Washington Law Review

Volume 73 | Number 1

1-1-1998

Marital Status Discrimination in Washington: Relevance of the Identity and Actions of an Employee's Spouse

Katrina R. Kelly

MARITAL STATUS DISCRIMINATION IN WASHINGTON: RELEVANCE OF THE IDENTITY AND ACTIONS OF AN EMPLOYEE'S SPOUSE

Katrina R. Kelly

Abstract: Before 1993, Washington's employment anti-discrimination statute did not define the term "marital status," and courts interpreted the term broadly to include discrimination based upon the actions or identity of an employee's spouse. A 1993 amendment to the Law Against Discrimination added a definition of marital status. Although the Supreme Court of Washington has not yet considered the impact of this amendment, the dissent in *Magula v. Benton Franklin Title Co.* argued that the change in the statute should narrow the interpretation of marital status to exclude the identity and actions of an employee's spouse. This Comment argues that the scope of the law against marital status discrimination is unaffected by the 1993 amendment, which clarified, rather than changed, existing law.

Acme Company owns and operates a large fish processing plant in Washington State. Acme hires a new manager, Sandy, who has excellent credentials. Sandy proves to be diligent, honest, and creative, possessing all the professional and personal qualities Acme desires. Six months later, Acme discovers that Sandy's spouse, Mark, has recently been accused of child sexual abuse. The allegations against Mark make front page news in the local paper. That same day, Sandy's friend, who is the secretary to Acme's CEO, tells Sandy that she overheard a conversation between the CEO and Sandy's supervisor. The CEO had said that he did not want Mark associated with Acme in any way, and Sandy would have to be terminated if she did not get a divorce. Sandy is in a dilemma: although she would like to support Mark through this crisis, she feels that her job, which is terminable "at will," is in jeopardy. The following week, the allegations against Mark receive national media attention, and Sandy's name is mentioned in several newspaper articles. Acme terminates Sandy's employment.

Should Sandy be able to bring a legal claim against Acme for discrimination on the basis of marital status? The answer depends on the interpretation of the term "marital status." If marital status is interpreted narrowly, to encompass only the condition of being single, married, widowed, or divorced,[1] then Sandy will not be able to bring such a claim;

1. When reference is made to the "narrow interpretation" of marital status in this Comment, it refers only to the *condition* of being married, single, widowed, divorced, or separated, *without* incorporating any reference to the identity or actions of a person's spouse. *See infra* notes 21–23 and accompanying text.

the mere condition of being married did not lead to her dismissal. However, if marital status is construed more broadly, to include the identity and actions of a person's spouse,[2] then Sandy will be entitled to bring a claim for legal relief. On the facts above, it is possible that Acme dismissed Sandy because her spouse is a person accused of child sexual abuse.

This Comment examines the interpretation of the term "marital status" in Washington's anti-discrimination law.[3] Traditionally, Washington courts have construed the term broadly, to include the identity and actions of an employee's spouse.[4] In *Magula v. Benton Franklin Title Co.*,[5] however, in which an employee was fired following allegations that her husband was harassing her co-workers, the Supreme Court of Washington left open the question of whether it would continue to construe the statute broadly.[6] The dissent in that case argued that, in light of a 1993 amendment to the anti-discrimination statute,[7] the court should not interpret marital status broadly.[8]

This Comment argues that a narrow interpretation of marital status fails to fulfill the purpose of the anti-discrimination statute. A broad interpretation, in contrast, is compatible with the 1993 amendment, and Washington courts should therefore maintain this protection for employees by continuing to interpret the term broadly. Part I of this Comment provides an overview of how marital status anti-discrimination laws are treated nationally and examines the development of Washington's law against marital status discrimination. Part II analyzes

2. When reference is made to the "broad interpretation" of marital status in this Comment, it refers to an interpretation that *includes* consideration of the identity and actions of a person's spouse. *See infra* notes 24–29 and accompanying text.

3. Wash. Rev. Code ch. 49.60 (1996 & Supp. 1997).

4. Washington Water Power Co. v. Washington State Human Rights Comm'n, 91 Wash. 2d 62, 586 P.2d 1149 (1978) (upholding Human Rights Commission's anti-nepotism rules, which broadly interpreted marital status to include identity of employee's spouse).

5. 131 Wash. 2d 171, 930 P.2d 307 (1997) (applying Washington law prior to 1993 legislative amendment to Wash. Rev. Code § 49.60.040, and finding that genuine issue of material fact existed as to whether employee was dismissed because of her marital status).

6. *Id.* at 181, 930 P.2d at 313.

7. "'Marital status' means the legal status of being married, single, separated, divorced, or widowed." Law Against Discrimination, ch. 510, § 4, 1993 Wash. Laws 2331, 2334 (codified at Wash. Rev. Code § 49.60.040(7) (1996 & Supp. 1997)).

8. *Magula*, 131 Wash. 2d at 185–92, 930 P.2d at 315–18 (Sanders, J., dissenting). The majority found that the 1993 amendment was not applicable in *Magula* because the facts in the case occurred before the amendment became effective. *Id.* at 181, 930 P.2d at 313.

relevant policies and issues of statutory interpretation and argues that Washington should continue to interpret marital status broadly.

I. THE LAW AGAINST MARITAL STATUS DISCRIMINATION

A. An Overview of Marital Status Anti-Discrimination Laws

The default rule for an employment relationship in the United States and in the State of Washington is "at will" employment.[9] "At will" means that an employee can be dismissed, or can quit, at any time and for any reason.[10] Anti-discrimination laws modify the "at will" employment rule by prohibiting employers from discriminating against employees on the basis of particular enumerated grounds.[11] Anti-discrimination laws do not protect against employment decisions based on *any* classification; only clearly defined suspect classifications are protected. For example, action based upon a racial stereotype is proscribed in Washington,[12] but action based upon a person's astrological sign is not.

Federal law does not explicitly prohibit employment discrimination on the basis of marital status.[13] It does, however, prohibit discrimination based on sex, and suits against employers with policies discriminating on the basis of marital status have been brought successfully on the basis of gender discrimination.[14] To prevail in such an action, disparate treatment

---

9. Roberts v. Atlantic Richfield Co., 88 Wash. 2d 887, 891, 568 P.2d 764, 767 (1977).

10. 1 Mark A. Rothstein et al., *Employment Law* § 1.4 (1994).

11. Title VII of the Civil Rights Act prohibits discrimination by an employer on the grounds of race, color, religion, sex, or national origin. Civil Rights Act of 1964 § 703(a), 42 U.S.C. § 2000e-2(a) (1994). Age and disability discrimination are also prohibited by federal legislation. *See* Age Discrimination in Employment Act § 4, 29 U.S.C. § 623 (1994); Americans with Disabilities Act § 102, 42 U.S.C. § 12112 (1994). States have enacted various statutes covering additional grounds of discrimination such as marital status, pregnancy, and parenthood. *E.g.*, Alaska Stat. § 18.80.220 (Michie 1996). Washington's employment anti-discrimination law protects against discrimination on the grounds of "age, sex, marital status, race, creed, color, national origin, or the presence of any sensory, mental, or physical disability or the use of a trained guide dog or service dog by a disabled person." Wash. Rev. Code § 49.60.180 (1996 & Supp. 1997).

12. Wash. Rev. Code § 49.60.180.

13. 42 U.S.C. § 2000e-2(a).

14. Sangster v. United Air Lines, Inc., 438 F. Supp. 1221 (N.D. Cal. 1977), *aff'd*, 633 F.2d 864 (9th Cir. 1980) (holding that airline that restricted employment of married female cabin attendants, but not married male cabin attendants, had discriminated on basis of sex in violation of Title VII); *see also* Lansdale v. Air Line Pilots Ass'n Int'l, 430 F.2d 1341 (5th Cir. 1970) (holding that complaint alleging that union caused airline employer to permit male, but not female, employees to marry stated claim of sex discrimination under Title VII).

of[15] or disparate impact upon[16] either gender must be shown.[17] Federal law therefore limits the relief it affords for marital status discrimination; if both married men and married women are equally subject to discrimination, no remedy is available.[18] Many states, including Washington, have therefore enacted legislation prohibiting discrimination by employers on the ground of marital status.[19]

Courts in states with such statutes have not been uniform in their interpretation of the term "marital status."[20] Some courts have construed the term narrowly, holding that it means nothing more than the status of being married, single, widowed, or divorced.[21] One reason for such a

---

15. Allen v. Lovejoy, 553 F.2d 522, 524 (6th Cir. 1977) (holding that employer's requirement that female employees sign forms endorsing name change reflecting their husbands' surnames constituted sex discrimination in violation of Title VII); *see also Sangster*, 438 F. Supp. at 1225; *Lansdale*, 430 F.2d at 1342.

