trustees in Tampa, Florida decided not to modify the definition of "spouse" under PPO plans, but to provide coverage for same sex spouses in Massachusetts HMO plans to comply with Massachusetts law. (Vol. I, p. 216). Shriners uses a national "opposite gender" definition of "spouse" across the seventeen states in which it has hospitals. (Vol. I, p. 210). In reaching its decision not to modify the definition of "spouse" for PPO plans, Shriners determined that there would be an "administrative burden" of opening up the definition of "dependent" which would open Shriners to "ERISA discrimination issues." (Vol. I. pp. 207-208). For example, if the definition of "dependent" is changed for same-sex spouses, other employees may believe that they too should have the definition expanded to include their elderly parents, ex-spouses and domestic partners. Opening up the definition of "dependent" to include same-sex spouses would make it "harder [for Shriners] to draw a line in the sand." (Vol. I, pp. 208 – 209, 211).

37. By email dated August 9, 2004 Ms. Gazzara informed Complainant that "[a]pproval was granted to allow same sex marriage couples to be covered under the HMO plans in Mass." Ms. Gazzara further stated that "under Federal Law the Shriners Dental plan does not comply with State Law." Ms. Gazzara also advised the Complainant that there was no determination available regarding Complainant's application for the Davis Vision plan. Ms. Gazzara informed the Complainant that she sent an email to Ms. Brannon in Tampa, Florida, and would send Complainant an answer regarding coverage under the Davis Vision plan as soon as she received that information. Finally, Ms. Gazzara stated that she understood the Complainant's Spouse was enrolled in the Harvard HMO on July 6, 2004 retroactive to the date of Complainant's marriage on May 17. (Exh. J-5, p .55).

38. Complainant received no follow up from Shriners regarding the availability of Davis Vision coverage for her Spouse, and learned about her Spouse's eligibility for that plan "a couple years" later during a conversation with the Shriners Boston Hospital's new Human Resources Director, Maureen Huffman. (Vol. I, pp. 94-96). Complainant failed to take any action towards obtaining such coverage because she was focused on the anticipated birth and adoption of her daughter at that time. (Vol. I, pp. 95-96).

39. On August 20, 2004, Complainant requested from Ms. Gazzara copies of the plan documents for the Aetna Dental Insurance and Davis Vision Discount plan offered by Shriners to its employees. (Vol. I, pp. 78-79; Exh. J-5, p. 56). Complainant testified that she was not provided the requested documents. (Vol. I, pp. 103-104).

40. Effective December 31, 2005, Harvard-Pilgrim HMO was eliminated as a medical plan option for employees working at Shriners Hospital for Children in Boston. (Exh. J-11; Vol. I, pp. 100, 112).

41. In January 2006, the two medical plans offered to Shriners employees in Massachusetts were limited to one HMO (Tufts) and the PPO (Blue Cross Blue Shield). (Exh. J-5 and J-11).

42. On December 1, 2005, Shriners informed Complainant that there had been no change and that same sex spouses are still ineligible to participate in the Blue Cross Blue Shield PPO. (Exh. J-5; Exh. J-11).

43. On May 30, 2006, Complainant filed a second charge of sexual orientation discrimination against Shriners at the Massachusetts Commission Against Discrimination (MCAD Docket No. 06-BEM-01307). (Exh. J-11).

44. In 2006 Complainant was allowed to enroll herself and obtain spousal coverage in the Tufts HMO medical plan. (Exh. J-5; Exh. J-11).

45. Complainant testified that she sought therapy and counseling prior to, and concurrent with events pertinent to this case. Complainant's therapy addressed issues related to and unrelated to this case. (Vol. I, pp. 142 - 145). Complainant testified that, as of the time she responded to discovery on January 5, 2007, she had not sought counseling or therapy due to Shriners' failure to provide her and her Spouse with spousal coverage. (Vol. I, p. 150). By the time of Complainant's deposition on March 28, 2007, approximately ninety percent of Complainant's therapy addressed personal issues unrelated to this case; only ten percent of the therapy was for issues related to this case. (Vol. I, pp. 142-145). Complainant testified that at the time of hearing approximately sixty percent of her therapy and counseling involved treatment for personal matters unrelated to this case; only forty percent of the therapy was for issues related to this case. (Vol. I, p. 143-144). I credit that testimony.

