

**Topic:** Employment Law and State Constitutional Requirements  
**Date:** 2/16/04  
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**Tanner v. Oregon Health Sciences Univ., 157 Ore. App. 502**

**FACTS**

OHSU provided group health insurance benefits to its employees. It provided each employee a certain amount of money and authorized each employee to select insurance benefits within the limits of the money provided. OHSU permitted employees to purchase insurance coverage for "family members." Under this criterion, unmarried domestic partners of employees were not "family members" who were entitled to insurance coverage.

Plaintiffs are three lesbian nursing professionals employed by OHSU and their unmarried domestic partners. Each of the couples has enjoyed a long-term and committed relationship, which each wishes to continue for life. Each of the couples would be married if Oregon law permitted homosexual couples to marry. All three OHSU employees applied for medical and dental insurance benefits for their domestic partners. The OHSU benefits manager refused to process the applications on the ground that the domestic partners of the employees did not meet the eligibility criteria.

**ISSUE**

Did OHSU's denial of benefits to plaintiffs and their domestic partners violate ORS 659.030(1)(b) and Article I, section 20 of the Oregon Constitution?

**WHAT HAPPENED AT TRIAL?**

The trial court issued a letter opinion concluding that the denial of benefits to plaintiffs and their domestic partners violated ORS 659.030(1)(b) and Article I, section 20. The judgment enjoined the State of Oregon, OHSU, SEBB, and the State Board of Higher Education from continuing the practice of denying group life, health, and dental insurance coverage to domestic partners of homosexual employees when those benefits are offered to spouses of heterosexual employees.

The judgment defines "domestic partners" as homosexual persons not related by blood closer than first cousins who are not legally married, who have continuously lived together in an exclusive and loving relationship that they intend to maintain for the rest of their lives, who have joint financial accounts and joint financial responsibilities, who would be married to each other if Oregon law permitted it, who have no other domestic partners, and who are 18 years of age or older. The judgment awarded plaintiffs their costs and attorney fees.

## HOW DID THIS CASE GET TO THE OREGON COURT OF APPEALS?

Defendants (OHSU) appealed and while the appeal was pending, OHSU adopted an employee benefit plan that now provides fringe benefits for the domestic partners of its employees, whether or not they are married. It continues to take the position, however, that it is not legally obligated to provide such benefits.

## ARGUMENTS

Plaintiffs argue because homosexual couples cannot marry the OHSU health plan has a discriminatory impact on homosexuals. Heterosexual couples can marry and thus at least have the option of doing so to avail themselves of the employee benefits; homosexual couples cannot marry and have no such option. Because of the disparate impact on homosexual couples of denying benefits on the otherwise facially neutral basis of marital status, plaintiffs argue, OHSU has discriminated on the basis of the sex of persons with whom employees associate, in violation of ORS 659.030(1)(b) and Art I § 20 of the Oregon Constitution

OHSU argues that the trial court erred, because its denial of benefits was in no way predicated on the sex of any employee or of any individual but that its denial of benefits instead was based on marital status alone, without reference to the sexual orientation of the employees or their domestic partners. OHSU emphasizes that any unmarried domestic partners--heterosexual and homosexual alike--were denied insurance benefits and there is no desperate discriminatory impact on homosexual employees.

*\*\*\*this case study does not focus on the moot issues concerning the additional parties involved (State of Oregon, the State Board of Higher Education, the Executive Department and PEBB)*

## WHO WON?

The Plaintiffs won with the court concluding; "OHSU's denial of insurance benefits to the unmarried domestic partners of its homosexual employees violated Article I, section 20, of the Oregon Constitution and that the trial court correctly entered judgment in favor of plaintiffs on that ground." The Trial Court decision that OHSU violates ORS 659.030 (1)(b) was reversed because OHSU did not intentionally discriminate against homosexuals as required by the state employment statute.

## HOW THE COURT EXPLAINED ITS DECISION?

### **No Employment Violation under ORS 659.030(1)(b).**

#### No intent to discriminate as required by the state employment violation statute

- Although OHSU's practice of denying insurance benefits to unmarried domestic partners of its homosexual employees had an otherwise unlawful disparate impact

on a protected class, because there is no evidence that OHSU engaged in a subterfuge to discriminate against that protected class--and because there is affirmative evidence that it did not--it did not engage in an unlawful employment practice. The trial court erred in reaching a contrary conclusion.

Basing decision on definition of "subterfuge" in ORS 659.030 (1)(b)

- The Court began by noting that the ordinary meaning of the term is "a scheme, plan, stratagem, or artifice or evasion." Applying the ordinary meaning of the term, the Court held that proof of actual intent to discriminate is required. OHSU did not have actual intent to discriminate against homosexuals as required under ORS 659.030

**Violation of Art I § 20 of the Oregon Constitution**

OHSU discriminated because of marital status, appears facially neutral yet has a discriminatory impact

- OHSU did not discriminate "because of" sexual orientation; it discriminated "because of" marital status, without regard to sexual orientation. OHSU's practice of denying insurance benefits to unmarried domestic partners, while facially neutral as to homosexual couples, effectively screens out 100 percent of them from obtaining full coverage for both partners. That is because, under Oregon law, homosexual couples may not marry.

