

June 27, 2012

VIA U.S. MAIL AND EMAIL

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President, Board of County Commissioners
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County Administrator
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Dear Mr. McKay and Mr. Eberly:

I write to inquire into Allegany County's policy regarding recognition of the validly-entered out-of-state marriages of same-sex spouses for County purposes. Lambda Legal is a national organization committed to achieving full recognition of the civil rights of lesbians, gay men, bisexuals, transgender people and those with HIV through impact litigation, education and public policy work. Our organization has successfully represented a number of same-sex spouses in Maryland in efforts to obtain recognition of their marriages performed in other jurisdictions. I respectfully ask that your County confirm that its policy is to recognize the out-of-state marriages of same-sex couples for all County purposes, including benefits coverage for same-sex spouses of County employees.

The County is legally required to recognize the out-of-state marriages of same-sex couples, as a recent decision of the Maryland Court of Appeals makes clear. In *Port v. Cowan*, 2012 Md. LEXIS 283 (Md. May 18, 2012), a unanimous decision issued in May 2012, the Court of Appeals confirmed that out-of-state marriages of same-sex couples are entitled to legal respect and recognition in Maryland. Under the common law principle of comity, Maryland recognizes valid out-of-state marriages so long as they are neither expressly prohibited by Maryland law nor "repugnant" to Maryland public policy. Recognition under comity law is required when these two criteria are met, even if the marriage would have been void had the parties entered into it in

Maryland. *Id.* at 13. The Court in *Port* noted that Maryland has never statutorily prohibited the recognition of valid out-of-state marriages of same-sex couples, and efforts by state legislators to do so have repeatedly failed. *Id.* at 19-21. The Court also found that recognition of such marriages is consistent with, not repugnant to, Maryland public policy. *Id.* at 25.

Moreover, as the Court noted, according legal respect to the out-of-state marriages of same-sex spouses is compelled under Maryland comity principles, independent of whether same-sex couples can marry within Maryland. *Id.* at 13-15. As the Court confirmed, this issue is distinct from the recently passed Maryland marriage law—the 2012 Civil Marriage Protection Act (CMPA)—and the potential state-wide referendum on this law. Resolution of “whether a foreign marriage is valid in this State, for purposes of divorce or otherwise, employ[s] the common law doctrine of comity, not principally our domestic marriage laws” and thus does not implicate the CMPA. *Id.* at 10-11. Therefore, regardless of the ability of same-sex couples to marry in Maryland or the outcome of any referendum on that question, the comity doctrine requires recognition of valid out-of-state marriages of same-sex spouses. *Id.* at 11-12, 34. Indeed, following a 2010 Attorney General opinion, the State of Maryland has “expressed a panoply of policies recognizing explicitly out-of-state same-sex marriages.” *Id.* at 29.

Not only has Maryland adopted state-wide policies recognizing these marriages and providing benefits to same-sex spouses of State employees, but a number of Maryland counties have also confirmed that they are abiding by Maryland comity law and recognizing the marriages of their lesbian and gay county employees. For example, Lambda Legal successfully represented Baltimore County police officers seeking spousal benefits for their same-sex spouses in a grievance procedure that culminated in a favorable arbitration award. Shortly thereafter, Baltimore County announced that it would grant spousal benefits to *all* county employees married to same-sex spouses.¹ Lambda Legal also lodged a complaint with the Maryland Commission on Human Rights (now the Maryland Commission on Civil Rights (MCCR)), on behalf of an administrator in the Anne Arundel County Public Schools (AACPS) seeking spousal benefits. In response, the AACPS changed its policy in July 2011 to conform to Maryland law and extend employee benefits coverage to married same-sex couples.² This past spring, Lambda Legal filed an MCCR complaint on behalf of a Washington County employee seeking recognition of his marriage for the purpose of spousal benefits. County officials there have confirmed that they will pursue a policy in line with *Port* and recognize the out-of-state marriages of same-sex spouses.³

As Lambda Legal has already successfully contended, Maryland counties are obligated to recognize the out-of-state marriages of lesbian and gay county employees, not only under Maryland comity principles, but also under the Maryland Fair Employment Practices Act, which prohibits discrimination by employers, including county governments, on the basis of sexual orientation.⁴ In the resolution of the Baltimore County police officers’ grievance discussed above, Arbitrator Lois Hochhauser of the American Arbitration Association expressly noted that denying an employee spousal employment benefits and protections solely because the person to whom they are lawfully married is of the same sex violates state discrimination prohibitions:

¹ For more information, see <http://lambdalegal.org/in-court/cases/selby-and-ballard-v-baltimore-county>.

² For more information, see http://lambdalegal.org/news/md_20111116_anne-arundel-school.

³ For more information, see http://www.lambdalegal.org/news/md_20120613_wash-county-grant-health.

⁴ Md. Code Ann., State Gov’t §§ 20-606, 20-901 (2012).

The County provides benefits to spouses unless they are in a same sex marriage which would identify spouses as gay or lesbian. Thus, the exclusion appears to violate the Maryland code barring discrimination based on sexual orientation.⁵

Beyond these legal requirements, providing benefits coverage to same-sex spouses of County employees is simply good employment practice. Research has shown that the cost to employers of extending coverage to same-sex partners of their employees is de minimis.⁶ At the same time, providing these benefits brings significant gains to the employer, including the ability to attract and retain valuable employees.⁷ Maryland employers who do not comply with county and anti-discrimination laws by denying coverage to same-sex spouses risk not only legal action against them, but also alienating sectors of the workforce essential to gaining and maintaining a competitive edge in the larger marketplace.

In sum, your County is obligated under Maryland law to accord respect to the out-of-state marriages of same-sex couples for all County purposes, including spousal benefits for County employees. We ask that you confirm that the County's policy is to recognize valid out-of-state marriages of same-sex spouses, that same-sex spouses of County employees are eligible for health and other spousal benefits, and that County employees have been made aware of this policy. I request that you please provide a written response and a copy of the relevant County policies by **Friday, July 27, 2012**. Please do not hesitate to contact me if you have any questions.

Very truly yours,

Susan Sommer
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⁵ See, e.g., *Fraternal Order of Police v. Baltimore Cnty. Gov't*, Case No. 16 390 00098 11, at 7 (Nov. 17, 2011) (Hochhauser, Arb.), available at http://www.lambdalegal.org/sites/default/files/selby_md_20111117_opinion-and-award.pdf.

⁶ Michael A. Ash & M. V. Lee Badgett, *Separate and Unequal: The Effect of Unequal Access to Employment-Based Health Insurance on Same-sex and Unmarried Different-sex Couples*, 24 *Contemporary Economic Policy*, 582, 596 (2006).

⁷ See, e.g., *Domestic Partner Benefits: Facts and Background*, Facts from EBRI (Employee Benefit Research Institute) (Feb. 2009), available at <http://www.ebri.org/pdf/publications/facts/0209fact.pdf>.