16. *See* EEOC v. Rath Packing Co., 787 F.2d 318, 331–33 (8th Cir. 1986) (holding that employer's prohibition against hiring spouses of employees had disparate impact upon women and was not justified by business necessity); *cf.* Yuhas v. Libby-Owens-Ford Co., 562 F.2d 496 (7th Cir. 1977) (holding that employer's prohibition against hiring spouses of employees had statistically-proven discriminatory impact on women, but nevertheless finding that employer's policy was job-related and so did not violate Title VII).

17. For an analysis of cases involving marital status discrimination brought under Title VII, see Joyce D. Edelman, Comment, *Marital Status Discrimination: A Survey of Federal Caselaw*, 85 W. Va. L. Rev. 347 (1983).

18. "If Vassar [the employer] was as unlikely to promote married men as it was to promote married women, then the only thing one could say is that Vassar discriminated against married people. But marital status alone is not a ground for bringing a suit under Title VII." Fisher v. Vassar College, 70 F.3d 1420, 1447 (2d Cir. 1995) (holding that because married female plaintiff was unable to show that Vassar College treated married female employees differently from married male employees, college had not discriminated against her by denying tenure), *aff'd*, 114 F.3d 1332 (2d Cir. 1997) (en banc), *cert. denied*, 66 U.S.L.W. 3472 (U.S. Jan. 20, 1998) (No. 97-404).

19. Alaska Stat. § 18.80.220(1) (Michie 1996); Cal. Gov't Code § 12940 (West 1992 & Supp. 1997); Conn. Gen. Stat. Ann. § 46a-60(a)(1) (West 1995); Del. Code Ann. tit. 19, § 711 (1995); D.C. Code Ann. § 1-2512 (1992 & Supp. 1997); Fla. Stat. Ann. § 760.10 (West 1997); Haw. Rev. Stat. Ann. § 378-2 (Michie 1994 & Supp. 1997); 775 Ill. Comp. Stat. Ann. 5/2-103(Q) (West 1993 & Supp. 1997); Md. Ann. Code of 1957 art. 49B § 16 (1994); Mich. Comp. Laws Ann. § 37.2202 (West 1985 & Supp. 1997); Minn. Stat. Ann. § 363.03 (West 1991 & Supp. 1997); Mont. Code Ann. § 49-2-303 (1997); Neb. Rev. Stat. Ann. § 48-1104 (Michie 1995 & Supp. 1997); N.H. Rev. Stat. Ann. § 354-A:7 (1995); N.J. Stat. Ann. § 10:5-12 (West 1993 & Supp. 1997); N.Y. Exec. Law § 296 (McKinney 1993 & Supp. 1997); N.D. Cent. Code § 14-02.4-03 (1991 & Supp. 1997); Or. Rev. Stat. § 659.030 (1995); Va. Code Ann. § 2.1-716 (Michie 1995 & Supp. 1997); Wash. Rev. Code § 49.60.180 (1996 & Supp. 1997); Wis. Stat. Ann. § 111.321 (West 1997); *cf.* Colo. Rev. Stat. Ann. § 24-34-402(h) (West 1990) (prohibiting discrimination against employees or potential employees on basis of marriage or engagement to another employee).

20. *See* Stephen B. Humphress, Note, *State Protection Against Marital Status Discrimination by Employers*, 31 U. Louisville J. Fam. L. 919 (1992–93) (summarizing laws against marital status discrimination in different states).

21. *See, e.g.*, Muller v. BP Exploration (Alaska) Inc., 923 P.2d 783, 791 (Alaska 1996); Boaden v. Department of Law Enforcement, 664 N.E.2d 61, 65 (Ill. 1996); Whirlpool Corp. v. Michigan Civil

narrow construction is that where the statute does not define marital status, the term should be given its plain and ordinary meaning.[22] Determining the scope of the term has most commonly been an issue in cases involving an employer's anti-nepotism policies that resulted in termination of, discrimination against, or refusal to hire an employee's spouse.[23] Under the narrow interpretation of marital status, such policies do not amount to unlawful marital status discrimination.

Other courts have interpreted marital status broadly, to encompass the identity, occupation, and actions of a person's spouse,[24] despite the fact that the legislation under consideration provided either an ex facie narrow definition[25] or no definition at all.[26] These courts have focused on the broad purposes of the statutes in question. For example, *Thompson v. Board of Trustees* involved a school board policy that prohibited an employee from having a spouse who was also employed by the school board.[27] The Supreme Court of Montana adopted a broad interpretation of marital status "with a view . . . to promote justice," and stated that a narrow interpretation of the term "could lead to . . . [the] absurd result" that both parties could remain employed simply by getting a divorce.[28] In this case, the plaintiffs were school administrators who were married to school teachers. One was fired and the other demoted after the school board enacted its no-spouse policy. The court held that the employer's

---

Rights Comm'n, 390 N.W.2d 625, 626 (Mich. 1986); Miller v. C.A. Muer Corp., 362 N.W.2d 650, 654 (Mich. 1984); Thomson v. Sanborn's Motor Express, Inc., 382 A.2d 53, 56 (N.J. Super. Ct. App. Div. 1977); Manhattan Pizza Hut, Inc. v. New York State Human Rights Appeal Bd., 415 N.E.2d 950, 953 (N.Y. 1980); Townshend v. Board of Educ., 396 S.E.2d 185, 189 (W. Va. 1990).

22. *See, e.g., Manhattan Pizza Hut*, 415 N.E.2d at 953 ("[T]he plain and ordinary meaning of 'marital status' is the social condition enjoyed by an individual by reason of his or her having participated or failed to participate in a marriage."); *cf. Miller*, 362 N.W.2d at 654 ("By including marital status as a protected class, the Legislature manifested its intent to prohibit discrimination based on *whether* a person is married.").

23. *E.g., Boaden*, 664 N.E.2d at 64 (holding that two state police troopers who married and were subject to state police policy prohibiting spouses from working same shift had not been discriminated against on basis of marital status).

24. Ross v. Stouffer Hotel Co. (Hawai'i) Ltd., 879 P.2d 1037, 1041 (Haw. 1994); Thompson v. Board of Trustees, 627 P.2d 1229, 1231 (Mont. 1981).

25. *Ross*, 879 P.2d at 1041. The statute in Hawai'i defines marital status as "the state of being married or being single." Haw. Rev. Stat. Ann. § 378-1 (Michie 1994 & Supp. 1997).

26. *Thompson*, 627 P.2d at 1231.

27. The policy stated that "all school administrators of the Harlem Public Schools shall not have a spouse employed in any capacity in the Harlem school system." *Id.* at 1230. This policy not only prohibited the employer from hiring the spouse of an employee, but also prevented two employees from marrying each other. *Id.*

28. *Id.* at 1231.

actions created a cause of action for marital status discrimination under the Montana statute.[29]

Minnesota is the only state with a statute that explicitly defines marital status broadly.[30] The definition provides that protection from marital status discrimination includes, "in employment cases, . . . protection against discrimination on the basis of the identity, situation, actions, or beliefs of a spouse or former spouse."[31]

Commentators have written extensively about marital status discrimination, both in the context of housing[32] and employers' anti-nepotism policies.[33] In both these contexts, commentators have argued that marital status discrimination should be applied broadly.[34] Few authors favor a narrow interpretation of marital status discrimination.[35]

---

29. *Id.* at 1232. The court was considering Mont. Code Ann. § 49-2-303(1)(a) and § 49-3-201(1). *Id.* at 1230.

30. Minn. Stat. Ann. § 363.01(24) (West 1991 & Supp. 1997).

31. Minn. Stat. Ann. § 363.01(24). The legislature added this definition in 1988, following the Minnesota Supreme Court's refusal to interpret the term "marital status" to include the actions of a job applicant's spouse. Cybyske v. Independent Sch. Dist. No. 196, 347 N.W.2d 256, 260 (Minn. 1984). The Minnesota Supreme Court had previously held that marital status included the "identity or situation" of a job applicant's spouse. Kraft, Inc. v. State, 284 N.W.2d 386, 388 (Minn. 1979).

32. *E.g.*, Robert C. Mueller, Note, Donahue v. Fair Employment and Housing Commission: *A Free Exercise Defense to Marital Status Discrimination?*, 74 B.U. L. Rev. 145 (1994); Donna Bailey, Case Note, 17 Wm. Mitchell L. Rev. 563 (1991); Recent Case, 108 Harv. L. Rev. 763 (1995); Seth H. Salinger & Neil D. Warrenbrand, *Does a Sincerely Held Religious Belief Provide a Right to Discriminate?*, 39 Boston B.J. 5 (1995).

33. *E.g.*, Douglas Massengill & Donald J. Petersen, *Legal Challenges to No Fraternization Rules*, 46 Lab. L.J. 429, 430 (1995); Julius M. Steiner & Steven P. Steinberg, *Caught Between Scylla and Charybdis: Are Antinepotism Policies Benign Paternalism or Covert Discrimination?*, 20 Employee Relations L.J. 253 (1994); Dennis Alerding, Note, *The Family That Works Together . . . Can't: No-Spouse Rules as Marital Status Discrimination Under State and Federal Law*, 32 U. Louisville J. Fam. L. 867 (1994); Anna Giattina, Note, *Challenging No-Spouse Employment Policies as Marital Status Discrimination: A Balancing Approach*, 33 Wayne L. Rev. 1111 (1987).

