TANNER V. OREGON HEALTH SCIENCES UNIVERSITY: JUSTIFYING THE MANDATE FOR DOMESTIC PARTNER BENEFITS

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On August 8, 1996, Multnomah County Circuit Judge Stephen Gallagher handed down a first-of-its-kind order. Unlike other cases involving domestic partner benefits which focus on marital status discrimination,[1] the Oregon case is premised on sex discrimination. In Tanner v. Oregon Health Sciences University, Judge Gallagher ordered the state of Oregon to offer group life, medical, and dental insurance benefits to the domestic partners of homosexual state employees.[2] Judge Gallagher held that the state's current fringe benefit plan violates Article I, section 20 of the Oregon Constitution and Oregon Revised Statute (ORS) § 659.030(1)(b),[3] which prohibit sex discrimination in employment.[4] The decision enjoined the State of Oregon, Oregon Health Sciences University (OHSU), the State Board of Higher Education, and the State of Oregon's State Employee's Benefits Board (SEBB) from denying group life and group medical and dental insurance coverage to the domestic partners of homosexual employees when such employment-related benefits are afforded to the spouses of its heterosexual employees.[5]

The Tanner opinion is problematic because it is void of legal analysis— statutory, constitutional, common law, or otherwise—to justify the

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[1] *See* Rutgers Council of AAUP Chapters v. Rutgers State Univ., 689 A.2d 828 (N.J. Super. Ct. App. Div. 1997) (denying insurance benefits for domestic partners because spouse does not include a same-sex partner); Univ. of Alaska v. Tumeo, 1997 WL 112276 (Alaska Mar. 14, 1997) (holding that the denial by the University of equal benefits to married couples and unmarried same-sex domestic partners is discrimination based on marital status in violation of the Alaska Human Rights Act).

[2] Tanner v. Oregon Health Science University, No. 9201-00369, 1996 WL 585547 (Or. Cir. Aug. 8, 1996).

[3] Or. Rev. Stat § 659.030(1)(b) (1997).

[4] Tanner, No. 9201-00369, at *3.

[5] Tanner, No. 9201-00369, at *4.

outcome.[6] Instead, Judge Gallagher's opinion is premised upon the social injustices that continue to afflict the gay and lesbian communities; as a result, the decision is ripe for appeal.[7] On August 30, 1997, the Oregon Attorney General's office announced its decision to appeal the case. At the very least, the appeal is perfunctory, intended to force the Court of Appeals to set binding precedent.[8] On the other hand, the Attorney General's challenge could be a genuine effort to prove that the state's policies and practices are both non-discriminatory and constitutional. In either scenario, it is speculated that this case will reach the Oregon Supreme Court, with the possibility of becoming binding law in Oregon.[9] Both the Court of Appeals and the Supreme Court decisions are heavily anticipated because the implications could be far-reaching. Depending on the courts' analyses, homosexuals may be deemed a protected class in Oregon. Such a ruling would alter the current face of many of the state's legal doctrines and pave the way for a potentially successful challenge to the state's prohibition on same-sex marriages.[10]

This Comment first examines the Tanner case: the claim, the issues, the arguments set forth by both parties, and the holding. Next, the available constitutional, legal, and social arguments will be presented and analyzed applying the Tanner facts. Finally, this Comment concludes that the circuit court holding in Tanner v. OHSU can withstand constitutional and legal scrutiny, thereby taking Oregon a step closer to deeming homosexuals a protected class under the state's employment non-discrimination law and the Oregon Constitution.

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[6] "It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule." Marbury v. Madison, 5 U.S. 137, 177 (1803).

[7] Tanner, No. 9201-00369, at *1.

[8] This seems the likely reason for the challenge since the state of Oregon has generally taken a liberal approach toward sexual orientation issues in the past. For example, former Oregon Attorney General Ted Kulongowski filed an amicus brief on behalf of the state in support of the plaintiff in Romer v. Evans, the Colorado anti-gay rights initiative challenge. Romer v. Evans, 116 S. Ct. 1620 (1996).

[9] Domestic Partners: Oregon Attorney General to Appeal Ruling on Benefits to Same Sex Partners, 1996 Daily Labor Rep. (BNA) 171 d9 (Sept. 4, 1996).

[10] Oregon's marriage statute does not explicitly prohibit same-sex marriages. This issue has not yet been litigated, but it is highly speculated that the statute does prohibit such marriages. For the purposes of this Comment, it will be presumed that same-sex marriages are proscribed. This assumption is based on Judge Gallagher's acknowledgment that such marriages are not permitted, and on the Plaintiffs' petition which also makes this assertion. *See* Second Amended Petition for Judicial Review and Complaint at 1, Tanner v. Oregon Health Sciences Univ., No. 9201-00369, 1996 WL 585547 (Or. Cir. Aug. 8, 1996); Tanner, 1996 WL 585547 at *2, 3.

I. TANNER V. OREGON HEALTH SCIENCES UNIVERSITY

On appeal, the findings of fact made by the circuit court are reviewed for clear error and the legal determination is reviewed *de novo*.[11] This Comment, therefore, will use the trial court's findings for relevant background information and facts.[12]

A. Findings of Fact

At all times relevant to the case, Plaintiffs/Petitioners Christine Tanner, Barbara Limandri, and Regenia Phillips were employees of OHSU. Plaintiffs Lisa Chickadonz, Terrie Lyons, and Kathleen Grogan are the female homosexual life partners of Plaintiffs Tanner, Limandri, and Phillips, respectively, and were not employed by OHSU when the controversy arose.[13] Plaintiffs are eligible for group life and group medical and dental insurance for themselves and certain family members as a fringe benefit of their employment at OHSU. The insurance was offered through SEBB pursuant to statutory and administrative rules.[14] The terms of the benefit plan make a domestic partner eligible for benefits only if the employee and the partner are married.[15] The State of Oregon, however, does not permit the marriage of a homosexual couple.[16]

When Tanner applied for group life insurance for her partner Chickadonz, her application was denied by OHSU because the couple was not married, even though OHSU was advised that Tanner and Chickadonz maintained a "long-term, exclusive, committed homosexual domestic partnership and that the couple would be married to one another if state law

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[11] Ensign v. Marion County, 140 Or. App. 114, 116 n. 1, 914 P.2d 5 (Or. Ct. App. 1966) (asserting that the trial court's interpretation of a statute is reviewed for error of law).

[12] The court's findings of fact are premised upon the claims set forth in the Plaintiffs' Second Amended Petition for Review and Complaint. Claim one, counts one through three, assert that OHSU is a division of the state of Oregon and the State Board of Higher Education and that plaintiffs Tanner, Limandri, and Phillips were employed by OHSU, that Chickadonz, Lyons, and Grogan are the same-sex domestic partners of the plaintiffs, respectively. Second Amended Petition for Judicial Review and Complaint at 1, Tanner v. Oregon Health Sciences Univ., No. 9201-00369, 1996 WL 585547 (Or. Cir. Aug. 8, 1996).

[13] Tanner, No. 9201-00369, at *1 - 2.

[14] Tanner, No. 9201-00369, at *2.