46. Complainant's Spouse testified that Complainant has "a couple of stomach conditions that are exacerbated by stress … when things flair up here, like … with the hearing and this whole process… . She has acid reflux and IBS. … She doesn't sleep well at night. She stays on the computer a lot because she says she can't sleep, her mind's racing and racing." (Vol. I, pp. 165-166). Complainant's Spouse also testified that Complainant had headaches and would cry in the mornings before work. (Vol. I, p. 161). I credit Complainant Spouse's testimony.

47. Complainant experienced bouts of crying and plateaus of calm. Complainant's increased stress level, sleeping difficulties and bouts of crying would resume when she had to participate in events related to the processing of this case. (Vol. I, p. 166).

48. Complainant testified that she felt upset about not having the same coverage as her heterosexual co-workers and felt like a second class citizen again everyday that she walked into work. (Vol. I. p. 102).

49. Complainant's co-worker, Lisa Donovan, started at Shriners around the same time as Complainant, worked with Complainant every day and knew Complainant well. Ms. Donovan testified that Complainant was a "fantastic therapist" and she was "upbeat , friendly." (Vol. II, p. 275). Ms. Donovan testified that Complainant was excited about getting married to her Spouse in 2004. (Vol. II, p. 276). Ms. Donovan testified that, after Complainant applied for Spousal benefits for her Spouse in 2004, Complainant's demeanor changed to a person who was withdrawn and who placed an emotional wall around herself. Ms. Donovan also testified that Complainant became more solemn and serious in her interactions with co-workers. (Vol. II, pp. 281- 283). There were occasions when Complainant attributed her demeanor to matters unrelated to this case. (Vol. II, p. 286). I credit Ms. Donovan's testimony.

III. CONCLUSIONS OF LAW

Complainant alleges that Shriners discriminated against her based on her sexual orientation and on the basis of associational sex, in violation of G.L. c. 151B §4(1) and Title VII of the Civil Rights Act of 1990, as amended. Specifically, Complainant alleges that Shriners subjected her to disparate terms and conditions of employment when it (1) refused to allow her to obtain dental coverage for her Spouse; (2) initially denied and then failed to inform her that her spouse was eligible to use the vision discount benefit provided through Shriners; (3) failed to allow her to elect spousal coverage for the same full array of choices for medical plans provided to her heterosexual co-workers who marry people of the opposite gender; and (4) initially denied and subsequently delayed the placement of Complainant's Spouse on the Harvard-Pilgrim HMO.

The parties have asked the Commission to decide (1) Whether Complainant suffered employment discrimination in violation of M.G.L. c. 151B; and (2) What damages, if any, did Complainant suffer as a result of any employment discrimination by Shriners. Before we can reach the substantive dispute in this case, however, several jurisdictional issues have surfaced, each potentially capable of barring Commission determination in this matter. These jurisdictional issues are so intertwined with the factual and legal determinations, however, that we are compelled to conduct simultaneous analysis of the substantive and jurisdictional issues.

SHRINERS' MOTION TO DISMISS FOR LACK OF JURISDICTION BASED UPON ERISA PREEMPTION

Shriners argues that the Commission lacks jurisdiction to decide Complainant's claims since they are preempted, in their entirety, by the federal Employee Retirement Income Security Act ("ERISA"). In essence, Shriners submits that 1) ERISA preempts any state or common law claim that relates to an ERISA plan, including state law discrimination claims; 2) Complainant's

sexual orientation claim is wholly a state law claim since it is not recognized as a protected category under Title VII; and 3) Complainant's claim of associational sex discrimination is essentially a claim of sexual orientation discrimination under a theory of associational discrimination – a claim that is not actionable under Title VII and is, therefore, preempted by ERISA as a state law based claim. Shriners' motion to dismiss is premised on the argument that Complainant's claim should fail in all respects because the existence of an ERISA welfare plan is a critical factor in resolving this claim, and Complainant's entire cause of action relates to and arises out of Shriners' ERISA identified PPO and national dental plans.

Complainant argues that both her original and amended charges of discrimination encompass non-ERISA benefit plans and, therefore, are not preempted by ERISA. Complainant also argues that her claim for associational sex discrimination is actionable as a Federal claim under Title VII and, therefore, not preempted by ERISA. Within this complex landscape of legal questions we must now seek answers.

State courts are competent to decide whether ERISA has preempted a state law claim. Wright v. General Motors Corp., 262 F.3d 610, 615 (6th Cir. 2001). The Massachusetts Commission Against Discrimination is a court of competent jurisdiction and is therefore qualified to determine the ERISA preemption defense. Colonial Life & Acc. Ins. Co. v. Medley, 572 F.3d 22, C.A.1 (Mass. 2009).