34. Giattina, *supra* note 33, at 1130–31 (employing broad definition of marital status to argue that employers' "no spouse" policies should be struck down); Mueller, *supra* note 32, at 146 (arguing that prohibition of marital status discrimination in housing should be read broadly to apply to cohabiting unmarried couples). Alerding, *supra* note 33, at 883, even recommends amending Title VII to include marital status.

35. *But see* John-Edward Alley, *Marital Status Discrimination: An Amorphous Prohibition*, 54 Fla. B.J. 217, 221 (1980) (concluding that "the [Florida] Commission [on Human Relations] should be hesitant to expand the definition of 'marital status' beyond its plain and ordinary meaning").

B. *The Development of the Law Against Marital Status Discrimination in Washington*

When Washington's Law Against Discrimination[36] was first enacted in 1949, it only prohibited discrimination on the basis of "race, creed, color or national origin."[37] Over time, this law was revised to prohibit discrimination based on other characteristics such as sex, age, and physical handicap.[38] In 1973, Washington's legislature amended the statute to prohibit discrimination on the ground of marital status, whereby it became an unfair practice for an employer to refuse to hire, discharge, or otherwise discriminate against a person based on marital status.[39] Although the change did not include a definition of the term "marital status," the statute mandated that its provisions "shall be construed liberally for the accomplishment of the purposes thereof."[40]

Two years after the addition of marital status to Washington's anti-discrimination law, the Washington State Human Rights Commission defined marital status discrimination in detail in regulations implementing the statute.[41] The Commission adopted a broad definition of marital status discrimination, identifying three situations in which such discrimination could occur: "In general, discrimination against an employee or applicant for employment because of (a) what a person's marital status is; (b) who his or her spouse is; or (c) what the spouse

36. Wash. Rev. Code ch. 49.60 (1996 & Supp. 1997).

37. Law Against Discrimination in Employment, ch. 183, §1, 1949 Wash. Laws 506, 506.

38. *See* Law Against Discrimination, ch. 37, § 1, 1957 Wash. Laws 107, 107; Law Against Discrimination, ch. 167, § 1, 1969 Wash. Laws 1171, 1171; Law Against Discrimination, ch. 141, § 1, 1973 Wash. Laws 418, 419; Law Against Discrimination, ch. 214, § 1, 1973 Wash. Laws 1648, 1648; Law Against Discrimination, ch. 185, § 1, 1985 Wash. Laws 684, 684; Law Against Discrimination, ch. 510, § 1, 1993 Wash. Laws 2331, 2331.

The current version addresses discrimination on the basis of "race, creed, color, national origin, families with children, sex, marital status, age, or the presence of any sensory, mental, or physical disability or the use of a trained dog guide or service animal by a disabled person." Wash. Rev. Code § 49.60.010.

39. Law Against Discrimination, ch. 141, § 10, 1973 Wash. Laws at 424 (codified as amended at Wash. Rev. Code § 49.60.180(1)–(3)).

40. Law Against Discrimination ch. 141, § 2, 1973 Wash. Laws at 419 (codified as amended at Wash. Rev. Code § 49.60.020). *See generally* Phillips v. City of Seattle, 111 Wash. 2d 903, 908, 766 P.2d 1099, 1102 (1989) ("[T]he statutory protections against discrimination are to be liberally construed and its exceptions narrowly confined.").

41. Wash. Admin. Code § 162-16-150 (1997).

does, is an unfair practice because the action is based on the person's marital status."[42]

The breadth of this definition is substantially mitigated by an exception in the regulations for "business necessity," defined as "circumstances where an employer's actions are based upon a compelling and essential need to avoid business-related conflicts of interest, or to avoid the reality or appearance of improper influence or favor."[43]

In 1978, the Washington Supreme Court examined and upheld the Human Rights Commission's broad definition of marital status in *Washington Water Power Co. v. Washington State Human Rights Commission.*[44] In this case, the court reviewed a declaratory judgment that the regulation's broad definition of marital status was ultra vires. The court reversed the judgment and held that the Commission did not exceed its statutory authority with its definition of marital status discrimination.[45] The court took a broad view of the discrimination statute, construing the relevant provisions in light of the statute's purpose

---

42. Wash. Admin. Code § 162-16-150(2). The regulations also provide examples of actions that would constitute unfair practices amounting to marital status discrimination:

> (i) Refusal to hire a person because her or his spouse has a job and is "making good money." (ii) Refusal to hire a person because his or her spouse is already employed by the same employer, except for particular positions where business necessity requires exclusion of relatives, consistently with this section. (iii) Discharge of a person because he or she has married another employee of the same employer, unless the spouses occupy positions where business necessity requires the exclusion of relatives, consistent with this regulation, and neither spouse can be transferred to a position where the business necessity reason doesn't apply.

Wash. Admin. Code § 162-16-150(3)(a)(i)–(iii).

43. Wash. Admin. Code § 162-16-150(2). The regulations provide examples of situations in which the business necessity exception will operate:

> (i) Where one spouse would have the authority or practical power to supervise, appoint, remove, or discipline the other; (ii) Where one spouse would be responsible for auditing the work of the other; (iii) Where other circumstances exist which would place the spouses in a situation of actual or reasonably foreseeable conflict between the employer's interest and their own; (iv) Where, in order to avoid the reality or appearance of improper influence or favor, or to protect its confidentiality, the employer must limit the employment of close relatives of *policy level* officers of customers, competitors, regulatory agencies, or others with whom the employer deals.

Wash. Admin. Code § 162-16-150(3)(b)(i)–(iv).

44. 91 Wash. 2d 62, 586 P.2d 1149 (1978).

45. *Id.* at 69–70, 586 P.2d at 1153–54; *see also* Wash. Rev. Code § 49.60.120(3) (1996 & Supp. 1997) (providing that Commission may promulgate rules and regulations to implement anti-discrimination law); Wash. Rev. Code § 49.60.110 (1996) (providing that Commission can formulate policies to give effect to anti-discrimination law).

when viewed as a whole.[46] The court found that, in the absence of a statutory definition, the legislature had given the Commission the power to define circumstances constituting marital status discrimination.[47]

Washington Water Power appeared to settle the issue of whether Washington's Law Against Discrimination defined marital status to include the identity of an employee's spouse. Subsequent Washington courts interpreted the law against marital status discrimination liberally.[48] Indeed, commentators frequently cited *Washington Water Power* as placing Washington in the group of states adopting a broad interpretation of marital status.[49]

C. The 1993 Amendment

1. The Passage of the 1993 Amendment to Washington's Anti-Discrimination Law

In 1993, the Washington legislature amended the law against discrimination to define marital status as "the legal status of being

---

46. The court, per Justice Rosellini, stated that "[w]hen read in the light of the entire statute, the provision which makes it an unfair practice to refuse to hire any person 'because of such person's . . . marital status' is broad enough in its import to cover the . . . [anti-nepotism policies] here." *Washington Water Power*, 91 Wash. 2d at 69, 586 P.2d at 1154.

47. *Id.* at 68, 586 P.2d at 1153. The court stated:

> The fact that the commission was given broad policy formulation and rule-making powers indicates a legislative recognition that all of the circumstances in which discrimination might exist and all of the forms which it might take were not then known and could not be anticipated, and that the diligence and expertise of an administrative agency were needed to achieve the purpose intended in the statute.

Id. at 69, 586 P.2d at 1153.

48. Kastanis v. Educational Employees Credit Union, 122 Wash. 2d 483, 488, 859 P.2d 26, 29 (1993) ("The meaning of marital status as used in RCW 49.60.180 is not limited to conditions such as being married, single, or divorced, but also applies to antinepotism policies based on the identity of an employee's spouse."); *modified*, 122 Wash. 2d 483, 865 P.2d 507 (1994); Waggoner v. Ace Hardware Corp., 84 Wash. App. 210, 927 P.2d 251 (1996) (holding that discrimination against employees because of dating relationship is prohibited by Wash. Rev. Code § 49.60.180), *review granted*, 132 Wash. 2d 1001, 939 P.2d 216 (June 3, 1997) (No. 65079-9); *cf.* Loveland v. Leslie, 21 Wash. App. 84, 583 P.2d 664 (1978) (affirming finding that landlord's policy of renting only to married couples constituted marital status discrimination). *But see* McFadden v. Elma Country Club, 26 Wash. App. 195, 613 P.2d 146 (1980) (finding that refusal by country club to permit unmarried couple to buy house on club's property was not marital status discrimination).