[15] *Id.*

[16] *Id.*

so permitted."[17] Tanner then appealed the denial to SEBB.[18] SEBB upheld the denial of the application.[19] Tanner exhausted her administrative remedies before filing her action with the circuit court.[20] Similarly, Limandri and Phillips applied for group medical and dental insurance for their homosexual partners, had their applications denied, and exhausted their administrative remedies with SEBB.[21]

As a result of these denials, Plaintiffs and Plaintiffs' domestic partners were forced to pay more in premiums for replacement insurance coverage than heterosexual domestic partners of employees.[22] Additionally, the terms of both Lyons' and Grogan's replacement coverage are inferior to the group medical and dental coverage they sought under the OHSU policy.[23]

B. Plaintiffs' Claims

Plaintiffs' complaint requests judicial review of the SEBB order[24] and states that Defendants' policies and practices (1) constitute sexual orientation discrimination in violation of ORS § 659.030;[25] (2) violate the Oregon

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[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Id.*

[21] *Id.*

[22] *Id.* Through her own employment that began after the denials at issue, Chickadonz later became eligible for insurance coverage under the SEBB-administered insurance program. "Until that employment began, the Chickadonz-Tanner family paid more for the replacement life insurance Chickadonz obtained." Even with the benefits Chickadonz gained from her new employment, the Chickadonz-Tanner family continued to pay more for medical and dental coverage as "individuals" through the SEBB provisions than they would have if the couple were married partners applying for insurance as a "family" under Tanner's benefits. *Id.*

[23] *Id.*

[24] Second Amended Petition for Judicial Review and Complaint at 20, Tanner v. Oregon Health Sciences Univ., No. 9201-00369, 1996 WL 585547 (Or. Cir. Aug. 8, 1996).

[25] *Id.* at 1.

Constitution's Equal Privileges and Immunities Clause;[26] and (3) violate the Federal Constitution's Equal Protection Clause.[27]

1. Claim One: Sexual Orientation Discrimination—Violation of ORS § 659.030

Plaintiffs claim that Defendants violated Oregon Revised Statute (ORS) § 659.030, which prevents an employer from discriminating against an individual in the terms, conditions, or privileges of employment "because of the . . . sex . . . of any other person with whom the individual associates."[28] Plaintiffs contend they were discriminated against in the terms, conditions, and privileges of their employment because their domestic partners were not eligible to receive the same insurance benefits as the heterosexual domestic partners of married couples.[29] Because the laws of Oregon prevent Plaintiffs from marrying, Plaintiffs claim that Defendants' policy and practice in determining eligibility of an employee's partner for benefits has a disparate negative impact upon homosexuals.[30] Plaintiffs reason, therefore, that each Plaintiff has been discriminated against solely "because of her sexual orientation and because of the sex of a person with whom she associates" in direct violation of ORS § 659.030.[31]

Plaintiffs offer two reasons to support their contention that Defendants violated ORS § 659.030.[32] First, in ACLU v. Roberts, the Oregon Supreme

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[26] *Id.* at 13. On appeal, the state, representing Defendant OHSU, did not raise the federal Equal Protection claim. As such, Appellants' claims were narrowed down to two: (1) denial of life and health insurance benefits to the same-sex partners of state employees violates ORS § 659.030 and (2) denial of such benefits violates Article I, section 20 of the Oregon Constitution. Brief for Appellant at 2, Tanner v. OHSU, No. 9201-00369, 1996 WL 585547 (Or. Cir. Aug. 8, 1996).

[27] Second Amended Petition at 17, Tanner, No. 9201-00369.

[28] Or. Rev. Stat. § 659.030(1)(b) (1997).

[29] Second Amended Petition at 4, Tanner, No. 9201-00369.

[30] *Id.* at 4-13.

[31] *Id.* at 4.

[32] Pursuant to their claim that Defendants violated ORS § 659.030, Plaintiffs seek injunctive and all other equitable relief pursuant to ORS § 659.121, including but not limited to an order declaring that OHSU's and the State Board of Higher Education's conduct, policy, and practice is illegal per ORS § 659.030(1)(b). Second Amended Petition at 5, Tanner, No. 9201-00369. They also request an order directing defendants to adopt policies and practices to make life insurance and medical and dental benefits available to domestic partners of homosexual employees of OHSU and/or the State Board of Higher Education as long as such

Court said "it is possible to construe some Oregon statutes as prohibiting discrimination based on sexual orientation."[33] The court then cited ORS § 659.030 as an example of such a statute, strongly suggesting that ORS § 659.030 prohibits employers from discriminating against its employees on the basis of an employee's sexual orientation.

Second, Plaintiffs rely on their characterization of Plaintiffs' relationships as equivalent to a heterosexual marriage as well as the fact that Plaintiffs would be married if Oregon law permitted same-sex marriages.[34] The Petition asserts that each couple holds itself "out to their family, friends and acquaintances as an exclusive, loving couple, and would get married to each other if the laws of the state of Oregon did not prevent them from doing so."[35] By analogizing Plaintiffs' relationships to a heterosexual marriage, Plaintiffs reason that they are essentially "married" in all the ways in which society thinks about a married couple. Accordingly, OHSU and Oregon State Board of Higher Education should extend benefits to Plaintiffs' "spouses" just as they do to heterosexual "spouses."

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benefits are available to the married partners of similarly situated employees. *Id* at 5-6.

[33] ACLU of Oregon, Inc. v. Roberts, 305 Or. 522, 526 - 527, 752 P.2d 1215, 1217 (1988).

[34] Second Amended Petition at 6-7, Tanner, No. 9201-00369. For example, the petition characterizes the Limandri-Lyons relationship as being indistinguishable from a heterosexual marriage:

> . . . these two individuals have for over nine continuous years together shared, and continue to share, a loving, exclusive relationship which includes them living together, having mutually committed to a life-long partnership, having joint checking accounts, jointly owning their home and at least some personal property including household possessions, being the named primary beneficiary in each other's wills and life insurance policies, and having each other's medical and financial power of attorney.

Id. at 6.

The Tanner-Chickadonz and the Phillips-Grogan relationships are similarly characterized and both relationships also include the raising of a child together. *Id.* at 3-4, 9-10.

[35] *Id.* at 6-7. It should be noted that the state recognized the Tanner-Chickadonz domestic partnership in 1991, when the couple adopted a child together. The Decree of Adoption awarded by a Circuit Court judge in Oregon includes a birth certificate that lists Chickadonz, the biological mother, and Tanner as the parents of their daughter. *Id.* at 2-3. Plaintiffs state that the recognition of the relationship and family unit is equivalent to that of a married couple in all ways but the certificate of marriage which the couple is not able to obtain in the State of Oregon. *Id.* at 3.

2. Claim Two: Oregon Constitution—Equal Privileges

Plaintiffs assert that the policies and practices of OHSU and the State Board of Higher Education violate Article I, section 20 of the Oregon Constitution because "they create and have a disparate impact upon a class of citizens (namely, homosexuals) who are deprived of privileges granted to all other citizens of this state."[36] Plaintiffs cite a letter submitted by Attorney General Dave Frohnmayer in Merrick v. Board of Higher Education[37] to support this contention. The Attorney General's letter states that intentional discrimination in personnel decisions on the basis of sexual orientation is a violation of Article I, section 20.[38] Plaintiffs maintain that this is the state's position given the Attorney General's capacity to represent the state.

3. Claim Three: Federal Constitution—Equal Protection

Plaintiffs maintain that Defendants' policies and practices violate the Fourteenth Amendment of the United States Constitution because they "intentionally create and intentionally have a disparate impact" upon a class of citizens who are deprived of privileges granted to all other citizens of this state.[39] Plaintiffs contend, therefore, that they are denied equal protection under the laws. Plaintiffs note that the State of Oregon, acting by and through the Attorney General of the State of Oregon, previously recognized that discrimination on the basis of sexual orientation violates the Fourteenth Amendment of the United States Constitution "in almost every conceivable situation."[40]

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[36] *Id.* at 13-14. Plaintiffs seek declaratory judgment per ORS §§ 28.010 - 28.160 and injunctive relief under Article I, section 20 of the Oregon Constitution. *Id.* at 14.

[37] Merrick v. Board of Higher Education, 116 Or. App. 258, 841 P.2d 646 (Or. Ct. App. 1992).

[38] Second Amended Petition, *supra* note 25, at 14 (citing a letter contained within the court file for Merrick, 116 Or. App. 258, 841 P.2d 646).

[39] Second Amended Petition, *supra* note 25 at 17, Tanner, No. 9201-00369.