Complainant's Associational Sex Discrimination Claim

The Federal Employee Retirement Income Security Act ("ERISA") is designed to supersede all state laws to the extent they "relate to" an employee benefit plan that fits within the definition of an ERISA plan. 29 U.S.C. §§ 1144(a), 1002(3). A claim is preempted by ERISA

where the existence of the ERISA plan is inseparably connected to any determination of liability under state law. Vartanian v. Monsantos Co., 14 F.3d 697, 700 (1st Cir. 1994). Indeed, there is very little argument that even a claim arising under the Massachusetts anti-discrimination statute, G.L. c. 151B, may be preempted by ERISA where such claim implicates an ERISA plan. See Cathey v. Fallon Clinic, Inc., 13 Mass.L.Rptr. 325 (Mass.Super. 2001) (Plaintiff's age discrimination claim is preempted in its entirety by ERISA because of the existence of an ERISA plan was a critical factor in establishing liability). However, to the extent G.L. c. 151B prohibits acts that are also prohibited under Title VII, preemption does not apply. See Shaw v. Delta Airlines, Inc., 103 S.Ct. 2890 (1983); See, also Tompkins v. United Healthcare of New England, Inc., 203 F.3d 90, 96-97 (1st Cir. 2000)(Claim under G.L. c. 151B is exempt from ERISA preemption to the extent that conduct prohibited by Massachusetts law would also violate Title VII).

In the instant case, Complainant has expressly asserted a distinct claim of sex discrimination, a recognized claim under Title VII. Complainant's sex discrimination claim is, however, couched as discrimination based upon her association with another female. Thus, the key question for us at this point is whether Complainant, by packaging her claim in this manner, raises a claim that is cognizable under both Massachusetts anti-discrimination law (M.G.L. c. 151B) and corresponding federal law (Title VII). The answer is no.

I, as do both parties to this matter, recognize the fragility of *stare decisis* in this area. We are, however, guided by both the inaction of the courts in directly addressing this issue and by the apparent limited attempts of the United States Equal Employment Opportunity Commission ("EEOC") to open the door to Title VII based associational sex discrimination claims. In doing so I fully acknowledge that "the EEOC's interpretation of Title VII, for which it has primary

enforcement responsibility ... [is] entitled to deference." EEOC v. Commercial Office Products Co., 108 S.Ct. 1666, 1671 (1988).

An associational sex claim becomes complicated when, as in this case, there is also a claim, indeed a primary claim, of discrimination based upon sexual orientation. Complainant attempts to shed light on this issue through the example of Cooke v. Nicholson, 2006 WL 842209 (EEOC 2006), an EEOC case. Yet, if we are to take any guidance from the Cooke decision, it is that sex discrimination may be found where there is evidence of sex discrimination that is clearly and independently discernable from the sexual orientation of the players.[5] Cooke offers no guidance that would suggest an inherent associational sex discrimination claim within a claim of sexual orientation discrimination. In fact, taking the case before us as an example, it appears that Shriner's policy equally prohibits a male married to another male from qualifying for the spousal benefits denied to Complainant. Thus, both females who associate with females through marriage and males who associate with males through marriage are treated equally under the policy. Any adverse result is not limited to the gender of the participants.

In this case Complainant's associational discrimination claim suggests that, because Complainant is married to a female, Shriners denied and delayed her benefit coverage in a manner different than it does for similarly situated women who are married to men. Conversely, Complainant would argue, Shriners' discriminatory conduct would not have occurred if Complainant were a man married to a woman. In the first instance, it is the sex of the person with whom Complainant is associated that is examined. In the latter, it is Complainant's own

[5] In Cooke, there was evidence that the female gay employee with whom Cooke associated was the only female employee in a plant of nine employees. Immediately upon commencing her job, the female employee was treated with disrespect by male employees who did not want to work with her. Rumors were started about a sexual relationship between Cooke and the female employee, and explicit sexual comments were targeted to Cooke and the female employee. In advancing the case on associational sex discrimination grounds, the EEOC determined that the evidence suggested a hostile work environment and other grounds that could support a claim of sex discrimination.

sex that is examined. In either case, it is the nature of the relationship between the two that gives rise to the controversy before the Commission. In other words, it is Complainant and her Spouse's relationship status as a married couple that raises the question of whether they were entitled to employment benefits. At the core of that question of marital status lies the sexual orientation of Complainant and her spouse. Sexual orientation is not a cognizable claim under Title VII. It is my conclusion that, while associational sex discrimination may deter preemption in some situations, this case does not present such a situation. To the extent Complainant's associational sex discrimination and sexual orientation claims relate to an ERISA defined benefit plan, the MCAD does not have jurisdiction to decide such claims.

