

VIA U.S. MAIL AND FACSIMILE

Mr. Russell Childs, President and COO
SkyWest Airlines, Inc.
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St. George, Utah 84790
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Mr. Richard B. Hirst, Senior Vice President & General Counsel
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October 29, 2009

Dear Mr. Childs and Mr. Hirst:

I write to you on behalf of Gilbert Caldwell, a loyal and dedicated SkyWest Airlines, Inc. ("SkyWest") employee since 2004 at the Palm Springs International Airport, and one of the gay and lesbian employees who are treated unfairly by the discriminatory employee travel benefits agreement maintained by SkyWest and Delta Air Lines, Inc. ("Delta"). In violation of well-established law and the equal employment policies of both SkyWest and Delta, SkyWest inexplicably is refusing to provide spousal travel benefits on equal terms for same-sex spouses and registered domestic partners of its Delta dedicated employees in California. This surprising and discriminatory policy not only sends a powerful message of stigma and devaluation to SkyWest's gay and lesbian employees, but contravenes clear California legal mandates to treat same-sex spouses and registered domestic partners on equal terms with heterosexual spouses. Although we suspect that this anachronistic policy may remain due to senior management oversight, the companies' persistent refusal to change it after repeated requests is, at best, deeply disrespectful of and unfair to your gay employees. Given the equal opportunity statements of both SkyWest and Delta, we have been disappointed and shocked that SkyWest has opted to defend this policy during the past year of agency investigation of our client's civil rights complaint. Accordingly, we make this formal demand that SkyWest and Delta immediately end this discrimination if each company wishes to avoid having to defend it in court.

Lambda Legal is the oldest and largest nonprofit legal organization advocating nationally for 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. Since 1973, Lambda Legal has appeared as counsel or *amicus curiae* in hundreds of cases in state and federal courts on behalf of lesbians and gay men who have suffered discrimination because of their sexual orientation and marital status, including many cases seeking and defending access to marriage and domestic partnership protections for same-sex couples. Lambda Legal's work to

secure and protect marriage equality for same-sex couples in California includes representing plaintiff lesbian and gay couples in *In re Marriage Cases*, 43 Cal.4th 757 (2008) (securing the freedom to marry for same-sex couples in California prior to the passage of Proposition 8) and *Strauss v. Horton*, 46 Cal.4th 364 (2009) (holding that, for same-sex couples who married in California prior to Proposition 8's passage, their "marriages remain valid in all respects"). Lambda Legal also drafted California's broad domestic partnership law ("AB 205"), which granted state-registered domestic partners the same rights and responsibilities as spouses, and has won landmark rulings confirming the rights of domestic partners. *See, e.g., Koebke v. Bernardo Heights Country Club*, 36 Cal.4th 824 (2005) (interpreting AB 205 and holding that a business's refusal to extend equal spousal benefits to California-registered domestic partners constitutes unlawful marital status discrimination); *Ellis v. Arriaga*, 162 Cal. App. 4th 1000 (2008) (applying AB 205 and holding that putative registered domestic partners must have equal putative spouse protections because domestic partnership laws afford the same rights and responsibilities to same-sex couples as marriage laws afford to different-sex couples).¹

Mr. Caldwell has worked since September 23, 2004 as a Baggage Service Agent for SkyWest at the Palm Springs International Airport. Mr. Caldwell has been an exemplary employee with uniformly positive job performance reviews and no record of discipline. Mr. Caldwell, age 56, and his spouse, Rev. David Farrell, age 72, have been in a loving, mutually devoted relationship for 34 years, since they met at Metropolitan Community Church of San Diego in 1975. The couple held a commitment ceremony in October of 1993 to celebrate with friends and family the profound, life-long commitment they have made to each other. Mr. Caldwell and Rev. Farrell registered as domestic partners with the State of California on November 16, 2002, and were legally married in California on June 24, 2008.