[40] *Id.* at 6 (citing answering memorandum at 6-7 in the court files for ACLU v. Roberts, 305 Or. 522 (Or. 1988). Plaintiffs' claim four simply requests judicial review of the SEBB order denying Plaintiffs benefits. Second Amended Petition at 20-21, Tanner, No. 9201-00369. Since Plaintiffs exhausted all of their administrative remedies under the SEBB plan, they are statutorily entitled to appeal the SEBB Management Committee's decision. OR. REV. STAT. § 183.484 (1997). This issue was not raised by the state on appeal.

C. ACLU Amicus Memorandum

The American Civil Liberties Union of Oregon, Inc. (ACLU) submitted a memorandum of amicus curiae in support of Plaintiffs' position. Judge Gallagher references the brief on several occasions. The ACLU requested the court's support of Plaintiffs' claims because: (1) gay men and lesbians have historically been targets of discrimination and violence; (2) homosexuality is an immutable trait; and (3) gay and lesbian families are a significant component of changing family dynamics.[41]

The ACLU asserts that Defendants' practice of denying the benefits at issue to gays and lesbians is a continuation of the legacy of virulent discrimination and violence targeted at this community.[42] The memorandum states that the family relationships and intimate sexual relations of lesbians and gay men have been ignored, viewed as wrong, and punished by both government entities and private individuals and institutions.[43] Second, the ACLU asserts that homosexuality is a nonmalleable[44] or even an inheritable[45] trait by citing numerous studies and sources for support. Determination of the immutability of homosexuality is critical in a constitutional analysis of Oregon's equal privileges and immunities clause as well as a Fourteenth Amendment, equal protection claim. (See *infra* section IV).

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[41] Memorandum of Amicus Curiae American Civil Liberties Union of Oregon, Inc., Tanner v. Oregon Health Sciences Univ., No. 9201-00369, 1996 WL 585547 (Or. Cir. Aug. 8, 1996).

[42] *Id.* at 2.

[43] *Id.* at 6.

[44] *Id.* at 16-17.

[45] The memorandum cites to three distinctive studies, each of which indicates the possibility that sexual orientation is inheritable: (1) A 1991 study at the Boston University Medical Center that studied gay men and their twin or adopted brothers which suggest that "there is a strong genetic effect for homosexuality." J. Michael Bailey, Ph.D. & Richard C. Pillard, M.D., A Genetic Study of Male Sexual Orientation, 48 Arch. Gen. Psychiatry 1089 (1991); (2) a study looking at female sexual orientation using twins and adopted siblings of lesbians. J. Michael Bailey, Ph.D. & Richard C. Pillard, M.D., Michael C. Neale, Ph.D. & Yvonne Agyei, M.A., Heritable Factors Influence Sexual Orientation in Women, 50 Arch. Gen. Psychiatry 217 (1993); and (3) a DNA study of pairs of gay brothers and their mothers or other siblings conducted by the National Institutes of Health indicating to a 99% certainty that at least some form of male homosexuality is transmitted through the maternal side and is genetically linked to a specific chromosomal region. Dean H. Harner, Stella Hu, Victoria L. Magnuson, Nan Hu, Angela M.L. Pattatucci, A Linkage Between DNA Markers on the X Chromosome and Male Sexual Orientation, 261 Science 321 (1993). Memorandum of Amicus Curiae American Civil Liberties Union of Oregon, Inc., at 16 - 18, Tanner, No. 9201-00369.

Third, the amicus curiae maintain that there is no rational basis for the State's denial of benefits to "a historically oppressed minority" because of (1) the diversity of American and Oregonian families; (2) the nature of gay and lesbian families; and (3) the ability of numerous governmental entities, educational institutions, and private employers to provide these benefits to homosexual domestic partners without significant burden.[46] The ACLU urges the Oregon court to recognize, as did the City of San Francisco, that "accommodating the needs of real families in today's society may well improve the employment relationship and health and well-being of families in the community."[47]

D. The Defendants' Response

Defendants counter Plaintiffs' claim by denying "each and every allegation of the Second Amended Petition and Complaint, and the whole thereof."[48] Defendants allege six affirmative defenses. First, Defendants allege partial lack of subject matter jurisdiction and that judicial review under the Administrative Procedures Act is Plaintiffs' exclusive remedy.[49] Second, Defendants allege that Plaintiffs' first claim for relief fails to allege facts sufficient to state a claim for relief because it is not demonstrated how Plaintiffs were "aggrieved by an unlawful employment practice" within the meaning of ORS § 659.121(1). This argument is premised on the provision of Defendants' benefit plan where employees who are ineligible for partner benefits receive additional money in lieu of the benefits.[50] Defendants claim, therefore, Plaintiffs were paid additional money and are therefore not aggrieved.[51] If Defendants can demonstrate that the additional money Plaintiffs received was adequate to purchase equal benefits on the open market, then Defendants' defense will be viable. The trial record, however,

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[46] Memorandum of Amicus Curiae American Civil Liberties Union of Oregon, Inc., at 21, Tanner, No. 9201-00369.

[47] *Id.* at 26.

[48] Answer to Second Amended Petition and Complaint at 3, Tanner v. Oregon Health Science Univ., No. 9201-00369, 1996 WL,585547 (Or. Cir. Aug. 8, 1996).

[49] Answer to Second Amended Petition and Complaint, at 4, Tanner, No. 9201-00369.

[50] *Id.*

[51] *Id.*

does note that Plaintiffs' replacement insurance was more costly than OHSU's equivalent benefits.[52]

Defendants' third and fourth affirmative defenses are that Plaintiffs' second and third claims for relief fail to allege facts sufficient to state a claim.[53] Similarly, Defendants fifth defense is that Plaintiffs' fourth claim fails to state a claim for relief because Plaintiffs fail to allege "the facts showing how the petitioner is adversely affected or aggrieved" as required by ORS § 183.484.[54] Defendants final affirmative defense is that Plaintiffs Chickadonz, Lyons, and Grogan fail to allege ultimate facts sufficient to state a claim under any of Plaintiffs' claims for relief. Accordingly, Defendants asked that Plaintiffs' Second Amended Petition and Complaint be dismissed with prejudice and that Defendants be awarded judgment for their costs, disbursements, and attorney fees.[55]

In a supplemental brief, Defendants assert that changes made by the 1995 legislature to OHSU's public entity status render the proceedings against the State Board of Higher Education a non-issue.[56] The legislature's actions made the following changes: (1) OHSU is no longer part of the State Board of Higher Education, but rather is an independent public corporation;[57] and (2) OHSU is no longer subject to the statutes in ORS Chapter 243 that govern the state's fringe benefit insurance program for its employees; rather OHSU's Board of Directors establish the terms of all employees' compensation, including benefits.[58] As such, Defendants profess that "plaintiffs' claims for declaratory and injunctive relief should be dismissed as moot."[59] This request was declined and the case was adjudicated on its merits.[60]

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[52] Tanner, No. 9201-00369, at *2.

[53] Answer to Second Amended Petition and Complaint, at 3-4, Tanner, No. 9201-00369.

[54] *Id.* at 4.

[55] *Id.* at 4-5.

[56] Defendants' Memorandum of Supplemental Authorities at 1, Tanner v. Oregon Health Sciences Univ., No. 9201-00369, 1996 WL 585547 (Or. Cir. Aug. 8, 1996).

[57] *Id.* *See* 1995 Or. Laws 162, §§ 2 and 74.

[58] Defendants' Memorandum of Supplemental Authorities at 1, Tanner, No. 9201-00369. *See* 1995 Or. Laws 162, §§ 8(2) and 9(2).

[59] Defendants' Memorandum of Supplemental Authorities at 3, Tanner, No. 9201-00369.

[60] The state did not raise this issue on appeal.