The ERISA status of Shriners' Benefit Plans

Shriners contends that Complainant's claims are preempted by ERISA and must fail since they relate to an employee benefit plan. A claim under G.L. c. 151B may be preempted by ERISA where they implicate an ERISA plan. See Cathey v. Fallon Clinic, Inc., 13 Mass.L.Rptr. 325 (Mass.Super. 2001)(Court held that plaintiff's age discrimination claim was preempted by ERISA because the existence of an ERISA plan was a critical factor in establishing liability). To the extent the employer provides employee benefits that are not regulated by ERISA, the application of state anti-discrimination laws to such non-ERISA benefits is not preempted. Catholic Charities of Maine, Inc. v. City of Portland, 304 F.Supp.2d 77, 93 (D.Me. 2004).

Courts have identified an ERISA employee welfare plan as "(1) a plan, fund or program (2) established or maintained (3) by an employer or by an employee organization, or by both (4) for the purpose of providing medical, surgical, hospital care, sickness, accident, disability, death, unemployment or vacation benefits, apprenticeship … (5) to participants or their beneficiaries."

Wickman v. Northwestern Nat'l Ins. Co., 908 F.2d 1077, 1082 (1st Cir. 1990) (quoting Donovan v. Dillingham, 688 F. 2d 1367, 1370 (11th Cir. 1982)).

Only two of the plans involved in this case appear to meet ERISA's exhaustive definition. Evidence at hearing established that the Harvard-Pilgrim HMO, the Tufts HMO and the Davis Vision plans are neither established nor maintained by Shiners or an employee organization. The record is instructive on this issue. Melisa Brannon, Shriners' Human Resources and Benefits Manager, a twenty-two year employee in Shriners' Tampa, Florida headquarters, testified that"[t]he HMOs are what we call fully insured plans which means we have purchased the insurance product from that company, so we purchased a Tufts or we purchased a Harvard." (Vol. I, p. 187). She also testified that in "[t]he state plans or the HMOs that are fully insured, the carrier holds the risk. We've just bought a product from them, they hold the risk." (Vol. 1, p. 189). There was no evidence that Shriners engaged in any activity that would suggest they maintain either plan. Similarly, the Davis Vision plan is a discounted benefit that is available to Shriners' employees and their families, but which is neither established nor maintained by Shriners. (Vol. I, pp. 227-228). On the other hand, the PPO plans (Blue Cross Blue Shield, and Aetna Dental) are established and maintained by Shriners. The PPO plans, as Ms. Brannon testified, are "self-insured plan[s], basically we are the plan. The employer is the insurance company but you can have a third party administrator that processes your claims… . We hold the risk; that means we pay claims. … Blue Cross Blue Shield … is not paying claims for us; they're just administering the plan. We are the insurance company." (Vol. I, p.189). Shriners even instructed Aetna, its dental plan administrator, on how to define "spouse" (Vol. II, pp. 249-250). That level of authority over the plan indicates ownership and maintenance. It is my conclusion that the Harvard-Pilgrim HMO medical plan, the Tufts HMO plan, and the Davis

Vision Discount plan are not ERISA plans as they are neither established nor maintained by Shriners. However, Shriners' Blue Cross Blue Shield PPO and Aetna Dental plans meet ERISA definition of an ERISA plan.

As to the plans that are ERISA plans, it must next be determined whether the action "*relates to*" those employee benefit plans. A claim is expressly preempted by ERISA where a plaintiff, in order to prevail, must plead, and the court must find, that an ERISA plan exists. Ingersoll-Rand Co. v. McClendon, 498U.S. 133(1990). Second, a claim may be preempted if it conflicts with a cause of action provided by ERISA. Id. at 142. Shriners' PPO plans satisfy the first test because, in order to determine liability involving Shriners' PPO plans, the Complainant has alleged the existence of such plans, which I have determined meet the definition of ERISA plans. Claims relating to Shriner's PPO plans are therefore preempted by ERISA and are beyond the reach of MCAD's determination.