Mr. Caldwell's position with SkyWest entitles him to family travel benefits. Pursuant to a SkyWest policy described in the "New Delta Leisure Travel Agreement," access to family benefits is restricted to the "spouse, eligible dependents and parents" of a SkyWest employee. We understand that SkyWest interprets this policy to exclude an employee's California-registered domestic partner, despite the law's clear requirement that domestic partners receive the same rights and responsibilities as spouses. In fact, SkyWest's discriminatory treatment of domestic partners is written explicitly in the SkyWest Employee Travel Manual, which states that domestic partners are eligible only for SkyWest's Travel Companion program – an inferior and more expensive travel benefits option for friends of employees. SkyWest also interprets its family travel benefits policy to exclude an employee's same-sex spouse, similarly relegating that

¹ *See also Kline v. UPS*, San Francisco Superior Court Case No. RG03112427 (obtained successful settlement in 2004 on behalf of plaintiff UPS employee denied relocation benefits for his same-sex life partner that UPS routinely provided to employees with a different-sex spouse); *Air Transport Ass'n of America v. City and County of San Francisco*, 266 F.3d 1064, 1072 (9th Cir. 2001) (provided amicus support to city in case enforcing contracting ordinance prohibiting employment benefits discrimination by municipal contractors, including denial of equal travel benefits by airlines).

person to the status of Travel Companion – despite California’s clear mandate that validly married same-sex spouses be afforded the same dignity, respect and legal rights as different-sex spouses. SkyWest’s Travel Companion benefits require same-sex domestic partners and spouses to purchase tickets on qualifying flights by paying a “yield fare” and related taxes, while heterosexual spouses may travel on the same flights without charge.

Mr. Caldwell repeatedly and expressly has requested that SkyWest provide spousal travel benefits on equal terms to him for the benefit of Rev. Farrell, and has been met with apathy, delay, and a failure to correct the unlawful policy to allow Mr. Caldwell and other gay and lesbian employees equal access to those benefits. As a result, Mr. Caldwell has incurred damages in the form of yield fares he has been required to pay for tickets through the Travel Companion program, when his registered domestic partner and spouse should have been able to travel on flights without charge as heterosexual spouses are permitted to do. While he should not have had to shoulder these additional expenses because of SkyWest’s patently discriminatory conduct, Mr. Caldwell’s primary concern is the insulting and degrading devaluation of his relationship with his spouse and registered domestic partner. Mr. Caldwell finds it painful that SkyWest maintains a public position, ensconced partly in its written travel benefits policy, that regards his loving partner of 34 years as no more than a “friend,” while heterosexual employees’ spouses are fully respected automatically, regardless of the duration or interdependence of their relationships. SkyWest’s denial of travel benefits on equal terms to its gay and lesbian employees, including Mr. Caldwell, sends an unmistakable message demeaning their worth as employees – simply because of their marital status and sexual orientation. California law requires equal pay for equal work regardless of those characteristics, and SkyWest must reform its travel benefits policy immediately to conform with this well-established law.

SkyWest’s insistence on unequal treatment for gay and lesbian employees is particularly shocking given California’s crystal clear prohibitions on employment discrimination based on marital status or sexual orientation.² See Cal. Gov’t Code § 12940(a). The California Supreme Court established over four years ago that differential treatment of a same-sex registered domestic partner constitutes unlawful marital status discrimination. See *Koebke*, 36 Cal.4th at 850 (holding that lesser treatment of state-registered domestic partners as compared with heterosexual spouses is prohibited marital status discrimination); see also Cal. Fam. Code § 297.5(a) (“[r]egistered domestic partners shall have the same rights ... and shall be subject to the same responsibilities ... under law ... as are granted to and imposed upon spouses”).

Any confusion on the companies’ part is even harder to understand given the wide public attention paid to the California Supreme Court’s May 26, 2009 ruling that same-sex couples who married in California in 2008 remain married and are entitled to all spousal rights and responsibilities under California law. *Strauss*, 46 Cal.4th at 473 (“same-sex couples who

² This letter is not intended to set forth a complete statement of all of the legal rights or remedies of Mr. Caldwell, nor of all of the facts nor the legal or equitable bases on which those rights and remedies rest, nor to waive or compromise them in any way.

married [lawfully in California] ... acquired vested property rights as lawfully married spouses with respect to a wide range of subjects, including, among many others, *employment benefits ...*) (italics added).³