E. The Holding

Judge Gallagher held that the benefit insurance programs of the State of Oregon, OHSU, and the State Board of Higher Education violate ORS § 659.030(1)(b) and Article I, section 20 of the Oregon Constitution.[61] He thereby enjoined the parties from continuing the practice of denying group life and group medical and dental coverage to the domestic partners of its homosexual employees when "such employment-related benefits are afforded to the spouse of its heterosexual employees."[62] He also outlined criteria to determine who qualifies as a domestic partner for purposes of his judicial order.[63] To establish a qualified relationship, a homosexual employee is required to truthfully swear that his or her domestic partner meets the following criteria:

> (a) They are not related by blood closer than would bar marriage in the State of Oregon (first cousins or nearer);
> (b) Neither is legally married;
> (c) They have continuously lived together as a family and shared a close personal relationship, which is exclusive and loving, for an extended period of time, and they intend to maintain that family and that relationship with each other for the rest of their lives;
> (d) They have joint financial accounts and have agreed to be jointly responsible for each other's common welfare, including basic living expenses;
> (e) They would be married to each other if the law permitted them to marry in Oregon;
> (f) They are the sole domestic partner of each other and have no other domestic partner;
> (g) They are both 18 years of age or over; and
> (h) They are each homosexual.[64]

This set of criteria is similar to that used by the City of San Francisco and other corporations that have adopted domestic partner benefits. Judge Gallagher, however, specifically excluded heterosexual domestic partners from receiving benefits under the Tanner order, reasoning that these couples

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[61] Tanner, No. 9201-00369, at *3.

[62] *Id.* at *4.

[63] It is peculiar that Judge Gallagher promulgated criteria for determining domestic partner eligibility. It would have been more appropriate if he instructed SEBB, an administrative agency, to formulate such criteria subject to judicial approval.

[64] Tanner, No. 9201-00369, at *4.

have the opportunity to marry in Oregon.[65] This test is promulgated without justification or substantiation of the criteria.[66]

Additionally, Judge Gallagher makes it clear that Defendants' argument that the fringe benefit insurance provisions at issue are designed to make insurance coverage available to individuals for whose debts the State employee is legally responsible "does not withstand a minimal examination."[67] Judge Gallagher stated that the policy affords benefits to employees' children who are between the ages of nineteen and twenty-three when the employees' legal responsibility for the child's debts terminated upon the child reaching the age of eighteen.[68] The analogous nature of this situation nullified Defendants' argument that homosexual domestic partners are ineligible for benefits because there is not a "legal" responsibility for the partner.

Overall, Judge Gallagher's opinion is void of pertinent and necessary legal analysis. His opinion evokes the Oregon Constitution's equal privileges and immunities clause, when he refers to heightened judicial scrutiny being required to evaluate the Defendants' policies and practices, yet the opinion fails to examine the case's facts under a constitutional analysis.[69] Instead, Judge Gallagher's decision is based on social policies and the historical trend of "invidious and virulent discrimination . . . directed toward and suffered by the lesbian and gay men communities in this state."[70] Though this opinion seems logical and fair in light of the homosexual community's history of oppression, its conclusions must be supported by legal analysis in order for it to be upheld. Plaintiffs' task on appeal will be to persuade the Oregon Court of Appeals that Judge Gallagher's opinion was both constitutionally and precedentially warranted.[71]

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[65] *Id.*

[66] Judge Gallagher alludes to the fact that since heterosexual domestic partners can legally marry, Defendants should not be required to extend benefits to this group since they are not being denied any privileges. If the holding in this case is upheld, the future might see a heterosexual challenge to the new policy denying heterosexual domestic partners from receiving benefits. It is likely, however, that such a challenge will fail a constitutional analysis because the group is not being denied a privilege based on an immutable characteristic, but rather for a mutable choice.

[67] Tanner, No. 9201-00369, at *3.

[68] *Id. See also* Or. Admin. R. 102-10-025(1) (1997).

[69] Tanner, No. 9201-00369, at *1.

[70] *Id.*

[71] Tanner v. OHSU was argued before a three judge panel of the Oregon Court of Appeals on March 3, 1998.

II. DEFENDANTS VIOLATED ORS § 659.030(1)(b)

Oregon Revised Statute § 659.030(1)(b) states that it is an unlawful employment practice "[f]or an employer . . . because of the . . . sex . . . of any other person with whom the individual associates . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment."[72] Plaintiffs claim that Defendants violated this statute by denying Plaintiffs' homosexual partners health benefits that are offered to the spouses of married employees. To prove that Defendants violated ORS § 659.030, Plaintiffs have two arguments: (1) a precedent-based analysis; and (2) a statutory language and legislative history analysis.

A. Precedent-Based Analysis

Plaintiffs elected to attack the validity of Defendants' policies as a violation of ORS § 659.030 because the Oregon Supreme Court previously stated that "it is possible to construe some Oregon statutes as prohibiting discrimination based on sexual orientation."[73] The supreme court then cited ORS § 659.030 as an example of such a statute.[74] This suggests that homosexuals are protected by statute in Oregon and, therefore, Defendants' actions under ORS § 659.030 are illegal and discriminatory. Because the supreme court's statement is dicta, it is not binding.[75] Unfortunately, there has been no further appellate court discussion of discrimination of ORS § 659.030 or of sexual orientation nondiscrimination.[76] As it stands, therefore, it appears that the ACLU v. Roberts dicta gives Plaintiffs an advantage unless the supreme court is willing to reverse its prior position at the risk of appearing blatantly contradictory.

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[72] Or. Rev. Stat. § 659.030(1)(b) (1997). This statute is generally regarded as Oregon's employment nondiscrimination statute.

[73] ACLU of Oregon, Inc. v. Roberts, 305 Or. 522, 526-527, 755 P.2d 1215, 1217 (Or. 1988).

[74] *Id.* at 527. Originally the opinion said "It is true that there are some Oregon statutes . . . ." This language was amended to "It is possible to construe some Oregon statutes as . . . ." Letter from Charles F. Hinkle, Attorney, Stoel Rives Boley Jones & Grey, Portland, to Stevie Remington, ACLU of Oregon, Inc. 2 (Apr. 25, 1988) (on file with author). If this case reaches the Supreme Court, the Court may be forced to solidify their position.

[75] This means that the court of appeals and/or the Oregon Supreme Court will have to interpret what was meant by the language in ACLU v. Roberts.

[76] Edward J. Reeves, Emerging Trends in Human Resources Management, at 5, Jan. 1997 (on file with the author).

In addition, the ACLU v. Roberts court file contains an answering memorandum written by Oregon's Attorney General for and on behalf of the state which supports the contention that other laws protect against discrimination based on sexual orientation.[77] Though the Attorney General was directly referring to the Oregon and Federal Constitutions, it can be inferred that he intended to include existing Oregon laws. ACLU v. Roberts challenged the validity of a ballot measure that sought to revoke an executive order directing state officials not to discriminate on the basis of sexual orientation.[78] Petitioners argued that in revoking Executive Order 87-20, the ballot measure would effectively authorize state employers to discriminate in employment on the basis of sexual orientation.[79] In response, the Attorney General maintained that the kinds of discrimination Petitioners claimed the ballot measure would authorize are already protected by "superior law."[80] Accordingly, ORS § 659.030 can be interpreted to be included in this body of "superior law" because it was a pre-existing law that specifically addressed the issue to which the Attorney General was referring—the prohibition of discrimination in employment based on the sex of the employee or the sex of a person with whom the employee associates.[81] Since the Attorney General was acting in his capacity as a representative of the state, his position is considered to be the state's position. Thus, the state's position is that sexual orientation discrimination is prohibited in Oregon by existing laws. It will be challenging, therefore, for the state to successfully reverse this position in Tanner. A divergence from its previous position will make the State appear opportunistic and hypocritical even if it is able to distinguish the fact patterns involved.

To avoid this pitfall, Defendants may assert that they are not discriminating on the basis of sex. Instead, Defendants might argue that their policies discriminate on the basis of marital status.[82] Such a tactic is likely to be devastating to Plaintiffs. A challenge of Defendants' policies based on marital status would tie the Tanner case to a constitutional challenge to the right of same-sex couples to marry. It is highly unlikely that the current Oregon Supreme Court will be willing to put Oregon in the controversial

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[77] *See* court file for Roberts, 305 Or. 522, 755 P.2d 1215.