The final step in this analysis is to inquire whether the claims involving Shriners' non-ERISA plans somehow "relate to" the ERISA plans and are, thereby, preempted. There is nothing in this body of law that would suggest such wholesale preemption merely because an ERISA plan is also involved in the dispute. Preemption of the non-ERISA related claims fails even under the Ingersoll-Rand "relates to" analysis since we do not have to recognize the existence of an ERISA plan to proceed with these claims. Further, there is no indication that proceeding with these claims would conflict with a cause of action under ERISA. To decide otherwise, I would be compelled to penalize a complainant who asserts multiple grounds as the basis for discrimination by finding that, as long as one of the plans in question falls into the category of an ERISA plan, all of Complainant's claims must fail, even those related to non-ERISA plans. The effect of such a penalty would reach far beyond the immediate complainant.

I conclude that Complainant's claim of discrimination on the basis of sexual orientation as it relates to the Harvard HMO plan, Tufts HMO plan, and Davis Vision Discount plan are properly before me and may be decided by the MCAD.

COMPLAINANT'S CLAIM OF DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION

Complainant alleges that Shriners discriminated against her on the basis of her sexual orientation in violation of G.L. c. 151B § 4 by (1) refusing to allow her to obtain dental coverage for her wife; (2) denying then failing to inform her that her Spouse was eligible to use the vision discount plan provided through the hospital; (3) failing to allow her to elect spousal coverage from the full array of choices for medical benefit plans provided to her heterosexual co-workers who marry spouses of the opposite gender; and (4) denying and then delaying the placement of her Spouse on Complainant's Harvard HMO plan. Complainant alleges that she suffered out of pocket expenses and emotional distress damages as a result of Shriners' discriminatory conduct.

Massachusetts General Laws, c. 151B, §4, 1 prohibits an employer from providing different benefits and privileges of employment based upon the sexual orientation of an employee. The statute makes it unlawful "[f]or an employer, by himself or his agent, because of the … sexual orientation … of any individual to … discriminate against such individual in compensation or in terms, conditions or privileges of employment, unless based upon a bona fide occupational qualification." Id. Absent direct evidence of an unlawful motive based on sexual orientation, as in this case, the Commission analyzes a claim utilizing the burden-shifting framework set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 972 (1973) and adopted by

the Supreme Judicial Court in Wheelock v. Massachusetts Commission Against Discrimination, 371 Mass. 130 (1976).

In order to establish a prima facie case of discrimination based upon sexual orientation in the absence of direct evidence, the Complainant must demonstrate that (1) she is a member of the relevant protected class; (2) she was satisfying the normal requirements of her job: (3) she suffered an adverse employment action; and (4) she was treated differently from other people outside of her protected class. Blare v. Huskey Injection Molding Systems, Boston, Inc., 419 Mass. 437, 441; Henderson v. Burlington Coat Factory Warehouse of Braintree, Inc., 72 Mass.App.Ct. 1105, 889 N.E.2d 451 (2008)(citing Trustees of Health & Hospitals of Boston, Inc. v. Massachusetts Commission Against Discrimination, 449 Mass. 675,682 (2007).

I conclude that Complainant has established a prima facie case of discrimination based upon sexual orientation with respect to her spouse's participation in non-ERISA benefit plans. Complainant has demonstrated that she is a member of a protected category based upon her sexual orientation. She is a lesbian who was hired by Shriners in October 2001. She has satisfactorily performed her job, as evidenced by her annual performance evaluations and the absence of any criticism of her work by Shriners. Indeed, Complainant has received recognitions and awards for the work she has performed as a Music Therapist at Shriners. As a full-time employee, Complainant was eligible for benefits offered by Shriners to its full-time employees. Complainant married another female on May 17, 2004, a marriage that was, and is, lawful under the laws of the Commonwealth of Massachusetts. Complainant's sexual orientation was known to Shriners' managers. On May 12, 2004, Complainant notified Shriners' Human Resource personnel, Donna Dozier, about her impending marriage on May 17, 2004, and informed Ms. Dozier that Complainant intended to add her female spouse to her health care coverage plans.

Prior to her marriage, Complainant received medical related coverage under Aetna Dental plan, Davis Vision Discount plan, and Harvard-Pilgrim medical insurance plan. Complainant's spouse, who was also enrolled in medical related coverage plans through her own employer, terminated that coverage in anticipation of being added to Complainant's plans. Complainant testified that the family plans offered through Shriners would have provided some cost savings to her family.

