

NO. 25679

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

HAWAI'I CIVIL RIGHTS COMMISSION,)
)
Appellant,) CIVIL NO. 02-1-1703-07
) (AGENCY APPEAL)
v.)
) FIRST CIRCUIT COURT
RGIS INVENTORY SPECIALIST,) HONORABLE EDEN ELIZABETH HIFO
) JUDGE
Appellee.)
_____)

AMENDED BRIEF OF AMICI CURIAE
AMERICAN CIVIL LIBERTIES UNION OF HAWAI'I AND
AMERICAN CIVIL LIBERTIES UNION
IN SUPPORT OF APPELLANT HAWAI'I CIVIL RIGHTS COMMISSION;
CERTIFICATE OF SERVICE

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I. POINT OF ERROR

The trial court erred in ruling that sex discrimination does not include gender identity (i.e., one's sense of whether one is male or female) discrimination.

II. ARGUMENT

A. Discrimination Against Transgender People Is Pernicious, Pervasive, and Intrinsically Motivated by Sex-Based Considerations

Discrimination against transgender people causes them substantial harm. Employers routinely fire, refuse to promote or hire, harass, and otherwise disadvantage them in the terms and conditions of their employment – simply because they are transgender. Such discrimination is not limited to the workplace. Transgender people regularly confront acute and systemic discrimination in all other spheres of traditional concern in civil rights laws – housing, public accommodations, education, and credit.¹ Most egregiously, such discrimination often manifests itself in acts of violence.

The common thread running through all such discrimination is that it is intrinsically motivated by sex-based considerations. Transgender people suffer discrimination precisely because they depart from stereotypes about how men and women should look and act. Transgender people are treated as men who are too feminine or women who are too masculine.

1. Employment discrimination

In Maffei v. Kolaeton Indus., Inc., 626 N.Y.S. 2d 391 (N.Y. Sup. Ct. 1995), a female-to-male transsexual endured a hostile work environment because of his gender identity. An employee since 1986, he was “an exemplary employee, who executed his duties in a stellar fashion, was frequently praised about his work performance, and received salary increases and bonuses on a consistent basis.” Id. at 392. In 1994, he transitioned from female to male. Id. at 391. Afterward, the president of the company “began to degrade and humiliate him at the office, called him names, stripped him of his duties, ostracized him from the rest of the employees and in the presence of the office manager stated that [he] was ‘immoral and what [he] did was amoral.’” Id. at 392. The court recognized that “the creation of a hostile work environment as a result of derogatory comments relating to the fact that as a result of an operation an employee

¹ See Haw. Rev. Stat. §§ 302A-1001 (education); 489-2 and 489-3 (public accommodations and credit); 515-3 and 515-16 (housing).

changed his or her sexual status, creates discrimination based on 'sex,' just as would comments based on the secondary sexual characteristics of a person." Id. at 396. It concluded that "an employer who harasses an employee because the person, as a result of surgery and hormone treatments, is now of a different sex has violated our City prohibition against discrimination based on sex. In other words, an employee who has fulfilled a sexual identity urge by changing sex and is harassed because of such fulfillment is entitled to the law's protection against employer harassment." Id.

In Rentos v. OCE-Office Sys., 1996 WL 737215 (S.D.N.Y. Dec. 24, 1996), a federal court interpreting state law adopted the same conclusion. A male-to-female transsexual was disadvantaged in the terms and conditions of her employment, harassed, and fired because of her gender identity. Prior to her employment with the company, she began the process of transitioning from female to male. Id. at *1. In 1993, she was hired as a field services manager "based upon her qualifications and experience." Id. In 1994, she asked her employer to contribute its share toward ongoing health care expenses associated with her transition, which at first it refused to do. Id. at *1-*2. "Tension resulted almost immediately upon [her employer's] becoming aware of [her] condition." Id. at *1. "Without any basis in fact," "her immediate manager attempted to place her on probation, pending termination." Id. She received "negative and inaccurate" performance evaluations. Id. She was "questioned on each and every issue of her job performance." Id. at *2. Her employer "attempt[ed] to fire [her] 'right-hand person,' reassign[ed] [her] . . . and provid[ed] her with an inexperienced and unqualified team hired on a nepotistic basis." Id. at *1. She "became the target of vicious jokes and comments 'about her sex background and subsequent change.'" Id. Ultimately, she "was terminated, her belongings were packed up, and employees of [the company] were warned not to talk to [her] any further." Id. at *2. The court held that all such discrimination was actionable as a form of sex discrimination. Id. at *9 n.3.