Federal law provides no defense for SkyWest's outrageous conduct. The Employee Retirement Income Security Act ("ERISA") does not bar Mr. Caldwell's claims, as the Ninth Circuit confirmed in a ruling against airlines seeking to avoid compliance with a San Francisco ordinance limiting eligibility for municipal contracts to companies that promise not to discriminate against employees based on, *inter alia*, marital status or sexual orientation. *Air Transport Ass'n of America*, 266 F.3d at 1074 (city ordinance not preempted with respect to travel benefits, which are "non-ERISA benefits" and subject to city contracting authority). SkyWest's discriminatory policy is at least remarkable, if not shocking, in light of the Ninth Circuit's ruling over eight years ago on this point.⁴ *Air Transport Ass'n of America* established that San Francisco's ordinance conditioning all city contracts on the contractor's promise to not discriminate in provision of employee benefits (including – for purposes of the precise issue here – travel benefits for airline employees) based on, *inter alia*, marital status and sexual orientation is fully enforceable against airlines operating out of the San Francisco International Airport.

SkyWest immediately should reform its travel benefits policy – not only to avoid having to defend its unlawful practice under laws permitting Mr. Caldwell to recover attorney's fees, costs, and punitive damages (*see, e.g.*, Cal. Gov't Code § 12965(b), Cal. Civ. Code § 3294), but also because providing equal employment benefits is a matter of company policy,⁵ basic fairness, and smart business practice. While providing such benefits to employees is generally financially

³ California's policy of providing equal dignity and respect to married same-sex couples recently was reaffirmed by the California Legislature through its enactment of the Marriage Recognition and Family Protection Act, which confirms that the state will recognize fully the marital status of same-sex spouses who married in another jurisdiction prior to Proposition 8's passage. *See* 2009 Cal. Stat. Ch 625 (S.B. 54).

⁴ The court similarly rejected the airlines' claims that the Airline Deregulation Act and the Railway Labor Standards Act preempted San Francisco's anti-discrimination ordinance. *Id.* at 1074-1075, 1078. SkyWest's flouting of its similar state law duty to offer equal travel benefits to its married and partnered gay employees is incomprehensible in the face of such well-established authority.

⁵ SkyWest publicly promises to provide equal treatment to its employees, *inter alia*, in its "Equal Employment Opportunity Standard Practice 52," sect. 1(A), which states: "It is SkyWest Airlines policy to provide equal employment opportunity to all employees ... regardless of ... sexual orientation ... or any other characteristic protected by applicable federal or state law" and in sect. 2(A), which states: "This policy applies to all terms, conditions and privileges of employment including ... compensation, benefits"

insignificant to the employer, it is well-known that travel benefits are a valuable form of compensation for the airline employee that significantly affect employee morale and productivity.⁶ SkyWest's denial of equal travel benefits amounts to a reduction of gay and lesbian employees' pay. SkyWest thus insists that its gay and lesbian employees with a state-registered domestic partner or spouse should not receive the same rate of compensation for their job performance, though Mr. Caldwell—as one representative of this class of SkyWest employees—is not excused from any of his assigned work hours or job responsibilities.

Our experience has been that discriminatory mistreatment of lesbian and gay employees sometimes is explained by an employer's confusion about the law, and resolution often can be achieved by informing the offending employer about its legal obligations and working with the employer to correct the unlawful treatment. In this instance, we have been surprised and deeply troubled that SkyWest's position thus far has been one of staunch resistance to its legal obligations, of indifference to its employees' needs, and of attempting to shift responsibility onto Delta. Mr. Caldwell recently completed the process of exhausting his administrative remedies with California's Department of Fair Employment and Housing ("DFEH") against both SkyWest