[78] Roberts, 305 Or. 522, 755 P.2d 1215.

[79] *Id.* at 525, 755 P.2d 1217.

[80] *Id.*

[81] Or. Rev. Stat § 659.030(1)(b) (1997).

[82] ORS § 659.030 also prohibits discrimination on the basis of marital status. *Id.*

position of being only the second state to allow same-sex marriage.[83] Consequently, if Defendants can frame the Tanner issue as marital status, it is likely Oregon will follow in the steps of the other state courts by finding that statutes preventing same-sex marriages and policies, permitting the denial of benefits based on marital status are nondiscriminatory and constitutional.[84] Plaintiffs' arguments, therefore, will need to be persuasive and focused enough to avoid any attempt by Defendants to change the issue from "because of sex" to marital status. If Plaintiffs can accomplish this, case law precedence weighs slightly in their favor.

B. Statutory Analysis

Plaintiffs second argument is that the statutory language and the legislative history of ORS § 659.030 support their contention that they are protected by the statute.

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[83] Hawaii is the first state to condone same-sex marriages. *See* Baher v. Miike, 1996 WL 694235, 65 U.S.L.W. 2399 (Haw. Cir. Ct. 1996). This case is currently being considered on appeal.

[84] Even though Oregon has a different constitutional analysis than the states that have found these types of statutes and policies constitutional, the Oregon court could, if pressured or motivated to do so, interpret the Tanner facts under the equal privileges and immunities clause to be constitutional. *See infra* section IV. *See also* Baker v. Nelson, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810, 93 S.Ct. 37, 34 L. Ed.2d 65 (1972) (holding that the use of the term marriage was one of common usage meaning the state of the union between persons of the opposite sex). Baker has been cited by virtually every court faced with a constitutional challenge to same-sex marriage. *See also* Dean v. District of Columbia, 653 A.2d 307 (D.C. App. 1995) (concluding that Congress intended marriage to be inherently male-female and that same-sex marriage was not a fundamental right protected by the U.S. Constitution); Rutgers Council of AAUP Chapters v. Rutgers State Univ., 689 A.2d 828 (N.J. Super. App. Div. 1997) (denying insurance benefits for domestic partners because spouse does not include a same-sex partner); Storrs v. Holcomb, 645 N.Y.S.2d 286 (Sup. Ct. 1996) (rejecting the claim of two homosexual men to obtain a marriage licensee because marriage is limited to opposite sex couples); Singer v. Hara, 522 P.2d 1187 (Wash. Ct. App. 1974) (upholding as constitutional laws that prevent same-sex couples from marrying). *But see,* Univ. of Alaska v. Tumeo, 1997 WL 112276 (Alaska Sup. Ct. Mar. 14, 1997) (holding that the denial by the University of equal benefits to married couples and unmarried same-sex domestic partners is discrimination based on marital status in violation of the Alaska Human Rights Act).

1. The Plain Meaning of the Statutory Language

An analysis of a statute begins with its plain meaning.[85] In pertinent part, ORS § 659.030(1)(b) says that "it is an unlawful employment practice . . . [f]or an employer, because of an individual's . . . sex . . . or because of the . . . sex . . . of any other person with whom the individual associates . . . to discriminate against such individual in compensation or in terms, conditions or privileges of employment."[86] Plaintiffs should assert that this language means that an employer cannot discriminate against an employee because of an employee's association, whether the associate is male, female, black, or white, and regardless of the nature of the association/relationship. Such a meaning tends to encompass all forms of association discrimination, even those associations that traditional mores would deem unacceptable. If the Oregon legislature intended the statute to exclude certain types of employee associations, then the language of the statute would have so indicated. Therefore, to limit the statute's meaning by excluding any particular type of association is to invalidate the statute's plain meaning—to prevent discrimination on the basis of the "race, religion, color, sex, national origin, marital status or age" of an employee's association.[87] Hence, the sex of an employee's associate is irrelevant in making any employment decision or extending any benefit of employment and thus Defendants' practices violate ORS § 659.030. This reading is also supported by the statute's legislative history.

2. Statutory History and Legislative Intent

ORS § 659.030 was first codified in 1969 and underwent numerous revisions through 1981.[88] The legislative history of ORS § 659.030 and its amendments provide insight into the intended scope and breadth of the statute including the incorporation of "because of the sex of . . . ." The legislative record is minimal, but this silence can also be construed as a reflection of intent.

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[85] PGE v. Bureau of Labor and Industries, 317 Or. 606, 859 P.2d 1143 (1993) (establishing the framework to follow when interpreting a statute to discern the legislature's intent). "[W]ords of common usage should be given their plain, natural, and ordinary meaning." 317 Or. 606, at 610.

[86] Or. Rev. Stat § 659.030(1)(b) (1997).

[87] *Id.*

[88] *Id.*

When first introduced in 1969, House Bill 1297 did not include protection based on "sex"[89]; instead, it focused on race. The initial intention of the Bill was to protect employees from discriminatory treatment if they associated with someone of another race.[90] When enacting Oregon's Fair Employment Practices Act, which includes ORS § 659.030, Oregon's legislature expressly intended to "insure human dignity of all people within this state, and protect [them] from the consequences of inter-group hostility, tensions and practices of discrimination."[91] This intent coincides with the Civil Rights Movement of the 1960s and the passing of the federal Civil Rights Act in 1964[92] (CRA), which prohibits discrimination in employment on the basis of race and other characteristics. The CRA does not prohibit discrimination in employment "because of" the race, or sex of a person with whom the employee associates. The Oregon statute, however, does include this broader range of employee protection. Thus, the protection afforded an employee from discriminatory treatment for associating with someone of another color was extended to the other characteristics listed in the bill. This broadening had two effects on ORS § 659.030. First, it authorized an expansive interpretation of the statute to include liberally defined groups under each of the protected characteristics. Second, "sex" became subject to the liberal interpretation afforded the other characteristics when it was added to the statute.

"Sex" was originally added to the statute at the request of Representative Skelton, who was concerned about discrimination against women in employment.[93] At no other time does the legislative record attempt to further clarify what it meant by adding "sex" as a protected classification. In light of the legislature's broad inclusion of protected characteristics, it is ludicrous to limit the statute's application only to women; to do so would preclude men from equal protections afforded to women under this law. The continued silence suggests that successive legislatures intended ORS § 659.030 to be read broadly. A remedial statute "must be given elastic operation if it is to cope with changing economic and social conditions" and should "not be considered frozen in the context which exist[ed] at the time of

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[89] Hearings on H.B. 1297 Before the House Comm. on Labor and Management, 55th Or. Legis. Ass'y (Mar. 24, 1969), Minutes at 5. (Copies of materials on file with the author).

[90] Telephone interview with Edward J. Reeves, (Apr. 7, 1997).

[91] Or. Rev. Stat § 659.022(1)(b) (1997).

[92] 42 U.S.C. §§2000e - 20000e-17 (1995).

[93] Hearings on H.B. 1297 Before the House Comm. on Labor and Management, 55th Or. Legis. Ass'y (Mar. 24, 1969), Minutes at 5. (Copies of materials on file with the author).

its passage."[94] To limit "sex" to a myopic definition that is not malleable enough to reflect society's changing views, roles, and interactions between the sexes contradicts this intent. As such, Plaintiffs can contend that the legislature intended the statute to protect employee associations with individuals of the opposite or the same sex and without a limitation based on the nature of that relationship.