In Enriquez v. West Jersey Health Sys., 777 A.2d 365 (N.J. Super. Ct. App. Div. 2001), a male-to-female transsexual was fired because of her gender identity. A physician, she was hired as the medical director of an outpatient treatment facility in 1995. Id. at 505. In 1996, she began the process of transitioning from male to female, having "felt like a woman trapped in a man's body from a very early age . . . [who] was called upon to act manly even though she did not feel masculine." Id. at 506, 509. She

“shaved her beard and eventually removed all vestiges of facial hair. She sculpted and waxed her eyebrows, pierced her ears, started wearing emerald stone earrings, and began growing breasts.” Id. at 506. She then “began manicuring and polishing her nails, growing long hair, and wearing a ponytail.” Id. After “extensive psychological counseling, extended planning for ‘transition,’ the use of contrahormonal therapy, hair removal, [and] living in the putative gender role full time,” she was diagnosed with gender dysphoria and underwent sex corrective surgery. Id. at 506-07, 510. Shortly after the start of her transition, the company confronted her “regarding their discomfort over her transformation.” Id. at 506. A vice president told her: “[S]top all this and go back to your previous appearance!” Id. Thereafter, she received a letter terminating her “without cause.” Id. at 506. She was not offered a new contract. Id. at 507. The vice president told her: “No one’s going to sign this contract unless you stop this business that you’re doing.” Id. Eventually, he told her “not to return to the office . . . and that her patients had been canceled for the next three months.” Id. Subsequently, the company told her patients that “they had no idea where [she] was . . . [and] that [she] might have stopped practicing medicine and that [they] should look for a new doctor.” Id. at 509. The court recognized that “‘sex’ embraces an ‘individual’s gender,’ and is broader than anatomical sex.” Id. at 515. In doing so, it noted that “[i]t is incomprehensible to us that our Legislature would ban discrimination against heterosexual men and women; against homosexual men and women; against bisexual men and women; against men and women who are perceived, presumed or identified by others as not conforming to the stereotypical notions of how men and women behave, but would condone discrimination against men or women who seek to change their anatomical sex because they suffer from a gender identity disorder.” Id.

Lie v. Sky Publishing Corp., 2002 WL 31492397 (Mass. Super. Ct. Oct. 7, 2002), is another case concerning a male-to-female transsexual who was fired because of her gender identity. In 1994, she was hired as an editorial assistant. Id. at *1. In 1998, she began to wear “traditionally female attire” to work. Id. At the time, she “[had] desired to live as a woman for a number of years, . . . [had] been diagnosed with gender identity disorder, . . . [was] engage[d] in psychotherapy, and . . . [was] tak[ing] hormones as part of her treatment.” Id. at *2. Shortly thereafter, her employer “request[ed] that she only

wear traditionally male attire while at work” “[to] compl[y] with what it perceived to be reasonable business policy.” Id. at *1. She declined to do so. Id. Subsequently, she received a letter instructing her to stop “dressing as a woman” and warning her that “failure to conform your attire may result in disciplinary action and/or termination.” Id. Nonetheless, she continued to depart from stereotypes about how men should dress. Id. Ultimately, she was fired. Id. The court noted that, “[h]ad she been born biologically female, [her employer] would not have demanded that she wear traditionally male attire and would not have fired her for failing to do so.” Id. at *5. Accordingly, it concluded that the discrimination that she suffered was a form of sex discrimination. Id.

2. Other types of discrimination

Housing. Hispanic AIDS Forum v. Bruno, 759 N.Y.S. 2d 291 (N.Y. Sup. Ct. 2003), concerns an HIV services provider that was evicted because it served transgender clients. In 1991, the Hispanic AIDS Forum (HAF) entered into a lease with a commercial landlord. Id. at 292. HAF shared bathrooms with other commercial tenants. Id. In 1999, one of HAF’s transgender clients was approached by an employee of a neighboring tenant and asked “why she was using the women’s bathroom.” Id. at 293. Shortly thereafter, another employee of the neighboring tenant told one of HAF’s employees that “they did not like ‘those men that look like women using the bathroom.’” Id. Subsequently, the lease expired. Id. at 292. Prior to its expiration, HAF negotiated a renewal with the landlord. Id. at 293. The landlord, however, refused to follow through, citing “complaints from other tenants and . . . issues with ‘men who think they’re women are using the women’s bathrooms’ and ‘women who think they’re men using the men’s bathrooms.’” Id. The landlord also “made several offensive comments and ridiculed HAF’s clients.” Id. Shortly thereafter, HAF was evicted.² Id.