49. *E.g.*, Steiner & Steinberg, *supra* note 33, at 259; Alerding, *supra* note 33, at 876; Edelman, *supra* note 17, at 361; Giattina, *supra* note 33, at 1119; Humphress, *supra* note 20, at 930; John P. Furfaro & Maury B. Josephson, *'No-Spouse' and Anti-Nepotism Policies*, N.Y. L.J., Feb. 3, 1995, at 3, 9; Lawrence A. Michaels & Tracy L. Thornburg, *Although Employers' Restrictions on Relationships Between Employees Can Give Rise to Claims, Some Restraints on Office Romances May Withstand Challenge*, Nat'l L.J., Apr. 1, 1996, at B5.

married, single, separated, divorced, or widowed."[50] Senate Bill 5474, which included this amendment, was sponsored by several senators at the request of the Washington State Human Rights Commission. The bill included numerous other amendments to Washington's anti-discrimination laws,[51] and as a result, the legislative history of Senate Bill 5474 does not mention the new definition of marital status.[52] When the bill was passed, however, Governor Mike Lowry stated that "Senate Bill No. 5474 strengthens the penalties available to the Human Rights Commission for civil rights violations" and that he "strongly support[ed] the bill's direction in this, as well as a number of technical clean up provisions."[53]

2. Kastanis *and* Magula: *The Impact of the 1993 Amendment Remains an Open Question*

Shortly after the 1993 amendment to Washington's anti-discrimination law became effective, the Supreme Court of Washington considered the definition of marital status discrimination. In *Kastanis v. Educational Employees Credit Union*,[54] an employee claimed that she was discriminated against when she was discharged after marrying the CEO of her corporate employer.[55] The court, however, did not consider the 1993 amendment because both parties accepted the Washington Administrative Code's broad definition of marital status.[56] Using the regulations' broad definition and the business necessity exception, the

50. Law Against Discrimination, ch. 510, § 4, 1993 Wash. Laws 2331, 2334 (codified as amended at Wash. Rev. Code § 49.60.040(7) (1996 & Supp. 1997)). The 1993 amendment became effective on July 25, 1993.

51. 1 Legislative Digest & History of Bills of the Senate and House of Representatives, 53d Legis. 212 (Wash. 1993–94).

52. 1993 Wash. Senate Journal, Regular Sess. 2163–64, 2180, 2267, 2268, 2279; House Judiciary Committee, Tape H-53-JUD-32b, side 1 (Apr. 2, 1993).

53. Governor Lowry made this statement in a letter explaining his partial veto of Senate Bill 5474. 1 Legislative Digest & History of Bills of the Senate and House of Representatives, at 212.

54. 122 Wash. 2d 483, 859 P.2d 26 (1993), *modified*, 122 Wash. 2d 483, 865 P.2d 507 (1994).

55. *Id.* at 487, 859 P.2d at 28. A jury found discrimination on the basis of marital status and awarded damages to the plaintiff. *Id.* The court of appeals certified the case to the Supreme Court of Washington under Wash. Rev. Code § 2.06.030. *Id.* at 488, 859 P.2d at 29. The supreme court reversed. *Id.* at 502, 859 P.2d at 36.

56. "This version of the statute [incorporating the 1993 amendment] is not before us." *Id.* at 488 n.2, 865 P.2d at 507 n.2. "Although both parties addressed WAC 162-16-150 in their briefs, neither party challenged the regulation. Accordingly we assume, but do not decide, that the regulation properly states the law to be applied in this case." *Id.* at 492, 865 P.2d at 507 n.4.

court found that in such cases business necessity is not an *affirmative* defense.[57]

The Supreme Court of Washington again considered the definition of marital status in *Magula v. Benton Franklin Title Co.*[58] and again declined to examine the effect of the 1993 amendment.[59] The plaintiff in *Magula* was terminated following allegations that her husband, an independent contractor for her employer, harassed other employees.[60] For the first time, the court considered briefs addressing the meaning of the 1993 amendment and whether it narrowed the definition of marital status discrimination to exclude discrimination based on the actions of an employee's spouse.[61] However, the court did not decide the meaning of the 1993 amendment because the plaintiff was discharged before the amendment became effective.[62] The majority, per Justice Talmadge, stated that the 1993 amendment should not be applied retroactively because "if the change is substantive, the general rule of prospective application applies; if the change is merely curative, prior Washington law is unaffected."[63]

Kastanis and *Magula* therefore shed little light upon the interpretation of the 1993 amendment. It is still unclear how the Supreme Court of Washington will interpret the term "marital status" in future cases.

---

57. *Id.* at 492–93, 859 P.2d at 31–32; *see also infra* notes 106–09 and accompanying text.

58. 131 Wash. 2d 171, 930 P.2d 307 (1997).

59. The majority stated that "[w]hile the 1993 amendment to RCW 49.60.040 . . . *may* alter the administrative definition of WAC 162-16-150, that issue is not now before us." *Id.* at 181, 930 P.2d at 312 (emphasis added).

60. *Id.* at 174–75, 930 P.2d at 309.

61. In contrast to *Kastanis*, the court stated that "the parties have focused solely on the definition of 'marital status'; Magula [the plaintiff] has not addressed, nor has BFT [the defendant] argued at this point in the case, whether Magula's termination was a 'business necessity.'" *Id.* at 176–77, 930 P.2d at 310.

62. The court therefore based its decision in *Magula* upon the definition in the regulations that was approved in *Washington Water Power*. *Id.* at 181, 930 P.2d at 312 (citing Washington Water Power Co. v. Washington State Human Rights Comm'n, 91 Wash. 2d 62, 586 P.2d 1149 (1978)). The majority in *Magula* held that the facts of the case could give rise to a claim of marital status discrimination under the Commission's regulations and remanded the case for further proceedings. *Id.* at 184, 930 P.2d at 314.

63. *Id.* at 182, 930 P.2d at 313. In a separate concurrence, Justice Alexander stated: "I . . . agree with the majority that the 1993 amendment may not be given retroactive effect." *Id.* at 185, 930 P.2d at 314 (Alexander, J., concurring).

D. *The Dissent in* Magula v. Benton Franklin Title Co.

Justice Sanders is the only member of the supreme court to have expressed an opinion on the meaning of the 1993 amendment to Washington's anti-discrimination law.[64] He directly addressed this issue in his dissent in *Magula*,[65] finding that the 1993 amendment clarified existing law by defining marital status narrowly, to exclude the identity and actions of an employee's spouse.[66]

The dissent in *Magula* relied on an insurance case, *Edwards v. Farmers Insurance Co.*,[67] to show that, before the 1993 amendment, the meaning of marital status was "ambiguous at best."[68] Although *Edwards* involved an insurance statute[69] and did not expressly consider the issue of employment discrimination, the dissent in *Magula* interpreted *Edwards* as having "specifically adopted the holding of [the Minnesota Supreme Court] . . . that an employer's refusal to hire because of the views of an applicant's spouse did not constitute marital discrimination

64. Justice Madsen signed on to Justice Sanders' dissent. *Id.* at 191, 930 P.2d at 318.

65. *Id.* at 185–91, 930 P.2d at 315–18 (Sanders, J., dissenting).

66. *Id.* at 186–87, 930 P.2d at 315 (Sanders, J., dissenting).

67. 111 Wash. 2d 710, 763 P.2d 1226 (1988). The dispute in *Edwards* involved a car accident in which Kenneth Edwards was killed by an uninsured motorist. At the time, Mr. Edwards was driving a truck that was insured by the defendant, Farmers Insurance Company. The named insured for the truck was Mr. Edwards' wife, Louise. Mr. Edwards was the named insured in another policy issued by the defendant that related to a different vehicle. Both policies provided for underinsured motorist protection and both covered Mr. Edwards as an insured person. *Id.* at 712 & n.1, 763 P.2d at 1227 & n.1. The estate of Mr. Edwards attempted to recover under both policies, but the defendant refused to pay under Mr. Edwards' own policy. The defendant argued that the terms of the policy prevented double recovery where the second insurance policy was issued to the spouse of the named insured who lived in the same house ("external stacking"). *Id.* at 713–15, 763 P.2d at 1228–29.

68. *Magula*, 131 Wash. 2d at 191, 930 P.2d at 317 (Sanders, J., dissenting). The majority of the court in *Magula* disagreed with the dissent's interpretation of *Edwards*. *Id.* at 181, 930 P.2d at 312.

69. Wash. Rev. Code § 48.30.300 (1996) provides:

> The amount of [insurance] benefits payable, or any term, rate, condition, or type of coverage shall not be restricted, modified, excluded, increased or reduced on the basis of sex or marital status . . . . [T]hese provisions shall not prohibit fair discrimination on the basis of sex, or marital status . . . when bona fide statistical differences in risk or exposure have been substantiated.