There was a discriminatory impact on a recognized class of individuals.

- We understand from the cases that the focus of suspect class definition is not necessarily the immutability of class defining characteristics, but instead the fact that such characteristics are historically regarded as defining distinct, socially-recognized groups that have been the subject of adverse social or political stereotyping or prejudice.

Subject to judicial scrutiny

- If a law or government action fails to offer privileges and immunities to members of such a class on equal terms, the law or action is inherently suspect, and may be upheld only if the failure to make the privileges or immunities available to that class can be justified by genuine differences between the disparately treated class and those to whom the privileges and immunities are granted.
- Here, there was not a legitimate justification for excluding homosexual partners from obtaining employment benefits

Homosexuals are members of a true class and a suspect class. Suspect class discrimination requires heightened judicial inquiry.

- Here, plaintiffs are members of a true class. That class--unmarried homosexual couples--is not defined by any statute nor by the practices that are the subject of plaintiffs' challenges. Moreover, the class clearly is defined in terms of personal and social characteristics. The question then is whether plaintiffs are members of a suspect class. Here, too, we have no difficulty concluding that plaintiffs are

members of a suspect class. Sexual orientation, like gender, race, alienage, and religious affiliation is widely regarded as defining a distinct, socially recognized group of citizens, and certainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice.

Intent to discriminate is irrelevant under State Constitutional analysis

- Article I, section 20, does not prohibit only intentional discrimination. What is relevant is the extent to which privileges or immunities are not made available to all citizens on equal terms. Homosexual couples may not marry. Accordingly, the benefits are not made available on equal terms. They are made available on terms that, for gay and lesbian couples, are a legal impossibility.

**Handout Questions**

1. Read only the factual pattern: How do you think the court will decide this claim? How would you decide this claim (gut reaction)?
2. As defendants, how would you argue that the Oregon Employment Violation Statute (ORS 659.030 (1)(b)) applies to the OHSU family benefit plan?
3. As OHSU, How would argue that “intent to discriminate” is required under Art I § 20 of the State of Oregon Constitution?
4. Would this case be decided differently if homosexuals were allowed to marry in the state of Oregon? Why?
5. Can you think of any other “true” or “suspect” class employees that could possibly be negatively affected by the OHSU “family benefit plans”? Can you think of any other situation where it would be considered unfair to exclude an individual from OHSU’s family benefit plan?

**APPLICATION**

1. This case analyzes the equal protection/ application requirements for employers and employees under Art 1 § 20 of the Oregon Constitution and ORS 659.030 (1)(b).
2. Do you think the Oregon Legislature intended to protect homosexual relationships under ORS 659.030? Why or why not? Does legislative intent have any bearing on the court’s decision here?

3. Do you think the Oregon legislature intended to protect homosexual relationships under Art 1 § 20? Why or why not? Is legislative intent relevant here?
4. Suppose that a polygamist is claiming unconstitutional discrimination under Art 1 § 20, because OHSU refuses to extend “family benefits” to his second and third wife. What kinds of arguments can be made in favor of the polygamist? Would the court rule similar to *Tanner*? Why or why not?
5. Suppose that a grandmother is claiming the same because her adult daughter is economically dependant on her, yet is not considered a dependant according to the OHSU “family benefit plan”. What kind of arguments would you make in favor of grandma?
6. Does it matter that supporting an adult daughter is socially acceptable and polygamy is not? Why or why not? Does the court address what is and is not socially acceptable in their opinion? Indirectly or directly?

***∞ FYI: In 2001 the Oregon Legislature changed the employment discrimination statute ORS 659.030 (1)(b) to include marital status***

**ORS § 659A.030 (2001)**

659A.030. Discrimination because of race, religion, color, sex, national origin, marital status or age prohibited.

(1) It is an unlawful employment practice:

(a) For an employer, because of an individual's race, religion, color, sex, national origin, marital status or age if the individual is 18 years of age or older or because of the race, religion, color, sex, national origin, marital status or age of any other person with whom the individual associates, or because of a juvenile record, that has been expunged pursuant to ORS 419A.260 and 419A.262, of any individual, to refuse to hire or employ or to bar or discharge from employment such individual. However, discrimination is not an unlawful employment practice if such discrimination results from a bona fide occupational requirement reasonably necessary to the normal operation of the employer's business.

(b) For an employer, because of an individual's race, religion, color, sex, national origin, marital status or age if the individual is 18 years of age or older, or because of the race, religion, color, sex, national origin, marital status or age of any other person with whom the individual associates, or because of a juvenile record, that has been expunged pursuant to ORS 419A.260 and 419A.262, of any individual, to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

**Ore. Const. Art. I, § 20 (2001)**

**Section 20. Equality of privileges and immunities of citizens.**

“ No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens.”