This analysis is supported by additional testimony which says "[p]assage of the measure would reaffirm the principle of Oregon Civil Rights law that employment ought to be by qualification and merit, and not by the whims of social stereotype."[95] This statement reiterates the intended broad scope of the statute and emphasizes the critical factors in an employment decision—qualification and merit. To base an employment decision on anything but qualification and merit is discriminatory and perpetuates unwanted stereotypes. As Plaintiffs contend, therefore, to discriminate against an employee in her terms, conditions, and privileges of employment because she is involved in a homosexual relationship is discriminatory and violates ORS § 659.030.

C. Application of Facts

It is appropriate to use a Title VII disparate impact analysis to analyze ORS § 659.030 since ORS §659.030 was modeled after Title VII and Oregon courts have turned to federal cases interpreting Title VII for their instructive value.[96] In addition, a systemic disparate treatment analysis may be useful to show that Defendants' practices violate Oregon law. Both analyses, however, hinge on the court's determination of whether or not homosexuality is a protected class under Oregon law. ACLU v. Roberts, the statutory language

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[94] State v. ex rel Nilsen v. Oregon Motor Ass'n, 248 Or. 133, 432 P.2d 512, 514 (Or. 1967).

[95] Hearings on H.B. 1297 Before the House Comm. on Labor and Management, 55th Or. Legis. Ass'y (Mar. 24, 1969), Minutes at 5. (Copies of materials on file with the author).

[96] Winnett v. City of Portland, 118 Or. App. 437, 847 P.2d 902 (Or. Ct. App. 1993). 42 U.S.C. §§2000e - 2000e-17 (1995) and Or. Rev. Stat § 659.030(1)(b) (1997). Plaintiffs likely did not pursue a Title VII violation because it is unclear whether sexual orientation is a protected characteristic under Title VII, and 9th Circuit case law indicates that it is not. *See e.g.*, Garcia v. Elf Atochem North America, 28 F.3d 446 (5th Cir. 1994) (holding that same-sex harassment is not cognizable under Title VII because Congress intended the statute to protect women from discrimination by men); DeSantis v. Pacific Tel. & Tel. Co. Inc., 608 F.2d 327, 329 (9th Cir. 1979) (holding that Title VII's prohibition of sex discrimination applies only to discrimination on the basis of gender); Williamson v. A.G. Edwards and Sons, Inc., 876 F.2d 69 (8th Cir. 1989), *cert. denied*, 493 U.S. 1089 (holding that Title VII's protections do not extend to discrimination based on sexual orientation).

and history of ORS § 659.030, the legislative intent, and the constitutional analysis (infra) all suggest that sexual orientation is protected in Oregon. As such, the application of disparate impact analysis to the Tanner facts is persuasive for Plaintiffs.

1. Statutory Analysis—Disparate Impact

An element of Plaintiffs' claim is that Defendants' policies and practices "intentionally create and intentionally have a disparate impact" upon a class of citizens who are deprived of privileges granted to all other citizens of this state.[97] Disparate impact occurs when an employment policy, regardless of intent, weighs more heavily on one group than it does on others.[98] To make out a *prima facie* case, the Plaintiff must identify a neutral policy and demonstrate that it has a disparate/disproportionate impact on a protected group of persons.[99] The burden then shifts to the employer to prove that the practice is consistent with business necessity and job-relatedness.[100] If the employer meets this requirement, the burden then shifts back to the plaintiff to show that there are equally effective practices available that do not create a disparate impact and that the employer refuses to adopt such practices.[101] Applying this inquiry to the Tanner facts will demonstrate that Plaintiffs can make out a *prima facie* case and that Defendants do not have a valid defense.

a. Plaintiffs' Prima Facie Case

The Tanner Plaintiffs can make out a *prima facie* case as follows: Defendants' insurance benefits program provides benefits to employees and certain members of the employees' families. Defendants maintain that this program is nondiscriminatory because it provides a set amount of money for

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[97] Second Amended Petition at 17, Tanner, No. 9201-00369.

[98] Employment Law § 3.18 (Mark A. Rothstein *et al.* eds., 1994). The disparate impact theory of employment discrimination was first accepted in Griggs v. Duke Power Co., 401 U.S. 424 (1971). The Court held that Title VII prohibited conduct that is "fair in form but discriminatory in operation." 401 U.S. 424 at 431. The disparate impact does not require that the employer acted intentionally. Employment Law § 3.18 (Mark A. Rothstein *et al.* eds., 1994). This is in contrast to disparate treatment theory which requires that the defendant acted intentionally to treat the plaintiff class or individual differently.

[99] Employment Law, *supra* note 98, at § 3.18.

[100] *Id.*

[101] *Id.*

each employee to obtain the benefits and refunds any unused portion to the employee.[102] On its face, therefore, this policy appears neutral. The policy, however, only permits employees to obtain benefits for their partner if they are married; the state requires Plaintiffs to marry, yet bars their marriage.[103] As a result, Plaintiffs are prohibited from obtaining benefits. Typically, plaintiffs would use statistical data comparing the injured class to the general population to substantiate a disparate impact claim.[104] Plaintiffs did not rely on statistical data for their claim, probably because of the strong inference that 100% of the homosexual state employees are denied benefits and are thus impacted. Plaintiffs also used their own collective experience as homosexual employees unable to obtain employee benefits because they cannot get married.[105] Accordingly, Defendants' facially neutral policy creates a disparate impact on those persons with same-sex partners because their partners cannot qualify for the benefits.

b. Employer Defenses

A defendant has several defenses available to refute a disparate impact claim under Title VII. The employer can (1) affirmatively assert that the practice is a business necessity and is job-related;[106] (2) rebut the *prima facie* case by denying a discriminatory policy exists, refuting anecdotal or other evidence proffered by the plaintiff, or challenging the statistical information; or (3) assert that a statutory exception applies.[107] In addition, ORS § 659.030(1)(a) specifically permits an employer to defend discriminatory actions on the basis of a *bona fide* occupational requirement which is reasonably necessary to the normal operation of the employer's business.[108]

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[102] Answer to Second Amended Petition and Complaint at 1, Tanner, No. 9201-00369.

[103] Ironically, the state also claims to fairly require marriage. A clear catch-22.

[104] Employment Law, *supra* note 98, at § 3.18.

[105] Even though ORS § 659.030 prohibits discrimination on the basis of marital status, Plaintiffs did not assert this in their complaint and the argument, therefore, is not available on appeal.

[106] Civil Rights Act of 1991 § 701(K)(1)(A)(i) (1995).

[107] Melinda Grier, Lecture at University of Oregon School of Law, Employment Discrimination course (Fall semester 1996) (citing the Civil Rights Acts of 1964 and 1991, 42 U.S.C. §§2000e - 2000e-17 (1995)) (notes on file with the author).

[108] Or. Rev. Stat § 659.030(1)(a) (1997).

Generally, a defendant can rebut the *prima facie* case by alleging that its policy does not create a disparate impact. In Tanner, the appeal is limited to the trial record; therefore, Defendants' ability to introduce evidence to contradict Plaintiffs' claim is stymied. As such, Defendants cannot rebut Plaintiffs' *prima facie* case. If Defendants are able to proffer evidence to refute the claim that their benefit plan disparately impacts homosexuals, Defendants will focus on the argument that even though homosexuals may be disproportionately affected, that are not being discriminated against because they are not a protected class and because similarly situated heterosexuals are also denied benefits. Similarly, statutory exceptions, such as professionally developed tests or *bona fide* seniority systems, are not available to Defendants because they do not exist in this case. In addition, it is unlikely that the Tanner defendants can assert that the denial of benefits to a select group of employees is consistent with business necessity since cost and expenses do not qualify as a justification for discrimination.[109] Defendants will also not be able to show that the policy at issue is job-related; that is, that there is a strong correlation between the policy and the job. There is simply no justifiable reason to correlate the denial of benefits with the job—qualifications, performance, or otherwise.

c. Equally Effective Practices Exist

If a defendant proffers a valid defense, the burden reverts back to the plaintiff to demonstrate that an equally effective practice exists that does not create a disparate impact.[110] Since the Tanner Defendants will not be able to assert a valid defense, as discussed above, Plaintiffs do not have to offer an alternative practice to rebut a nonexistent defense. To bolster their position, however, Plaintiffs can assert that there is a viable alternative that Defendants refused to adopt—the extension of benefits to the domestic partners of same-sex couples according to a set of criteria, like those set forth by Judge Gallagher. The ability of Plaintiffs to make out a *prima facie* case and to tender an equally effective alternative practice, coupled with Defendants' inability to proffer a valid defense, weighs heavily in favor of Plaintiffs and indicates that Defendants violated ORS § 359.030.