The issue for the court in *Edwards* was whether the relevant provision in Mr. Edwards' insurance policy constituted discrimination on the basis of marital status under Wash. Rev. Code § 48.30.300. The court held that the provision in the insurance policy did amount to marital status discrimination and remanded the case for a determination of whether there were any "bona fide statistical differences in risk or exposure" in terms of Wash. Rev. Code § 48.30.300. *Edwards*, 111 Wash. 2d at 720, 763 P.2d at 1231.

because it was not directed at the institution of marriage itself."[70] The dissent concluded that *Edwards* was therefore at odds with the broad definition of marital status in the Washington regulations,[71] and that the legislature deliberately passed the 1993 amendment to clarify this ambiguity.[72] According to the dissent, the 1993 amendment indicated that the legislature *originally* intended to interpret marital status narrowly.[73] Thus, the dissent found the definition of marital status in the 1993 amendment was clear: its plain meaning did not include the identity or actions of a person's spouse.[74]

The dissent then argued that even if the 1993 amendment were ambiguous, marital status should be construed narrowly.[75] First, it examined legislative history, but considered only the history of House Bill 404,[76] which amended Washington's law in 1973 to include the term marital status in the anti-discrimination statute. The dissent made no reference to the legislative history of Senate Bill 5474,[77] which introduced the 1993 amendment defining marital status. Second, asserting that the purpose of anti-discrimination statutes is to prevent discrimination based upon stereotypes,[78] the dissent concluded that the plaintiff in *Magula* had not been discriminated against because her termination was predicated upon facts specific to her, rather than a stereotypical view of a class of people.[79] "While being married is a class-defining factor, being married to Pat Magula [the plaintiff's husband] is

---

70. *Magula*, 131 Wash. 2d at 191, 930 P.2d at 317 (Sanders J., dissenting) (citing Cybyske v. Independent Sch. Dist. No. 196, 347 N.W.2d 256, 261 (Minn. 1984)).

71. Wash. Admin. Code § 162-16-150 (1997); *see also supra* notes 41–43 and accompanying text.

72. The dissent stated that the 1993 amendment "was meant to clarify an uncertainty rather than change existing law." *Magula*, 131 Wash. 2d at 191, 930 P.2d at 317 (Sanders, J., dissenting).

73. "This amendment was a legislative instruction clarifying what that body meant from the beginning. Through this enactment the Legislature merely restated its original intent." *Id.* at 192, 930 P.2d at 317–18 (Sanders, J., dissenting).

74. *Id.* at 187, 930 P.2d at 315 (Sanders, J., dissenting) ("The plain and ordinary meaning of the term 'marital status' clearly does not encompass the identity of one's spouse.").

75. The dissent concluded that there was "no indication whatsoever that the Legislature ever intended such a bizarre definition as the majority would impose." *Id.* (Sanders, J., dissenting).

76. H.B. 404, 43d Leg., Reg. Sess. (Wash. 1973).

77. S.B. 5474, 53d Leg., Reg. Sess. (Wash. 1993).

78. "Confining the definition of marital status to the condition of being married or unmarried best serves the purpose of this state's antidiscrimination laws because it confines the statute's focus to preventing offensive and demeaning stereotypes." *Magula*, 131 Wash. 2d at 189, 930 P.2d at 316 (Sanders, J., dissenting).

79. "The reasons for the plaintiff's dismissal are wholly unique to her." *Id.* (Sanders, J., dissenting).

not.... The majority's highly personalized reading of the statute therefore runs contrary to the goals embodied in our antidiscrimination laws."[80] Therefore, the dissent interpreted the 1993 amendment as an assertion that marital status should be narrowly defined.[81]

Implicit in the *Magula* dissent is the concern that a narrow interpretation of marital status is necessary to protect Washington's tradition of "at will" employment[82] and the policy of freedom of contract that it serves.[83] This argument assumes that a broad interpretation of marital status would deny employers the flexibility they need to make sound employment decisions based upon legitimate financial and business concerns.

II. WASHINGTON STATE SHOULD CONTINUE TO INTERPRET MARITAL STATUS BROADLY

The dissent in *Magula v. Benton Franklin Title Co.*[84] misreads Washington's anti-discrimination statute and is misguided as a matter of policy. As Washington courts have recognized since 1978, protection from discrimination based on the identity or actions of an employee's spouse is an important component of anti-discrimination legislation.[85] The 1993 amendment to Washington's anti-discrimination statute does not, by its own terms, remove this long-established protection, and the legislative history to the amendment does not indicate that it was intended to do so. Part A of this analysis explains how protection from marital status discrimination fits into the framework of anti-

---

80. *Id.* (Sanders, J., dissenting).

81. In forceful language, the dissent chastised the majority for disregarding the will of the democratically elected legislature:

> This court should refrain from rewriting legislation to reflect personal policy preferences of the individual justices. The decision ignores the plain meaning of words. The majority's decision casts aside the reasoned decision of the people's elected representatives in favor of its own. The majority's decision shows little respect for our Legislature and even less for the people that elected it.

Id. at 192, 930 P.2d at 318 (Sanders, J., dissenting).

82. *See* Roberts v. Atlantic Richfield Co., 88 Wash. 2d 887, 891, 568 P.2d 764, 767 (1977) ("In Washington an employer has the right to discharge an employee, with or without cause, in the absence of a contract for a specified period of time.").

83. Willis v. Champlain Cable Corp., 109 Wash. 2d 747, 757, 748 P.2d 621, 627 (1988) ("In the absence of unconscionability or illegality, the law requires enforcement of a contract as written.").

84. 131 Wash. 2d 171, 185–92, 930 P.2d 307, 315–18 (1997) (Sanders, J., dissenting).

85. Washington Water Power Co. v. Washington State Human Rights Comm'n, 91 Wash. 2d 62, 586 P.2d 1149 (1978); *see also supra* notes 44–47 and accompanying text.

discrimination legislation generally and provides several policy arguments in support of this protection. Part B considers the 1993 amendment to Washington's anti-discrimination statute and its legislative history, establishing that a broad definition of marital status is consistent with both.

A. A Broad Definition of Marital Status Is Compelled by Anti-Discrimination Policy

There are at least three policy arguments supporting a broad reading of marital status in Washington's anti-discrimination legislation. First, a broad interpretation of marital status is necessary to protect employees from undesirable stereotyping, particularly the stereotype that spouses are not autonomous. Second, marital status must be interpreted broadly to implement Washington's public policy encouraging marriage. Third, a broad interpretation of marital status, coupled with a defense of business necessity, properly balances the interests of employees and employers.

1. A Broad Interpretation of Marital Status is Necessary To Prohibit Discrimination Based on the Stereotype that Spouses Are Not Autonomous

Anti-discrimination laws modify the "at will" employment doctrine to prevent employers from making decisions that are based on certain classifications. The employee classifications protected by anti-discrimination laws identify characteristics such as race, religion, and marital status that often form the basis of irrational prejudice and stereotyping. Anti-discrimination laws therefore protect against the threat that an employer will make a decision based on prejudice about a *group* rather than based on the merits of an individual.

The adverse treatment of an employee based solely upon a stereotype conflicts with the core American values of individualism and the belief that everyone should succeed or fail on his or her own merit.[86] If stereotypes serve as the determining factor in the evaluation of an employee or a potential employee, then that employee is being neither

86. "The American Revolution transformed the social landscape from a world that emphasized hierarchy and communal goals, to a world marked by equality and individualism . . . ." Paul A. Gilje, *The Rise of Capitalism in the Early Republic*, 16 J. Early Republic 159, 178 (1996); *cf.* Gina M. Shkodriani & Judith L. Gibbons, *Individualism and Collectivism Among University Students in Mexico and the United States*, 135 J. Soc. Psychol. 765, 766 (1995) (finding that students in United States are more individualistic than students in Mexico).

treated as an individual nor assessed on the basis of his or her own merit.[87] The action of stereotyping a person denies that person his or her own individuality.[88] Keeping this general framework in mind, the choice between the broad and the narrow interpretations of marital status raises two questions. Does an adverse employment decision based on the identity or actions of an employee's spouse amount to stereotyping? If so, is this a form of stereotyping that is prohibited by Washington's law against marital status discrimination?

The dissent in *Magula v. Benton Franklin Title Co.* answered the first of these questions in the negative[89] and avoided reaching the second. The dissent's argument turned on the denial of the plaintiff's status as a member of a protected class for the purposes of her claim. The dissent reasoned that because the actions of the plaintiff's husband were particular to him and therefore particular to the plaintiff, the plaintiff could not be suffering from discrimination based upon her membership in a protected class, and therefore should not be protected by the statute against marital status discrimination.[90]

This argument ignores the reality that every marital relationship includes both particular and general elements.[91] The problem posed by discrimination claims based on the actions or identity of an employee's spouse is whether the court should focus on *facts about the spouse*, or on the *marital link* from those facts to the employee.[92] By considering only the first of these, the dissent ignored the marital relationship as an essential element in such claims; the bond of marriage operates as a bridge from the actions or identity of a spouse to an employer's detrimental decision relating to the employee. In contrast to the dissent's narrow interpretation of marital status, a broad reading takes this link

87. One commentator raises a concern about stereotyping in her argument that "no spouse" policies should be struck down. She states that "[c]ourts should not permit employers to base employment decisions on stereotypes regarding a married person's ability to perform when a spouse works in the same company for the same reason employers are not permitted to base employment decisions on stereotypes regarding race or sex." Giattina, *supra* note 33, at 1128.