Public accommodations. Renee Richards, a male-to-female transsexual, was denied the opportunity to compete in the women’s division of the United States Open on account of a requirement that she submit to a chromosomal test to determine her sex. Richards v. United States Tennis Ass’n, 400 N.Y.S. 2d 267 (N.Y. Sup. Ct. 1977). She had undergone sex corrective surgery, after which “[she] became a female,

² To date, the court has issued only an interlocutory ruling concerning a discovery dispute. It has yet to issue a ruling on the merits of HAF’s claim of sex discrimination.

psychologically, socially and physically [She] underwent this operation after many years of being a transsexual, a woman trapped inside the body of a man.” Id. at 267-68. An accomplished tennis player both before and after sex corrective surgery, she petitioned to compete in the women’s division of the United States Open in 1976. Id. at 268. In response, the chromosomal test requirement was instituted “[to] insur[e] fairness.” Id. at 268-69. The court concluded that, “[w]hen an individual such as [Richards] . . . finds it necessary for his own mental sanity to undergo a sex reassignment, the unfounded fears and misconceptions of [others] must give way to the overwhelming medical evidence that this person is now female.” Id. at 272. It went on to hold that discrimination based on transsexuality is a form of discrimination based on sex. Id. at 273; see also McGrath v. Toys “R” Us, Inc., 2002 U.S. DIST. LEXIS 22610 (E.D.N.Y. Oct. 16, 2002).

Education. In Doe v. Yunits, 2000 WL 33162199 (Mass. Super. Ct. Oct. 11, 2000), aff’d, 2000 WL 33342399 (Mass. App. Ct. Nov. 30, 2000), Pat Doe, a fifteen-year-old biological male who identified as a female, was barred from enrollment in school because she sought to wear “clothes and fashion accouterments that [were] consistent with her gender identity.” Id. at *1. In 1999, she “began to express her female gender identity by wearing girls’ make-up, shirts, and fashion accessories to school.” Id. Such attire included “skirts and dresses, wigs, high-heeled shoes, and padded bras with tight shirts.” Id. In response, the principal would send her home to change. Id. “On some occasions, [Doe] would change and return to school; other times, she would remain home, too upset to return.” Id. Soon thereafter, she was diagnosed with gender identity disorder. Id. Thereafter, the principal required her to report to his office every day “so that he could approve [her] appearance.” Id. She subsequently stopped attending school, “citing the hostile environment created by [the principal].” Id. On account of her absences, she was forced to repeat the eighth grade. Id. In addition, she was suspended at least three times for using the girls’ bathroom. Id. In concluding that all such discrimination was a form of sex discrimination, the court made clear that, “[s]ince [Doe] identifies with the female gender, the right question is whether a female student would be disciplined for wearing items of clothes [Doe] chooses to wear. If the answer to that question is no, [Doe] is being discriminated against on the basis of her sex, which is

biologically male.” Id. at *6.

Credit. The First Circuit in Rosa v. Park W. Bank & Trust Co., 214 F.3d 213 (1st Cir. 2000), held that a cross-dressing loan applicant who claimed that a bank had discriminated against him based on his sex had stated a claim under the federal Equal Credit Opportunity Act. In 1998, Lucas Rosa entered a bank and asked for a loan application. Id. at 214. At the time, he was wearing “traditionally feminine attire.” Id. As identification, he provided a public welfare card, a state identification card, and a check cashing card. The bank, however, “would not provide him with a loan application until he ‘went home and changed,’” saying that “he had to be dressed like one of the identification cards in which he appeared in more traditionally male attire before [it] would provide him with a loan application and process his loan request.” Id. “[L]ook[ing] to Title VII case law,” the court concluded that “[i]t [was] reasonable to infer that [the bank] told Rosa to go home and change because [it] thought that Rosa’s attire did not accord with his male gender: in other words, that Rosa did not receive the loan application because he was a man, whereas a similarly situated woman would have received the loan application.” Id. at 215.