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[109] Civil Service Bd. of Portland v. Bureau of Labor, 298 Or. 307, 692 P.2d 569 (Or. 1984).

[110] Michael J. Zimmer *et al.*, Cases and Materials on Employment Discrimination 443 (3d ed. 1994); Civil Rights Act of 1991 § 701(K)(1)(A)(i) (1995).

2. Statutory Analysis—Systemic Disparate Treatment

A systemic disparate treatment claim occurs when there is intentional discrimination against a group of employees based on a protected characteristic. To make out a *prima facie* case, a plaintiff must demonstrate that the employer has a formal policy or pattern or practice[111] that differentiates employees on based on a prohibited characteristic; that the employee was adversely effected by the policy or practice; and that there is a causal link between the negative impact on the employee and the prohibited employer policy.[112] As shown by the disparate impact analysis, applying this inquiry to the Tanner facts will demonstrate that the Plaintiffs can make out a *prima facie* case and that the Defendants do not have a valid defense.

a. Plaintiffs' Prima Facie Case

The Tanner Plaintiffs' *prima facie* case is as follows: first, OHSU and the State Board of Higher Education have a recognized and established policy, as administered by SEBB, that differentiates between groups of individuals on the basis of their ability to marry which is a direct reflection of the employee's sexual orientation. Second, the group of affected individuals is same-sex domestic partners of homosexual employees, and the protected characteristic is homosexuality.[113] Third, as a result of Defendants' actions, the adversely affected group is forced to obtain replacement insurance at a higher cost than they would have had to pay under the Defendants' benefit plan.[114] Finally, there is a causal link between the Defendants' denial of benefits and the discrimination based on sexual orientation: but for the Defendants' discrimination based on sexual orientation, the Plaintiffs and their families would not have incurred higher insurance premiums. Both at trial and on appeal, Defendants rebutted Plaintiffs' *prima facie* case by denying that their policies are discriminatory.

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[111] Absent a formal policy, the employee can demonstrate that the employer has a pattern and practice of discriminating against a protected class. In Tanner, Defendants practices are a result of an established policy so this analysis is not necessary.

[112] Zimmer, *supra* note 110, at 193.

[113] *See* discussion *supra* section III(A) in which the Oregon supreme court indicated that sexual orientation is a protected class.

[114] Tanner, No. 9201-00369, at *2.

b. Employer Defenses

To avoid liability for a systemic disparate treatment claim, an employer can rebut the inference of discrimination by denying that a discriminatory policy or practice exists or by challenging any statistical information used to prove systemic disparate treatment.[115] In addition, the employer can admit to the discriminatory act and offer a recognized defense justifies the action.[116]

The Tanner Defendants' only available affirmative defense is to proffer a *bona fide* occupational qualification (BFOQ).[117] A BFOQ allows an employer to take action on the basis of a prohibited factor if the reason for doing so is reasonably necessary for a particular business' normal operations.[118] In Oregon, an employer must prove that a valid BFOQ exists by a preponderance or an outweighing of the evidence.[119] In addition, the justification must be for a reason other than economics.[120] This means the Defendants cannot claim that the additional costs incurred by providing life insurance and group medical and dental benefits to homosexual domestic partners of its employees is a BFOQ. A BFOQ is a very narrow defense,[121] therefore, as economic reasons are disallowed, the Defendants will be unable to articulate a legitimate BFOQ.

3. Statutory Analysis Conclusion

Under both analyses, Plaintiffs can establish a *prima facie* case, and Defendants lack a viable defense. Defendants' policies, therefore, create a

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[115] Zimmer, *supra* note 110, at 259.

[116] The four available affirmative defenses are: (1) *bona fide* occupational qualification (BFOQ) including a *bona fide* seniority system and a *bona fide* merit system and (2) part of the employer's voluntary affirmative action plan. *Id.*

[117] Defendants' fringe benefit plan is regulated by Oregon Revised Statutes Chapter 243 and distribution or eligibility for contested benefits is therefore not based on a *Bona Fide* Merit System, a *Bona Fide* Seniority System or a voluntary affirmative action plan.

[118] Zimmer, *supra* note 110, at 278-290.

[119] Sch. Dist. 1 v. Nilson, 271 Or. 461, 534 P.2d 1135 (Or. 1975).

[120] Civil Service Bd. of Portland v. Bureau of Labor, 298 Or. App. 307, 692 P.2d 569 (Or. Ct. App. 1984) (holding that economic justifications such as adverse impact on pension and disability plans are not a *bona fide* occupational requirement reasonable necessary to the employer's business).

[121] Western Airlines v. Criswell, 472 U.S. 400 (1985).

disparate impact on homosexuals and the SEBB regulated policies result in systemic disparate treatment. The Oregon Court of Appeals, therefore, should affirm the circuit court decision that the Defendants' policy and practice of denying benefits to the domestic partners of its homosexual employees is a violation of ORS § 659.030.

III. OREGON CONSTITUTIONAL ANALYSIS

Judge Gallagher held that OHSU and the State Board of Higher Education's policy violated Article I, section 20, of the Oregon Constitution—the equal privileges and immunities clause—which states: "[n]o law shall be passed granting to any citizen or class of citizens privileges or immunities which, upon the same terms, shall not belong equally to all citizens."[122] Both Oregon's equal privileges and immunities guarantees and the federal equal protection guarantee seek to prevent the state from distributing benefits and burdens unequally; however, there are significant differences. As former Oregon Supreme Court Justice, Hans Linde, said "[these guarantees] were placed in different constitutions at different times by different men to enact different historic concerns into constitutional policy."[123]

Oregon's Constitution is intended to eliminate the injustice of unmerited favoritism and special treatment[124]—prevent the enlargement of rights—while the fourteenth amendment forbids the curtailment of rights belonging to a particular group or individual.[125] In effect, Oregon's Constitution assumes a larger body of rights for a larger group of persons than does the federal Constitution, thereby protecting against the enlargement of the already generous rights. The analyses also differ significantly. Federal equal protection analysis utilizes a three-tiered analysis which (1) applies a "strict judicial scrutiny" to state actions discriminating against a "suspect class" or implicating a "fundamental right"; (2) applies "heightened judicial scrutiny" to state actions discriminating against a "quasi-suspect" class; and (3) applies "rationality review" to state action discriminating against a "non-suspect class" or implicating a non-fundamental right.[126] Courts applying the

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[122] Or. Const. art. I, § 20 (1859).

[123] Hans Linde, Without Due Process, 49 Or. L. Rev. 125, 141 (1970).

[124] David Schuman, The Right to "Equal Privileges and Immunities": A State's Version of "Equal Protection," 13 Vermont L. Rev. 221, 222 (1988).

[125] Hewitt v. State Accident Ins. Fund Corp., 294 Or. 33, 42, 653 P.2d 970, 975 (Or. 1982).

[126] Schuman, *supra* note 124, at 225 interpreting San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 17 (1973).

federal analysis then undertake a highly discretionary balancing of individual and government interests.