⁶ A substantial body of empirical, non-partisan research demonstrates that employees who receive equal treatment in the terms of their compensation report higher job satisfaction, and their employers bear fewer costs from employee turnover. *See, e.g.*, Center for American Progress, *One Simple Step for Equality*, 2 (Sept. 2008) ("Gay and lesbian employees often cite benefit programs as a key factor in their decision to leave or stay at a job. ... Private employers cite a number of factors driving the decision to open up their benefits systems. Chief among these is the correlation between benefits and worker contentment. ... Even after staff are recruited, domestic partner benefits help employers retain good employees."), available at <http://www.americanprogress.org/issues/2008/09/pdf/domestic_partner_benefits.pdf> (last viewed on October 27, 2009); M.V. Lee Badgett and Gary J. Gates, *The Effect of Marriage Equality and Domestic Partnership on Business and the Economy*, 1 (Oct. 2006) (employees who receive domestic partner benefits are "healthier, more satisfied, and less likely to leave their jobs"), available at <http://www.law.ucla.edu/williams_institute/publications/MarriageEqualityontheEconomy.pdf> (last viewed on October 27, 2009); *see also Andersen v. King County*, 138 P.3d 963, 985 n. 17 (2006) ("Bottom-line, business decision-making explains it: Respected employees perform better and stay longer."), quoting *The Federal Marriage Amendment is Bad for Business*, Wall St. J., Oct. 5, 2004, at B2; *Crawford v. City of Chicago*, 304 Ill.App.3d 818, 827 (1999) (finding that cities must be able to offer good employment benefits in order to be able to hire and retain qualified individuals). For these reasons and many others, providing equality of treatment to employees has long been recognized as sound fiscal policy and the industry standard, as illustrated by the fact that Delta, American Airlines, Inc., United Air Lines, Inc., and other major airlines provide equal spousal benefits to their employees with a same-sex spouse or state registered domestic partner. Discrimination against gay and lesbian employees is bad for business, as many members of the public care deeply about supporting companies that offer equal treatment, and will choose other alternatives to avoid participating in a business that devalues and stigmatizes employees in committed same-sex relationships.

and Delta. We understand that, during the course of DFEH's investigation, SkyWest insisted that SkyWest would continue to enforce its patently discriminatory travel benefits policy, and claimed that Delta had demanded the unlawful treatment of gay and lesbian employees. SkyWest's claim about Delta is surprising indeed because Delta treats its own lesbian and gay employees equally for purposes of travel benefits, a fact confirmed by Delta's website. See Delta Careers, "Worldwide Travel Privileges," available at <http://www.deltajobs.net/travel_and_benefits.htm> (confirming that employee travel privileges include "free and reduced rate travel" for a "[s]ame-sex domestic partner/same-sex spouse (imputed income applies)") (last viewed on October 27, 2009). Accordingly, this letter seeks prompt clarification about precisely what role SkyWest and Delta have played respectively in crafting and implementing this discriminatory policy and what explanation, if any, each company wishes to offer in defense.

Again, SkyWest has had ample opportunity to correct this glaring violation of California's anti-discrimination and relationship recognition laws during DFEH's 11-month-long investigation of Mr. Caldwell's claims, and refused to do so. Delta has received formal notice that SkyWest is attributing equal or greater responsibility for this violation to Delta. This letter is our final attempt to correct SkyWest and Delta's clearly unlawful travel benefits policy before Mr. Caldwell proceeds to court. Without waiving any of Mr. Caldwell's rights, we still believe that this matter could be resolved amicably and efficiently if the terms of SkyWest's travel benefits policy were revised without delay to provide equal spousal benefits to registered domestic partners and same-sex spouses, and if Mr. Caldwell were compensated for his damages. Such a policy change should not be difficult or time-consuming to effect, as one need not look farther for appropriate model language than the non-discriminatory travel benefits policy Delta has adopted for its own employees, and which SkyWest incorporates into its travel benefits agreements with United Air Lines, Inc. and Midwest Airlines. Mr. Caldwell intends to file suit expeditiously if we are not able to achieve a prompt resolution of this matter.

I request that you respond to this letter no later than the close of business on November 12, 2009 so that I may advise Mr. Caldwell of his options. I can be contacted with any questions at 213-382-7600, ext. 231 or tborelli@lambdalegal.org.

Sincerely,



Tara L. Borelli, Esq.

cc: Mr. Todd Emerson, Director of Govt and Legal Affairs for SkyWest Airlines, Inc. (via email)

Mr. Gilbert Caldwell