88. *See generally Stereotyping and Prejudice: Changing Conceptions* (Daniel Bar-Tal et al. eds., 1989) (analyzing stereotyping and prejudice resulting from person's membership in group).

89. *Magula*, 131 Wash. 2d at 188–89, 930 P.2d at 316 (Sanders, J., dissenting).

90. *See supra* notes 80–80 and accompanying text.

91. The Hawai'i Supreme Court has stated that "[o]ne does not 'marry' in some generic sense, but marries a *specific person*. Thus, the 'identity' of one's spouse (and all of his or her attributes, including his or her occupation) is implicitly subsumed within the definition of 'being married.' The two cannot be separated." Ross v. Stouffer Hotel Co. (Hawai'i), 879 P.2d 1037, 1041 (Haw. 1994).

92. Business necessity considerations are the proper place for a focus on the particular facts about the employee's spouse. *See infra* notes 98–108 and accompanying text.

into account and acknowledges that a judgment branding an employee with the characteristics of his or her spouse is itself a potentially harmful stereotype based on marriage.[93]

In fact, employment decisions based on the identity or actions of an employee's spouse may involve a particularly invidious form of discrimination. The employee's individuality is denied not simply by the process of stereotyping, but also by the operation of a stereotype that itself assumes an absence of autonomy: employees are defined and judged not by any characteristics of their own, but by facts about their spouses. This double denial of the employee's autonomy underscores the importance of maintaining a broad definition of marital status.

The Acme hypothetical at the beginning of this Comment illustrates this point. In the hypothetical, the employer determines that the accusations against Sandy's spouse reflect on Sandy's suitability for the job, regardless of the fact that *Sandy, the employee*, was accused of no wrongdoing. Acme views Sandy as inseparable from her spouse, and Sandy's autonomy is denied.[94] The detrimental effects of this stereotype can only be tackled by affording the term "marital status" a broad interpretation.

2. *The Public Policy Encouraging Marriage Requires a Broad Interpretation of Marital Status*

It may seem illogical for an employee whose spouse has an undesirable trait to be protected from discrimination, while another employee who merely chooses to associate with an undesirable person as a friend or companion would not be protected. This discrepancy is justified because marital relationships *should* receive greater protection than other relationships. A marriage cannot be broken off as easily as a friendship. Once two people have made the initial choice to enter the legal and social relationship of marriage, they cannot subsequently choose to disassociate themselves from their spouse without effecting a legal dissolution. The special protection afforded to spouses by marital

---

93. Edelman argues for a broad interpretation of marital status on the ground that everyone should be judged according to his or her own merit. She states: "If future no-spouse cases do not analyze 'marital status' in this [broad] fashion [to include the identity and occupation of one's spouse], these state statutes must be relegated to the list of inadequate remedies." Edelman, *supra* note 17, at 362.

94. In *Washington Water Power*, the court noted that anti-nepotism policies operate "without any consideration being given to the actual effect of the marital relationship upon the individual's qualifications or work performance." Washington Water Power Co. v. Washington Human Rights Comm'n, 91 Wash. 2d 62, 64, 586 P.2d 1149, 1151 (1978).

status anti-discrimination provisions therefore accords with Washington's long-settled public policy of protecting the institution of marriage.[95] The Supreme Court of Washington has indicated that "divorce is against sound public policy, and statutes should not be construed so as to encourage divorce if such construction can reasonably be avoided."[96]

Washington's public policy encouraging marriage supports a broad interpretation of marital status anti-discrimination provisions. Consider the Acme hypothetical at the beginning of this Comment. Sandy has suffered from marital status discrimination in the broad sense: Acme terminated Sandy because she failed to divorce her spouse. Some employees in Sandy's situation might prefer to get divorced rather than lose their jobs. In either case, the public policy supporting marriage encourages protection of employees from such decisions.

3. *The Business Necessity Defense Ensures that Employers' Interests Are Protected in Marital Status Discrimination Cases.*

A broad definition of marital status discrimination does not preclude the defense of business necessity.[97] Washington's administrative regulations specifically provide for this defense, stating that "there are certain circumstances where business necessity may justify action on the basis of what the spouse does."[98] For example, the defendant in *Magula v. Benton Franklin Title Co.*[99] could have argued that the harassment of other employees by the plaintiff's spouse had made constructive working relationships between the plaintiff and her co-workers impossible,

---

95. For example, Washington's rules of evidence clearly reflect a public policy in favor of protecting marriage. *See* Wash. Rev. Code § 5.60.060(1) (1996 & Supp. 1997) (providing that communications between spouses during marriage are privileged for evidentiary purposes); *see also* Wolfle v. United States, 291 U.S. 7, 14 (1934) ("The basis of the immunity given to communications between husband and wife is the protection of marital confidences, regarded as so essential to the preservation of the marriage relationship as to outweigh the disadvantages to the administration of justice which the privilege entails."); State v. Wood, 52 Wash. App. 159, 163, 758 P.2d 530, 532 (1988) ("The marital [evidentiary] privileges are based on preserving the sanctity and harmony of marriage....").

96. Christiansen v. Department of Soc. Sec., 15 Wash. 2d 465, 469, 131 P.2d 189, 192 (1942); *cf.* Dille v. Dille, 64 Wash. 2d 856, 859, 394 P.2d 901, 903 (1964) ("We fully agree that underlying public policy requires both courts and counsel to clear and lay aside all obstacles to the possible reconciliation of estranged spouses, and when parties to a divorce action have settled their differences the action should be dismissed without delay.").

97. *See supra* note 43 and accompanying text.

98. Wash. Admin. Code § 162-16-150(2) (1997).

99. 131 Wash. 2d 171, 930 P.2d 307 (1997).

therefore necessitating dismissal of the plaintiff for business reasons.[100] A broad definition of marital status coupled with a business necessity defense, as set out in Washington's regulations, affords the possibility of relief to plaintiffs who suffer discrimination based on an attribute of their spouses, while allowing defendants to prove that their actions were justified on business grounds. In this way, the interests of plaintiffs and defendants are balanced.

The dissent in *Magula* inadvertently illustrates the role of business necessity when it uses an example of a bank that fires the spouse of a bank robber as proof that "the majority's definition goes well beyond what the Legislature intended."[101] The bank robber hypothetical is instructive, but it does not adequately justify the narrow definition of marital status suggested by the dissent. The bank robber hypothetical also differs in one important respect from the Acme hypothetical: the bank has a clear business necessity supporting dismissal of the employee. The bank should be able to protect information about its security systems from getting into such dangerous hands.[102] In the Acme hypothetical, however, business necessity is lacking unless the charges of child sexual abuse against the employee's spouse are somehow related to the employee's position in the company. The regulations indicate that the Human Rights Commission had a clear idea of the kinds of legitimate business needs required for dismissing an employee on the ground of marital status.[103] Examples identified by the Commission include a situation in which one spouse supervises the other spouse,[104] and in which circumstances exist placing "spouses in a situation of actual or reasonably foreseeable conflict between the employer's interest and their own."[105] Thus, the business necessity defense protects employers from

100. The trial court found evidence that the plaintiff's supervisor, Greg Bowers, was concerned that the actions by the plaintiff's husband were making it difficult for the plaintiff and one of her co-workers to have a working relationship. *Id.* at 174–75, 930 P.2d at 309.

101. *Id.* at 188, 930 P.2d at 316 (Sanders, J., dissenting).

102. It could be argued that the assumption the bank employee will divulge security information to her spouse is itself an example of stereotyping spouses as lacking autonomy. *See supra* note 94 and accompanying text. However, the point of the business necessity defense is not to negate the operation of such a stereotype, but to concede that in some circumstances such stereotyping is warranted. In the example of the bank robber, it could be said that the threat to the bank's business outweighs any adverse effects of the stereotyping.

103. In the regulations, the Commission set out examples of situations where business necessity would be present. Wash. Admin. Code § 162-16-150(3)(b) (1997); *see also supra* note 43.

104. Wash. Admin. Code § 162-16-150(3)(b)(i).

105. Wash. Admin. Code § 162-16-150(3)(b)(iii).

the excesses of the broad interpretation of marital status that troubled the dissent in *Magula*.

The business necessity defense is especially protective of defendants in Washington following the decision in *Kastanis v. Educational Employees Credit Union*.[106] In *Kastanis*, the Supreme Court of Washington held that business necessity is not an affirmative defense, and that the burden remains with the *plaintiff* to prove that business necessity is *absent*.[107] A plaintiff must not only prove that the action of the employer was based upon the plaintiff's marital status; the plaintiff must also prove there was no legitimate business reason for the action.[108] This extra burden on the plaintiff in an employment discrimination action acts as a sufficient counterbalance to a broad interpretation of marital status. A proper balance between a plaintiff and a defendant does not require a further restriction of the application of anti-discrimination laws by adopting a narrow interpretation of marital status.