Violence. The Ninth Circuit in Schwenk v. Hartford, 204 F.3d 1187 (9th Cir. 2000), held that a prison guard who sexually assaulted a male-to-female transsexual prisoner discriminated against her based on her sex in violation of the federal Gender Motivated Violence Act. At the time, Crystal Marie Schwenk was “pre-operative:”

[S]he realized that she was psychologically female by the age of 12, and . . . used illegally-obtained female hormones prior to incarceration, although she never received any medical or psychological treatment for gender dysphoria [S]he consider[ed] herself female and [had] been known as ‘Crystal Marie’ since early adolescence. She [had] shoulder-length hair, [was] extremely soft-spoken and feminine, crie[d] easily, and use[d] make-up and other female grooming products when possible.

Id. at 1193. In 1993, she was incarcerated in an all-male cell house and, the following year, was transferred to its medium security unit. Id. There, the prison guard “subjected her to an escalating series of unwelcome sexual advances and harassment that culminated in a sexual assault.” Id. Following the sexual assault, he threatened to have her transferred to the main cell house “where she would be at a high risk for sexual attack by other inmates” if she did not submit to his sexual demands. Id. at 1194. He eventually

followed through on his threat, causing her “[to] live[] in a constant state of fear and anxiety, wondering whether she would raped or otherwise assaulted.” Id. The court recognized that “[w]hat matters . . . is that in the mind of the perpetrator the discrimination is related to the sex of the victim: here, for example, the perpetrator’s actions stem[med] from the fact that he believed that the victim was a man who ‘failed to act like’ one Discrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII.” Id. at 1202. It went on to note that “GMVA . . . parallel[s] Title VII [B]oth statutes prohibit discrimination based on gender as well as sex. Indeed, for purposes of these two acts, the terms ‘sex’ and ‘gender’ have become interchangeable.”³ Id. Accordingly, it relied on evidence of sex stereotyping to support its finding that the prison guard violated GMVA:

“[The prison guard] knew that Schwenk considered herself a transsexual and that she planned to seek sex reassignment surgery in the future [The prison guard’s] demands for sex began only after he discovered that she considered herself female . . . and included commentary about her transsexuality. Moreover, . . . her appearance and mannerisms were very feminine, and . . . [the prison guard] was aware of these characteristics. In fact, [the prison guard] offered to bring her make-up and other ‘girl stuff’ from outside the prison in order to enhance the femininity of her appearance. Thus, the evidence . . . show[ed] that [the prison guard’s] actions were motivated, at least in part, by Schwenk’s gender – in this case, by her assumption of a feminine rather than a typically masculine appearance or demeanor.

Id.

B. Gender Identity Discrimination Is a Form of Sex Discrimination

The United States Supreme Court has long recognized that, “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.” Los Angeles Dep’t of Water and Power v. Manhart, 435 U.S. 702, 707 n.13 (1978). In Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), it confirmed that sex discrimination includes sex stereotyping discrimination. In particular, it held that an accounting firm had discriminated based on sex in violation of Title VII when it denied partnership to a female manager because she had failed to conform to stereotyped notions

³ By its own terms, Schwenk refutes the trial court’s assertion that the court distinguished between term “sex” and the term “gender.” “[S]ex’ under Title VII encompasses both sex – that is, the biological differences between men and women – and gender.” Id. (emphasis in original).

of how a woman should look and act.

[S]ome of the partners reacted negatively to Hopkins' personality because she was a woman. One partner described her as "macho" . . . ; another suggested that she "overcompensated for being a woman" . . . ; a third advised her to take "a course at charm school" [O]ne partner suggested that [some of the] partners objected to her swearing only "because it's a lady using foul language." . . . Another supporter explained that Hopkins "ha[d] matured from a tough-talking somewhat masculine hard-nosed [manager] to an authoritative, formidable, but much more appealing lady [partner] candidate." . . . [I]n order to improve her chances for partner, [Price Waterhouse] advised, Hopkins should "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."

Id. at 235. Recognizing that sex stereotyping discrimination is a form of sex discrimination, the Supreme Court explained that "an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender." Id. at 250. This is so because, "if an employee's flawed 'interpersonal skills' can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee's sex and not her interpersonal skills that has drawn the criticism." Id. at 256. As the Supreme Court concluded, "we are beyond the day when an employer could evaluate employees by assuming or insisting that they match the stereotype associated with their group." Id. at 251.

