Benefits ruling hailed

Judge says lesbian plaintiffs' partnerships are "identical to marriage"

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by Inga Sorensen

Lisa Chickadonz and Christine Tanner have "enjoyed a long-term and committed relationship identical to marriage," therefore the lesbian couple should not be denied spousal health benefits automatically granted to heterosexual married couples. So says Multnomah County Circuit Judge Stephen L. Gallagher Jr., who recently ruled that domestic partners of gay men and lesbians have a constitutional right to spousal health benefits.

In his Aug. 8 opinion, thought to be the first of its kind in the nation, Gallagher held that the State of Oregon and Oregon Health Sciences University illegally discriminate against their gay and lesbian employees by offering insurance fringe benefits to heterosexual employees' spouses, but not to gay and lesbian employees' domestic partners.

He ordered the state and OHSU to make their insurance fringe benefits equally available to the domestic partners of their gay and lesbian employees.

The ruling was prompted by a 1992 lawsuit brought by two OHSU nursing professors and a pharmacy supervisor who, joined by their respective partners, sued to obtain medical, dental and life insurance benefits.

Gallagher found the state's benefits policy violates Oregon's statute prohibiting employment discrimination and state constitutional guarantees of equal privileges and immunities.

"The [Oregon] statute says not only that you can't discriminate on the basis of sex, you also can't discriminate on the basis of the sex of someone with whom the employee associates, in this case the female partners of the employees," says Portland attorney Carl Kiss, who represents the three lesbian couples. He believes Gallagher's decision, by implication, "would prohibit every Oregon employer from discriminating against [gay men and lesbians] in any employment decision, including hiring, firing, promotion and pay."

"It is beyond debate that invidious and virulent discrimination has been and is directed toward and suffered by the lesbian and gay men communities in this state, and elsewhere," Gallagher writes.

"So pernicious and pervasive has this odious activity become that it is incumbent upon the judiciary to scrutinize, carefully and thoroughly, legislation and administrative rules which ostensibly are facially balanced or neutral, and hence appear to comport with constitutional mandates, but which, in fact and in practical effect, merely disguise the very discriminatory practices constitutional considerations proscribe," he adds. "Constitutional law may mandate, like it or not, that customs change along with an evolving social order."

Gallagher stated that all of the couples "conducted themselves as members of a 'family.'... [E]ach couple has enjoyed a long-term and committed relationship identical to marriage, with the usual indices of such a union. In all respects, each couple has successfully maintained a loving, functional, cohesive family-type relationship which they wish to maintain until parted by death. But for state law prohibiting same-sex marriages, each couple would have at all times...gladly and voluntarily exchanged the vows of marriage between themselves to achieve that legal status. Of this, the Court has no doubt."

"As the judge found, each couple's relationship is identical to a marriage in all ways within their power to make," says Kiss. "But the state, which says, 'We'll give you benefits if you get married,' refuses to allow these couples the right to do so."

It's a Catch-22, says Kiss, that the judge refused to ignore.

"This is really a path-paving ruling. It is the first court decision that I'm aware of in which a judge has ordered a government employer to provide fringe benefits to the domestic partners of lesbian and gay employees," says Jon Davidson of the Lambda Legal Defense and Education Fund, a national gay and lesbian legal organization.

Davidson says similar cases have been brought in the past, but have been unsuccessful or settled out of court. Cities such as Philadelphia and San Francisco have offered health benefits to domestic partners of lesbian and gay city employees, but no court order was involved and the benefits did not extend to state employees. Three states—New York, Massachusetts and Vermont—extend benefits to domestic partners, but again, have done so without a court mandate.

Kiss and others say the experience of the growing number of public and private employers who offer domestic partnership benefits coverage "shows that no material additional expense or administrative inconvenience results."

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"The judge showed that he was very thoughtful and respectful of these families," says Davidson. "He also made it clear that these couples would get benefits if they could marry, but were prohibited by the state from doing so."

In his opinion, Gallagher noted his review and re-review of materials submitted by counsel, including the recent *Romer vs. Evans* opinion, a U.S. Supreme Court ruling that deemed Colorado's anti-gay Amendment 2 unconstitutional.

Davidson says the ongoing public dialogue surrounding gay and lesbian issues probably helped inform the judge's ruling, as well as the *Romer vs. Evans* ruling.

"I think that ruling signaled to a number of lower court judges that they should be more receptive to hearing claims of discrimination by gays and lesbians," he says.

The state attorney general has 30 days from the date the ruling was issued to decide whether to appeal the case. Peter Cogswell, a spokesman with the attorney general's office, says the case is under review. While he says appeals are typical, he adds they are "not automatic."

Cogswell further says the attorney general alone "has the ability" to proceed with an appeal, but acknowledges a request from the governor "is certainly something we would pay attention to."

Gov. John Kitzhaber asked Attorney General Ted Kulongoski to submit an amicus brief to the nation's high court outlining Oregon's opposition to Amendment 2. Both men are considered allies of the gay and lesbian community. The governor was not available for comment.