Complainant was subjected to adverse employment action as her expected family coverage failed to materialize as she expected and as was provided to her co-workers who were in opposite gender marriages. Despite providing Ms. Dozier with the necessary paperwork to add Complainant's Spouse to Complainant's existing Harvard-Pilgrim plan, Aetna Dental plans and Davis Vision plan, Complainant faced denials, delays and was required to take steps that her co-workers in opposite-gender marriages did not have to undergo. For example, on May 18, 2004 Complainant was advised by Ms. Dozier that there may be a problem with her benefits request. On June16, 2004 Shriners' Boston Director of Human Resource, Margaret Gazzara, informed Complainant that her spousal benefits were denied. On June 25, 2004 the Boston Shriners Chief Operating Officer, Janet Mulligan, informed Complainant that the decision whether or not to cover her Spouse would be decided at the upcoming Board of Trustees meeting in Tampa, Florida. On August 9, 2004 Shriners informed Complainant that partial approval was granted to allow spousal coverage under the Harvard-Pilgrim plan. Complainant was also informed that her request for dental coverage was denied and that no determination had been made regarding her request for vision coverage.

The chronology demonstrates that Complainant was subjected to adverse terms and conditions of her employment. Contrary to the automatic coverage approval afforded to

heterosexual couples in Massachusetts, Complainant was met with undue delay in receiving medical insurance coverage for her spouse and outright denial of dental coverage. Additionally, she was denied enrollment in the discount vision plan and, only by pure happenstance several years later, learned that her Spouse was eligible to participate in that plan. Complainant was required to engage in a series of follow up activities. She had to wait until after a review by the Board of Trustees at their next scheduled meeting to learn if she would be provided spousal coverage. Testimony at hearing established that lawfully married Massachusetts heterosexual couples were not subjected to such reviews and follow up activities. The chronology clearly demonstrates that Complainant was treated differently from individuals who are not members of her protected category who, according to testimony at hearing, were allowed spousal coverage once they marry.[6] Complainant has established a *prima facie* case of discrimination.

Once Complainant has established a *prima facie* case of discrimination based upon sexual orientation, a presumption of discrimination arises and the burden shifts to Respondent to articulate a legitimate non-discriminatory reason for its actions. Blare, 419 Mass at 441. Rebutting the presumption of discrimination is a less than onerous task. Id. Yet, rebuttal requires more than mere articulation. It must be supported by credible evidence. Lewis v. Area II Homemaker for Senior Citizens, 397 Mass. 761 (1986). Respondent has met its burden.[7] Explaining the delay, Ms. Brannon testified that Shriners received Complainant's request for coverage "right at the time they were changing the law in Massachusetts" which occurred in May, 2004 (Vol. I, p. 213). Confusion followed within Shriners' administrative ranks. Ms.

[6] Shriners has failed to negate this *prima facie* showing by arguing that ex-spouses in Massachusetts and common law spouses in other jurisdiction are also denied spousal coverage. Similarly situated must be limited to those who, like Complainant and her spouse, are considered legally married under the laws of the Commonwealth of Massachusetts.

[7] Shriners primarily proffers legitimate non-discriminatory reasons to address the Blue Cross Blue Shield and Aetna Dental plans. Claims related to those plans are preempted by ERISA and, therefore, those articulations are not deemed pertinent to this analysis.

Brannon testified that since Massachusetts "was the first state to adopt gay marriage … it was very new for [Shriners]." (Vol. I, p. 214). "[Shriners] had to go through a consult with outside ERISA counsel … [and] go through a consult with our board to make a determination of how this affects Shriners and their plans and their employees in Massachusetts." Id. Several individuals, including the Vice President of Human Resources, Kathy Dean, weighed in to determine what would constitute an appropriate course of action. Shriners also presented testimony that the issue was submitted to its Salary and Personnel Committee and then to its full Board of Trustees. Ms. Brannon testified that the Board meeting was next scheduled to be held in July, 2004. This confusion and period of analysis, according to Shriners, explains the failure in providing Complainant's spousal coverage in a timelier manner.

Shriners has articulated a legitimate non-discriminatory reason for failing to provide timely health and vision coverage to the Complainant's Spouse. Complainant must now prove by a preponderance of the evidence that Shriners' articulated reasons constitute pretext for unlawful discrimination. Lipchitz v. Raytheon Co., 434 Mass. 493, 504 (2001). Shriners' articulation of confusion, miscommunications and delays caused by its review does not present a legitimate reason for failing to provide Complainant's spousal coverage in the same manner and by the same process it used to provide coverage for opposite-gender couples.