B. The 1993 Amendment Does Not Preclude a Broad Interpretation of Marital Status

1. Washington Adopted a Broad Interpretation of Marital Status Prior to the 1993 Amendment.

In *Washington Water Power Co. v. Washington State Human Rights Commission*,[109] the Supreme Court of Washington ratified the broad interpretation of marital status that had been promulgated by the Washington Human Rights Commission.[110] The *Magula* dissent relied on *Edwards v. Farmers Insurance Co.*[111] to show that the definition of marital status was unclear in Washington prior to the 1993 amendment.[112] However, there are several reasons why *Edwards* does not lead to that conclusion.

106. 122 Wash. 2d 483, 859 P.2d 26 (1993), *modified*, 122 Wash. 2d 483, 865 P.2d 507 (1994).

107. *Id.* at 492–93, 859 P.2d at 31–32.

108. *Id.* at 493, 859 P.2d at 32.

109. 91 Wash. 2d 62, 586 P.2d 1149 (1978).

110. *See* Wash. Admin. Code § 162-16-150 (1997).

111. 111 Wash. 2d 710, 763 P.2d 1226 (1988). For a description of *Edwards* and the *Magula* dissent's interpretation of it, see *supra* notes 67–72 and accompanying text.

112. Magula v. Benton Franklin Title Co., 131 Wash. 2d 170, 191, 930 P.2d 307, 317 (1997) (Sanders, J., dissenting).

Edwards interpreted a statutory provision dealing with insurance policies.[113] In contrast, *Magula* dealt with the employment discrimination statute.[114] Addressing the dissent's use of *Edwards*, the majority in *Magula* noted that "[t]he parties in *Edwards* did not argue and the Court did not consider the applicability of WAC 162-16-150. Thus, *Edwards* has no effect whatsoever on the vitality of our holding in *Washington Water Power* with respect to the regulation."[115] Because the underlying relationships and considerations in the *insurance* arena differ from those pertaining to *employment* discrimination,[116] the dissent's attempt to read the employment statute under the *Edwards* standard was properly rejected by the majority in *Magula*.[117]

In addition, even if *Edwards* were relevant to the law on employment discrimination, the Supreme Court of Washington clearly does not consider *Edwards* to be at odds with the broad interpretation afforded to the term marital status by Washington's administrative regulations. In *Kastanis*, for example, the court not only broadly interpreted marital status, but also cited *Edwards* as an additional source indicating support of that position.[118]

Therefore, a broad interpretation of marital status was firmly established in Washington law prior to 1993. The *Magula* dissent's attempt to create ambiguity in this area is unpersuasive.

---

113. Wash. Rev. Code § 48.30.300 (1996 & Supp. 1997).

114. Wash. Rev. Code § 49.60.180 (1996 & Supp. 1997); Wash. Admin. Code § 162-16-150.

115. *Magula*, 131 Wash. 2d at 181, 930 P.2d at 312.

116. Employment discrimination is likely to have an immediate impact on what is a crucial relationship for most employees. Employment is, after all, the relationship upon which employees depend for their very livings, and employees frequently spend large portions of the day at their places of work. In contrast, the relationship between the insured and insurer is more remote; it is unusual for an insurance relationship to be a core relationship in the life of an insured. In fact, an insured may never make a claim upon a policy.

117. Although laws against marital status discrimination in the areas of employment and insurance may be somewhat analogous, they are distinct. *Edwards* is clearly distinguishable from cases such as *Magula*, *Kastanis*, and *Washington Water Power*, which all deal with marital status discrimination in the context of an *employment* relationship. *Edwards* therefore does not affect the clearly broad interpretation afforded to the term marital status in the context of employment discrimination.

118. "The meaning of marital status as used in RCW 49.60.180 is not limited to conditions such as being married, single, or divorced, but also applies to antinepotism policies based on the identity of an employee's or applicant's spouse." Kastanis v. Educational Employees Credit Union, 122 Wash. 2d 483, 488, 859 P.2d 26, 29 (1993) (citing Edwards v. Farmers Ins. Co., 111 Wash. 2d 710, 718, 763 P.2d 1226 (1988)), *modified*, 122 Wash. 2d 483, 865 P.2d 507 (1994).

2. *The 1993 Amendment to the Washington Anti-Discrimination Statute Supports a Broad Interpretation of Marital Status*

Although the Washington anti-discrimination statute has included a prohibition on discrimination based on marital status since 1973,[119] marital status was not defined in the statute until 1993. The 1993 amendment added the definition "the legal status of being married, single, separated, divorced, or widowed."[120] This definition should not be read to narrow the types of *decisions* by employers that are deemed to be "on account of marital status"; instead, the definition should be interpreted as circumscribing the types of *relationships* that qualify for protection under the statute. As long as one of the relationships listed in the statute is at the root of a negative employment decision, then the employee's claim for marital status discrimination meets the definition of the statute. Thus the 1993 definition is not inconsistent with the Washington Human Rights Commission's regulations, which define marital status discrimination to include actions based on the identity of an employee's spouse.[121]

Prior to the 1993 amendment, the statute and the regulations were ambiguous in one important respect: the definition of marital status discrimination in the regulations referred only to "what a person's marital status is" without any further elaboration.[122] This definition thus failed to provide any guidance with respect to the primary phrase "marital status." The circularity of the definition in the regulations provided no check on the power of courts or future regulations to significantly expand employees' protections by defining marital status liberally to include, for example, same-sex relationships. The 1993 amendment, in contrast, specifies the relationships that may be at the root of discrimination based upon marital status[123] and thus clearly prohibits such an expansion.

Concern about protection afforded to homosexuals is, in fact, the most likely explanation for the 1993 amendment. It was passed when the issue of extending employment discrimination protection to homosexuals

---

119. *See supra* note 39.

120. Wash. Rev. Code § 49.60.040(7) (1996 & Supp. 1997).

121. Wash. Admin. Code § 162-16-150 (1997).

122. The current regulations retain the same language. *See* Wash. Admin. Code § 162-16-150(2)(a).

123. *See supra* note 50 and accompanying text.

raised controversy in Washington State.[124] In the same legislative session in which the 1993 amendment was passed, the legislature considered and rejected House Bill 1443, which addressed the problem of employment discrimination against homosexuals.[125] The legislature may have enacted the 1993 amendment to prevent anti-discrimination provisions for homosexuals from coming in through the statutory "back door" of marital status.

The 1993 amendment thus cures the circularity in Washington's administrative regulations by providing a definition of marital status. Rather than narrowing the scope of the established protection for employees, it prevents the *future* expansion of that protection. Therefore, the Supreme Court of Washington should regard the 1993 amendment as clarifying the regulations, rather than substantively changing the established law.[126]

Although regulations cannot have the effect of amending or changing legislation,[127] the anti-discrimination statute as amended in 1993 and the regulations pertaining to marital status do not directly conflict.[128] Where

---

124. Pat Matuska, *Gay-Rights Hearing Is Packed with Emotions*, Seattle Times, Mar. 3, 1993, at B1; *see also* Editorial, *Gay-Rights Bill—After 15 Years, Let's Pass This Measure*, Seattle Times, Mar. 18, 1993, at A16; Pat Matuska, *Gay-Discrimination Bills Again Stir Debate—Crowds Fill the Halls in Olympia To Air Views on Two Controversial Measures*, Seattle Times, Mar. 27, 1993, at A11; Barbara A. Serrano, *Former GOP Official With AIDS Backs Rights Bill—Foes of Gays Spread Hate and Fear, He Tells Senators*, Seattle Times, Feb. 18, 1994, at B1; Barbara A. Serrano, *Gay Community Pushes for Civil-Rights Law—Bill Would Ban Bias Statewide*, Seattle Times, Jan. 2, 1994, at B1; Joseph Turner, *Senate Dooms Gay Rights Bill by Failing To Vote on It*, News Trib. (Tacoma), Mar. 5, 1994, at A1.

125. The legislative digest indicated that House Bill 1443 "[e]xpands the jurisdiction of the human rights commission to include practices of discrimination because of a person's . . . sexual orientation." 2 Legislative Digest & History of Bills of the Senate and House of Representatives, 53d Legis. 206 (Wash. 1993–94).

126. It could be argued that the exclusion of a same-sex relationship as a root cause of marital status discrimination has an impact on the substantive content of the law because employees engaged in same-sex relationships will not be able to bring legal claims for marital status discrimination. However, the law against marital status discrimination in Washington to date has not been interpreted as providing protection to employees engaged in same-sex relationships. The exclusion of same-sex relationships from the definition of marital status therefore affects the *future* substance of the law. The proposed interpretation of the 1993 amendment, as merely clarifying the regulations, is consistent with the fact that the amendment does not impact the substance of the *established* scope of marital status.

127. *See* Fahn v. Cowlitz County, 93 Wash. 2d 368, 383, 610 P.2d 857, 865 (1980).