The Supreme Court's ruling that sex stereotyping discrimination is a form of sex discrimination is a broad one. Contrary to the trial court's assertion that Price Waterhouse "dealt with stereotypical attitudes against women qua women" alone, it has been applied in a number of dissimilar cases, both state and federal.⁴ Notwithstanding

⁴ See Rene v. MGM Grand Hotel, Inc., 305 F.3d 1061, 1068-69, 1070 (9th Cir. 2002); Knussman v. Maryland, 272 F.3d 625, 636 (4th Cir. 2001) ("[G]ender classifications that appear to rest on nothing more than conventional notions about the proper station in society for males and females have been declared invalid time and again by the Supreme Court."); Nichols v. Azteca Restaurant Enters., Inc., 256 F.3d 864, 874 (9th Cir. 2001) ("Price Waterhouse applies with equal force to a man who is discriminated against for acting too feminine At its essence, the systematic abuse directed at [plaintiff] reflected a belief that [plaintiff] did not act as a man should act. [Plaintiff] was attacked for walking and carrying his tray 'like a woman' – i.e., for having feminine mannerisms. [Plaintiff] was derided for not having sexual intercourse with a waitress who was his friend. [Plaintiff's] male co-workers and one of his supervisors repeatedly reminded [plaintiff] that he did not conform to their gender-based stereotypes, referring to him as 'she' and 'her.' And, the most vulgar name-calling directed at [plaintiff] was cast in female terms [T]his verbal abuse was closely linked to gender."); Bellaver v. Quanex Corp., 200 F.3d 485, 492 (7th Cir. 2000) ("[E]valuations may demonstrate discriminatory intent when employees are evaluated on how their interpersonal skills match stereotyped, unequal ideas of how men and women should behave."); Doe v. City of Belleville, 119 F.3d 563, 580-83 (7th Cir. 1997), vacated on other grounds, 523 U.S. 1001 (1998)

the disparate circumstances that they present, these cases mirror Price Waterhouse in one key respect: they confirm that sex stereotyping, in its various manifestations, is actionable as a form of sex discrimination.

Among these cases are the cases discussed in section III.A., all of which hold that gender identity discrimination is a form of sex discrimination. Price Waterhouse figures prominently in the analysis of many of these cases. As the Enriquez court noted, “[i]n Price Waterhouse, . . . the Court held that Title VII barred discrimination of a woman who failed to ‘act like a woman’ or to conform to socially-constructed gender expectations. This approach would seem to indicate that the word ‘sex’ in Title VII encompasses both gender and sex, and forbids discrimination because of one’s failure to act in a way expected of a man or a woman.” Enriquez, 777 A.2d at 371-72. The Lie court went even