There is no evidence that Shriners' confusion resulted from late notice or ignorance about the change in Massachusetts law which authorized same-sex marriage. Instead of permitting Complainant to obtain coverage under the HMO and Vision plan, Shriners chose to seek counsel and conduct research into eligibility under all its benefits plans. Due to the administrative difficulty in changing the PPOs to adapt to, and comply with, the laws of all seventeen states in which Shriners exists, and so as not to open the door for others to make similar request for

dependent coverage, Shriners chose to did not make any changes to its PPO plans. For unexplained reasons, Shriners also delayed its conformance with Massachusetts law even for its non-PPO plans. Unintended as it may have been, Ms. Brannon's testimony regarding Shriners' need to "draw a line in the sand" to determine who would be covered by its PPO plan accurately describes the source of Shriners' culpability in this case. Unfortunately, while Shriners struggled to decide who would be covered under its plans, Complainant and her Spouse landed on the wrong side of the eligibility line in the sand, at least for a significant period of time.

I am also unconvinced by Shriners' articulated legitimate non-discriminatory reasons, based upon the chronology of events. Shriners first denied complainant's request for spousal coverage without any basis. Indeed, it was not until one and a half months later when complainant requested a written memo explaining her denial that Ms. Mulligan requested an explanation from the Tampa headquarters; to which Shriners' Tampa headquarters responded that it was reviewing Complainant's request. Shriner's initial denial occurred prior to the conclusion of the review and, therefore, the study played no role in the initial denial.

I find also that Shriners' initial denial was erroneous and the delay unnecessary. Shriners is a sophisticated multi-jurisdictional organization with experienced and knowledgeable personnel. Ms. Brannon testified that, as soon as Shriners learned that there was a change in the Massachusetts law, Shriners knew it needed to make changes to accommodate the change in the law. Ms. Brannon testified that they started research on the Massachusetts law changes *even before* they received Complainant's request for spousal coverage. Based also on Ms. Brannon's testimony, Shriners practice was to not make changes to its national (PPO) plans to adapt to state laws but to make necessary accommodations for its non-ERISA plans. Taken together, this shows that Shriners knew its Harvard-Pilgrim HMO, Tufts HMO and Davis Vision Discount

plans were not ERISA plans. Shriners had adequate notice of the change in law and had time to make all necessary administrative changes to prepare for employees' coverage requests. Inexplicably, Complainant was unable to obtain even the Harvard-Pilgrim and Davis Vision coverage she sought in May, 2004, did not receive Harvard-Pilgrim coverage until July, 2004, and was never informed that Shriners' decision to deny her vision coverage had been reversed.

I am also unconvinced by Shriners' argument that it had to await a decision by its Board of Trustees. Ms. Brannon testified that in 2004 both Harvard-Pilgrim HMO and Tufts HMO defined what dependents, including spouses, were eligible for coverage. Shriners did not make that determination. In fact, Ms. Brannon testified that both HMOs changed their definition of spouse to include same sex spouses as soon as Massachusetts recognized same sex marriage as legal. Since Shriners neither established nor managed the HMOs, it was not their responsibility to determine whether same sex spouses were covered. Furthermore, if Shriners had any doubts about whether same sex couples were covered under the Harvard-Pilgrim and Tufts HMOs, all they needed to do, as they eventually did, was to simply call the Massachusetts HMOs and vision plan to get those answers. Shriners' responsibility was to submit Complainant's application to the Harvard-Pilgrim HMO and to the Davis Discount Vision plan, as it did for heterosexual married couples. Shriners' only additional responsibility, if required at all, would have been to submit Complainant's verification of marriage. There is no evidence to support a non-discriminatory reason for Shriner's delay in facilitating coverage for the Complainant and her Spouse, or why Complainant was never notified of her Spouse's eligibility to enroll in the Davis Vision plan.

I find that Complainant has established that Shriners failure to provide her timely coverage of medical and vision coverage was a pretext for unlawful discrimination based on her sexual orientation. I find no evidence of retaliation.

IV. REMEDY

Complainant seeks damages for out of pocket expense and emotional distress. The MCAD is authorized to award damages to compensate complainants for damages they suffer as a direct consequence of unlawful discrimination. M.G.L. c. 151B, § 5. This includes an award of damages to Complainant for lost wages and emotional distress as a direct and probable consequence of her unlawful treatment by Respondent. Bowen v. Colonnade Hotel, 4 MDLR 1007 (1982), citing Bournewood Hospital v. MCAD, 371 Mass. 303, 316-317 (1976); See Labonte v. Hutchins & Wheeler 424 Mass. 813, 824 (1997). Here, Complainant has presented no evidence of lost wages and her only out of pocket expenses relate to the ERISA preempted benefit plans. I am left only with deciding Complainant's claim for emotional distress.