128. If the 1993 amendment was intended to substantively change the law by narrowing the definition of marital status, then it would have been sensible to make this clear by repealing or modifying the regulations setting out a broad definition of the term. The fact that the regulations have remained unmodified for four years after the 1993 amendment was passed indicates that, in proposing the 1993 amendment, the Human Rights Commission in fact had no intent to make a substantive change in the law.

regulations do not conflict with a statute, Washington courts have deferred to the interpretation of the Human Rights Commission.[129] The supreme court should therefore defer to the broad interpretation of marital status in the Commission's regulations[130] and follow the precedent of *Washington Water Power*.[131]

3. *The Legislative History of the 1993 Amendment Does Not Support an Interpretation Narrowing the Protection Against Marital Status Discrimination for Washington Citizens*

Although it is clear that the 1993 amendment to Washington's anti-discrimination statute can be interpreted to be consistent with the broad reading of marital status, Justice Sanders, in his dissent in *Magula v. Benton Franklin Title Co.*, made a forceful argument that the amendment precludes such an interpretation.[132] Assuming arguendo that the statute is ambiguous, the absence of any legislative history of the 1993 amendment supporting the *Magula* dissent's narrow reading nevertheless indicates that the legislature had no intent to modify Washington's broad definition of marital status.

If the legislature intended to make a substantive change in the law when it passed the 1993 amendment, then surely it would have offered an explanation or justification for the change. However, the record does not include any legislative comment indicating that the amendment would narrow the statute's protection. In fact, the Governor understood that the bill was intended to strengthen, not weaken, civil rights in Washington.[133] This is a reasonable interpretation of the bill, considering

---

129. Marquis v. City of Spokane, 130 Wash. 2d 97, 111–13, 922 P.2d 43, 50–51 (1996) (deferring to Human Rights Commission's interpretation of Law Against Discrimination that allows cause of action against independent contractors); Barnes v. Washington Natural Gas Co., 22 Wash. App. 576, 581, 591 P.2d 461, 464 (1979) (relying on Human Rights Commission's construction of term "handicap" in interpreting Law Against Discrimination). *But see* Griffin v. Eller, 130 Wash. 2d 58, 68–69, 922 P.2d 788, 792 (1996) (invalidating Human Rights Commission's interpretation of small employer exemption). *See generally* Michael Spiro, Note, *Judicial Deference to Administrative Construction of Washington's Law Against Discrimination:* Griffin v. Eller *and* Marquis v. City of Spokane, 72 Wash. L. Rev. 677 (1997) (arguing that Washington courts should defer to Human Rights Commission's construction of Washington's anti-discrimination laws when Commission's construction is reasonably consistent with legislative intent and purposes of statute).

130. *See supra* notes 41–43 and accompanying text.

131. Washington Water Power Co. v. Washington State Human Rights Comm'n, 91 Wash. 2d 62, 586 P.2d 1149 (1978); *see also supra* notes 44–47 and accompanying text.

132. Magula v. Benton Franklin Title Co., 131 Wash. 2d 171, 187, 930 P.2d 307, 315 (Sanders, J., dissenting).

133. *See supra* note 53 and accompanying text.

that it was proposed by the Human Rights Commission.[134] The Governor also noted that the bill contained a number of "technical clean up provisions" that did not warrant discussion.[135] While curing an ambiguity in the regulations' definition might be described as a "technical clean up," narrowing the protection for employees could not.

Additional support for interpreting the 1993 amendment as a "technical clean up" rather than a substantive change can be found by considering the role of the Washington Human Rights Commission. The Commission drafted the detailed provisions of the Washington Administrative Code that define marital status broadly to explicitly include the identity and actions of an employee's spouse.[136] The dissent in *Magula* contended that this definition conflicts with the 1993 amendment. Yet the Human Rights Commission itself requested the introduction of the bill containing the 1993 amendment.[137] Because the Commission has not given any indication that it has since changed its policy on this issue, the absence of any explanation for a narrowing of employee protections, or even any statement that such a narrowing was the intent of the bill, supports the view that these provisions were simply intended to clarify existing law, not constrict it.

4. *The Broad Interpretation of Marital Status Accords with the Interpretation Provision of the Anti-Discrimination Statute*

The broad interpretation of marital status, with a view to preventing employers from acting upon damaging stereotypes, accords with the construction provision of the Washington anti-discrimination statute. This provision states that the chapter "shall be construed liberally for the accomplishment of the purposes thereof."[138] As discussed above, the purpose of anti-discrimination legislation is to prevent discrimination based upon stereotypes attaching to certain classes of people.[139] A broad

---

134. The Human Rights Commission proposed another bill in 1993. *See* 2 Legislative Digest & History of Bills of the Senate and House of Representatives, 53d Legis. 224 (Wash. 1993–94). This bill, which became effective on July 25, 1993, addressed federal Fair Housing Act requirements and clearly expanded the protections afforded by Washington's anti-discrimination laws. *See* Act of Apr. 21, 1993, ch. 69, 1993 Wash. Laws 190.

135. 1 Legislative Digest & History of Bills of the Senate and House of Representatives, 53d Legis. 212 (Wash. 1993–94).

136. *See supra* note 42 and accompanying text.

137. *See supra* note 51 and accompanying text.

138. Wash. Rev. Code § 49.60.020 (1996 & Supp. 1997); *see also* Phillips v. City of Seattle, 111 Wash. 2d 903, 908, 766 P.2d 1099, 1102 (1989).

139. *See supra* note 11 and accompanying text.

interpretation of marital status is necessary to be effective against all stereotypes attaching to people based upon marital status.[140]

5. *A Similar Provision Has Been Found Compatible with a Broad Interpretation of Marital Status*

Ross v. Stouffer Hotel Co. (Hawai'i)[141] illustrates that a broad interpretation of marital status is not incompatible with a statutory definition similar to that in the 1993 amendment. *Stouffer* involved two spouses employed by Stouffer Hotel Company as massage therapists.[142] The employer dismissed one of the spouses pursuant to its "no relatives" policy.[143] That employee brought an action under Hawai'i's law alleging discrimination on the basis of marital status.[144] The statutory definition of marital status in Hawai'i's discrimination statute is "the state of being married or being single."[145] The Supreme Court of Hawai'i adopted a broad definition of marital status, holding that the definition included discrimination based upon the identity or occupation of an employee's spouse.[146] The court reasoned that a narrow definition of the statute would be contrary to common sense, because it "ignores the simple fact of life that when a person marries, it is always to a particular person with a particular 'identity.' One does not 'marry' in some generic sense, but marries a *specific person*."[147] The court therefore found that the attributes of a person's spouse, including identity and occupation, were "implicitly subsumed" within the definition of marital status.[148] The court held that the employee had been discriminated against because of the identity of his spouse as an employee of Stouffer, and that the actions of the employer had violated "the plain language and purpose" of the statute.[149]

The definition of marital status in the Hawai'i statute resembles the definition of marital status in Washington's 1993 amendment. If anything, the Washington amendment is broader in that it covers a wider range of marital statuses, not just being married or single, but also

140. *See supra* text accompanying notes 92–94.

141. 879 P.2d 1037 (Haw. 1994).

142. *Id.* at 1039.

143. *Id.*

144. *Id.*

145. Haw. Rev. Stat. Ann. § 378-1 (Michie 1994 & Supp. 1997).

146. 879 P.2d at 1041–42.

147. *Id.* at 1041.

148. *Id.*

149. *Id.* at 1042.

separated, divorced, or widowed.[150] The decision of the Supreme Court of Hawai'i in *Stouffer* demonstrates that it would be reasonable for the Supreme Court of Washington to apply a broad interpretation of the term marital status as defined by the 1993 amendment.

III. CONCLUSION

Strong policies favor a broad interpretation of marital status in Washington's anti-discrimination legislation. First, employment decisions based upon undesirable stereotypes about spouses, particularly the stereotype that denies spouses their individual autonomy, are harmful and should be prohibited by the anti-discrimination statute. Second, a broad definition of marital status is necessary to implement the long-standing public policy of encouraging marriage. Third, employers' interests will be safeguarded by the fact that in Washington a successful plaintiff is required to prove an absence of business necessity for the discriminatory action.

The Supreme Court of Washington should regard the 1993 amendment as curing the circularity in the definition of marital status and preventing future expansion in the regulations, rather than as narrowing the established substantive law. It should continue to interpret marital status in a broad fashion to include the identity and actions of a person's spouse. This interpretation is in accordance with previous Washington case law, the Human Rights Commission's regulations, and legislative intent. If a narrow interpretation of marital status discrimination is adopted, as proposed by the *Magula* dissent, then the purpose of the anti-discrimination laws—to prevent employees from the operation of harmful stereotypes—will be frustrated. Therefore, Washington should continue to interpret its marital status anti-discrimination provisions to include the identity and actions of an employee's spouse.

150. *See supra* note 50 and accompanying text.