(“Title VII does not permit an employee to be treated adversely because his or her appearance or conduct does not conform to stereotypical gender roles [A] man who is harassed because his voice is soft, his physique is slight, his hair is long, or because in some other respect he exhibits his masculinity in a way that does not meet his coworkers’ idea of how men are to appear and behave, is harassed ‘because of’ his sex One need only consider for a moment whether [plaintiff’s] gender would have been questioned for wearing an earring . . . if he were a woman rather than a man Price Waterhouse itself recognizes that gender discrimination may manifest itself in the employer’s stereotypical notions as to how an employee of a given gender should dress and present herself.”); Centola v. Potter, 183 F. Supp. 403, 409 (D. Mass. 2002) (“Stated in a gender neutral way, the rule is: If an employer acts upon stereotypes about sexual roles in making employment decisions . . . then the employer opens itself up to liability under Title VII’s prohibition of discrimination on the basis of sex. This is the nub of [plaintiff’s] complaint: Co-workers and supervisors . . . discriminated against him because he failed to meet their gender stereotypes of what a man should look like, or act like.”); Jones v. Pacific Rail Servs., 2001 WL 127645, at *2-3 (N.D. Ill. Feb. 14, 2001) (“We see nothing . . . to indicate that the Seventh Circuit’s second rationale [in Doe concerning sex stereotyping] is no longer viable [Plaintiff’s] claim that [defendant] did not respond to his complaints that he was being harassed because of his alleged effeminacy is sufficient to state a claim.”); Ianetta v. Putnam Investments, Inc., 142 F. Supp. 2d 131, 134 (D. Mass. 2001) (“[Plaintiff] claims that he was discriminated against for failing to meet the male gender stereotype. The First Circuit[] . . . recognizes that such an allegation states a claim for sex discrimination under Title VII.”); Montgomery v. Independent Sch. Dist. No. 709, 109 F. Supp. 2d 1081, 1090-91 (D. Minn. 2000) (“[S]ome of the students called [plaintiff] ‘Jessica,’ a girl’s name, indicating a belief that he exhibited feminine characteristics It [was] . . . plausible that the students began tormenting [plaintiff] based on feminine personality traits that he exhibited and the perception that he did not engage in behaviors befitting a boy. Plaintiff thus appear[ed] to plead facts that would support a claim of harassment based on the perception that he did not fit his peers’ stereotypes of masculinity [N]o logical rationale appears to exist for distinguishing Title VII and Title IX . . . regarding the circumstances under which abusive or offensive conduct amounts to harassment ‘based on sex.’”); Samborski v. West Valley Nuclear Servs. Co., 1999 WL 1293351, at *4 (W.D.N.Y. Nov. 24, 1999) (“The Second Circuit Court of Appeals has reiterated . . . that evidence of sexual stereotyping may provide proof that an employment decision or an abusive environment was based on gender.”); Zalewski v. Overlook Hosp., 692 A.2d 131, 135 (N.J. Super. Ct. Law Div. 1996) (“Although Price Waterhouse dealt with female stereotyping, its rationale and logic are equally applicable to discrimination based on male stereotyping.”); see also Bibby v. Philadelphia Coca Cola Bottling Co., 260 F.3d 257, 262-64 (3d Cir. 2001); Simonton v. Runyon, 232 F.3d 33, 38 (2d Cir. 2000); Spearman v. Ford Motor Co., 231 F.3d 1080, 1085 (7th Cir. 2000); Higgins v. New Balance Athletic Shoe, Inc., 194 F.3d 252, 261 (1st Cir. 1999); Broadus v. State Farm Ins. Co., 2000 WL 1585257, at * 4-5 (W.D. Mo. Oct. 11, 2000) (employment discrimination based on sex stereotypes is impermissible).

further, characterizing Price Waterhouse as a “watershed case, which established a new federal standard for disparate treatment sex discrimination claims.” Lie, 2002 WL 31492397 at *3. Significantly, courts have noted that Price Waterhouse and its progeny postdate and therefore overrule cases that hold that transsexuals are not protected from employment discrimination under Title VII. See Schwenk, 204 F.3d at 1201-02 (“The initial judicial approach taken in cases such as Holloway has been overruled by the logic and language of Price Waterhouse. In Price Waterhouse, which was decided after Holloway and Ulane the Supreme Court held that Title VII barred not just discrimination based on the fact that Hopkins was a woman, but also discrimination based on the fact that she failed ‘to act like a woman’ – that is, to conform to socially-constructed gender expectations.”). The trend toward recognition of gender identity discrimination as a form of sex discrimination is further reflected in interpretations of international sex discrimination law and rulings by state civil rights commissions. See C-13/94, P v. S, 1996 E.C.R. 1-02143; AR 129-57.

IV. CONCLUSION

Especially in light of its expansive conceptualization of sex discrimination,⁵ the Court should join the ranks of courts across the country that have confirmed that gender identity discrimination is a form of sex discrimination. Amici Curiae respectfully request that the Court reverse the ruling of the trial court.

Dated: Honolulu, HI, August _____, 2003.

Respectfully submitted,

BRENT T. WHITE

⁵ See Baehr v. Lewin, 74 Haw. 530, 852 P.2d 44 (1993) (discrimination between same-sex and different-sex couples is a form of sex discrimination); see also Nelson v. University of Haw., 97 Haw. 376, 390, 38 P.3d 95, 109 (2001) (“[A]lthough the federal courts’ interpretation of Title VII is useful in construing Hawai’i employment discrimination law, it is not controlling.”).

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Amended Brief of Amici Curiae American Civil Liberties Union of Hawai'i and American Civil Liberties Union in Support of Appellant Hawai'i Civil Rights Commission were mailed to each of the following:

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