To justify an award, the evidence of emotional distress must be sufficiently linked to the established instance of unlawful discrimination. Barrow v. Falmouth School Committee, et. al., 2 MDLR 1176, 1197 (1980); Stonehill College v. MCAD, 441 Mass. 549 (2004). An award for emotional distress damages "must rest on substantial evidence and its factual basis must be made clear on the record. Some facts that should be considered include: (1) the nature of the alleged harm; (2) the severity of the harm; (3) the length of time the complainant has suffered and reasonably expects to suffer; and (4) whether the complainant has attempted to mitigate the harm." Id. at 576.

Based on Complainant's credible testimony, as well as testimony from her Spouse and her co-worker, Lisa Donavan, I am persuaded that Complainant suffered compensable emotional distress as a result of Shriners' unlawful discriminatory conduct. Complainant testified about her extraordinary efforts to have a union with her Spouse and to have the benefits and recognition of marriage. Complainant and her Spouse participated in two ceremonies before they were finally able to obtain the lawful sanction of marriage. The couple was so excited by the prospect of a lawful union that they got married on the first day that same sex marriage was allowed in Massachusetts. Complainant testified that she looked forward to no longer being treated as "a second class citizen," as was the promise of the Goodridge decision. Complainant expected her Spouse to receive the benefits that heterosexual couples received, and to which Complainant and her Spouse believed they were entitled. Complainant submitted appropriate paperwork and Complainant's Spouse even terminated her own benefit coverage in anticipation of receiving coverage under Complainant's family plan. Complainant's expectations and excitement were short lived by Shriners' decision to deny her spousal coverage. That initial denial left Complainant feeling deflated and disappointed. Complainant testified that she felt so dejected that she did not feel that she could return to her job that day. Complainant credibly testified that she was once again made to feel like a second class citizen.

Complainant testified that her emotional turmoil continued when, after initially being denied and then waiting for two months for a final determination, she was told on July 2, 2004 that her Spouse would be added to her Harvard-Pilgrim plan. That notification was immediately tempered by the information that the Board of Trustees would still meet to decide the fate of her Spouse's coverage. The Board's decision was not forthcoming for another month. Complainant testified that she felt anxious, nervous and angry as her Spouse had terminated her own coverage

in anticipation of having Shriners' coverage. Complainant felt helpless to help her Spouse. Complainant had to take matters into her own hands, including scheduling meetings to determine whether coverage would be forthcoming and eventually contacting Harvard-Pilgrim directly to determine whether her Spouse was granted coverage. Complainant's emotional turmoil included uncertainty and uneasiness, frustration and anger. While there was also testimony regarding the exacerbation of Complainant's existing Irritable Bowel Syndrome and Acid Reflux condition, I am unable to speculate the degree to which Shriners' conduct contributed to those conditions. Those conditions are not included in my remedy determination.

Complainant's Spouse also testified that Complainant transformed into a very emotional person who often cried, showed visible signs of stress and was reluctant to go into work. Complainant's Spouse also testified that Complainant had headaches in the mornings before work and had difficulty sleeping. Complainant's co-worker, Lisa Donovan, who started at Shriners around the same time as Complainant, and who knew Complainant well, testified that Complainant's demeanor changed to a person who was withdrawn and who placed an emotional wall around herself. Ms. Donovan also testified that Complainant became more solemn and serious in her interactions with co-workers. Complainant sought professional help to assist her with the stress related to Shriners' discriminatory conduct.

I conclude that there is ample evidence that the Complainant suffered emotional distress that was directly and probably caused by Shriners unlawful conduct. An award of damages in the amount of $30,000.00 is an appropriate compensation.

V. ORDER

Respondent is hereby Ordered to:

(1) Cease and desist from engaging in discrimination based on sexual orientation in the future with respect to its non-ERISA employee benefit plans;

(2) Take the necessary steps to ensure that its Massachusetts employees are notified of their right to obtain spousal coverage in Shriners' non-ERISA benefit plans regardless of their sexual orientation; and

(2) Pay to Complainant within 60 days of receipt of this decision, the sum of $30,000 in damages for emotional distress, with interest thereon at the rate of 12% per annum from the date the complaint was filed until such time as payment is made, or until this order is reduced to a court judgment and post-judgment interest begins to accrue.

This Decision constitutes the final order of the hearing officer. Any party aggrieved by this order may file a Notice of Appeal to the Full Commission within ten days of receipt of this order and a Petition for Review to the Full Commission within thirty days of receipt of this order.

SO ORDERED, this 5th day of November, 2010.

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MALCOLM S. MEDLEY
Hearing Officer