Oregon rejects this analysis,[127] and in fact, the Oregon court "eschews" the judicial technique of "weighing" various interests in order to achieve "a . . . 'balance' of pragmatic consideration about which reasonable people may differ over time . . . ."[128] Instead, Oregon courts look at whether the reasoning behind the classification is rational or stereotypical.[129] As a result, the Oregon courts do not have to address difficult constitutional issues such as free speech[130] and free exercise of religion[131] with rules requiring "ad hoc evaluations based on comparison of incommensurables."[132] Thus, "a statute which survives a federal constitutional challenge could conceivably fail a similar challenge under the Oregon Constitution."[133] Thus, the Oregon analysis results in a larger group of impermissible classifications.[134]

Additionally, before a state court can address federal constitutional issues, it must first scrutinize the statute or policy under its state constitution.[135] This means that if the Oregon Supreme Court holds a statute to be unconstitutional under independent and adequate Oregon constitutional grounds, the United States Supreme Court cannot review the decision.[136] Conversely, if a statute is adjudged constitutional under state constitutional law, the statute's constitutionality can then be challenged under the federal

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[127] Schuman, *supra* note 124, at 225. Of the fifteen states that have equal privileges and immunities clause, Oregon is the only state that has rejected the United State Supreme Court's equal protection analysis. *Id.*

[128] State v. Kennedy, 295 Or. 260, 267, 666 P. 2d 1316, 1321 (Or. 1983).

[129] Simone Liebman, Striking a Parental Notification Statute Under Oregon Constitutional Law, 70 Or. L. Rev. 651, 667 (1991).

[130] State v. Robertson, 293 Or. 402, 649 P.2d 569 (Or. 1982).

[131] Salem College & Academy v. Employment Div., 298 Or. 471, 695 P.2d 25 (Or. 1985).

[132] Schuman, *supra* note 124, at 227.

[133] Liebman, *supra* note 129, at 667.

[134] Schuman, *supra* note 124, at 234.

[135] Linde, *supra* note 123, at 133-35.

[136] Liebman, *supra* note 129, at 667.

constitution. The starting point, therefore, is a examination of the Tanner facts under the Oregon Constitution's equal privileges and immunities clause.

A. Oregon's Equal Privileges and Immunities Analysis[137]

Before the Oregon Supreme Court will analyze a statute or rule, it must be determined that the law was properly promulgated under lawful authority.[138] Because Tanner involves a policy/practice, rather than an administrative rule or statute, we can dispense with this preliminary inquiry. The analysis, therefore, begins with step one of Oregon's equal privileges and immunities inquiry.

1. Step One: Identifying the "Privilege or Immunity"

The first step is to identify the privilege and determine whether it is implicated by the challenged action.[139] In 1985, the Oregon Supreme Court set forth an abstract definition of "privilege or immunity":

> Whenever a person is denied some advantage to which he or she would be entitled but for a choice made by a government authority, Article I, section 20 of the Oregon Constitution requires the government's decision to offer or deny the advantage be made "by permissible criteria and consistently applied."[140]

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[137] The foundation for this analysis is taken from Schuman, *supra* note 124. The constitutional analysis sets forth in his article still appears to be the approach used by the Oregon Supreme Court in current equal privileges and immunities cases. This approach is also reiterated in a subsequent article: David Schuman, A Failed Critique of State Constitutionalism, 91 Mich. L. Rev. 274, 275 n. 8 (1992). As a professor of constitutional law at the University of Oregon School of Law, David Schuman was know throughout the state of Oregon as an expert in state and federal constitutional law. Currently he serves as Assistant Attorney General for the State of Oregon.

[138] This step was identified in State v. Clark. State v. Clark, 291 Or. 231, 231, 630 P.2d 810, 810 (Or. 1981), *cert. denied*, 454 U.S. 1084 (1981). Key questions in this inquiry include: Does the challenged action proceed under lawful authority?; or did the issuing agency follow the Administrative Procedures Act in promulgating the regulation? Again, because the constitutionality of ORS § 659.030 or another rule/statute is not at issue, this inquiry is not necessary.

[139] Liebman, *supra* note 129, at 668.

[140] Schuman, *supra* note 124, at 229 (citing City of Salem v. Bruner, 299 Or. 262, 268-69, 702 P.2d 70,74 (Or. 1985) (quoting State v. Freeland 295 Or. 367, 377 667 P.2d 509, 516 (Or. 1983)).

The court's usage of this definition suggests that the term "entitled" should not be construed narrowly to mean only a right, privilege, or benefit that would be deemed an "entitlement."[141] Instead, the crucial words in this definition are "whenever" and "some advantage"; thus Article 1, section 20 is implicated "whenever" the state might deprive unequally a citizen of "something potentially desirable."[142]

This language is essential to identifying the privilege being denied the Tanner Plaintiffs. Because the court's definition of privilege and immunity is expansive, the health benefits denied to Plaintiffs which are usually granted to other employees can be construed as a privilege under this definition. The group life insurance and medical and dental insurance denied Plaintiffs is "something desirable" because it is less expensive than replacement insurance. A broadly defined privilege is more likely to win judicial favor than a narrowly construed one.[143] For example, if the Tanner privilege is defined as a right to equal opportunities and treatment in employment, it is more likely to be viewed by the court as irrational or based on a stereotype than if the privilege is defined as benefits offered to spouses of domestic partners. Plaintiffs, therefore should argue for a broad definition of the privilege.

2. Step Two: Determining whether the Challenged Action Implicates a "Privilege or Immunity"

Once a privilege is identified, the court must determine whether it is implicated by the challenged action. The challenged action is OHSU's and the State Board of Higher Education's practice of denying homosexual employees group insurance coverage for their domestic partners. If the privilege is defined, as suggested above, as the right to equal compensation and terms of employment, Defendants' actions clearly affect Plaintiffs' ability to attain equal compensation and terms of employment—the privilege. To avoid this implication, Defendants will want to implicate the right to marry as the privilege denied. This tactic achieves two purposes for Defendants. First, it is consistent with the approach Judge Gallagher took in his opinion. On several occasions, Judge Gallagher referred to Plaintiffs' inability to qualify for benefits because they can not marry in the state of Oregon as being an important element of Plaintiffs' claim, and he also used homosexuals' limited access to a marriage to justify the exclusion of heterosexual domestic partners

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[141] Schuman, *supra* note 124, at 229.

[142] *Id.* at 230.

[143] Liebman, *supra* note 129, at 674.

from his promulgated criteria.[144] Second, this tactic shifts the focus from "because of sex" to the more controversial and high-profile right of same-sex couples to marry which, as previously stated, is an issue the Oregon courts are likely to handle more conservatively. If Plaintiffs can confine the privilege to the employment discrimination sphere, Plaintiffs' chances at a successful constitutional challenge substantially increases.

3. Step Three: Classifying the Challenged Discrimination

The next step in the Oregon Constitutional analysis is to classify the challenged discrimination as implicating a "true class" or "pseudo-class."[145] This is important because each type of discrimination is governed by different principles and rules.[146]

a. Pseudo-Classes

A "pseudo-class" consists of a group of individuals who are united only by the fact that they are subject to the law or the state action being challenged.[147] If it were not for the statute or policy affecting them, they would not conceive of themselves as a "class" nor would they be treated as such.[148] Income tax payers or persons who fail to file a petition for review of

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[144] Tanner, No. 9201-00369, at *2-4.

[145] Schuman, *supra* note 124, at 244-45. The Oregon privileges and immunities clause also protects individual discrimination, but it does not prevent the state from treating individuals differently than others unless the government distributes the privileges and immunities "arbitrarily, ad hoc, or haphazardly." *Id.* at 231-232 (citing Clark, 291 Or. at 239, 630 P.2d at 816.) *See also* State v. Edmunson, 291 Or. 251, 253-54, 630 P.2d 822, 823 (Or. 1981).

[146] Schuman, *supra* note 124, at 244-45. Article I, section 20, forbids inequality of privileges or immunities not available "upon the same terms," to any citizen and to any class of citizens. State v. Clark, 291 Or. 231, 237-8, 630 P.2d 810, 814-815, *cert. denied*, 454 U.S. 1084 (1981). "In other words, it may be invoked by an individual who demands equality of treatment with other individuals as well as by one who demands equal privileges or immunities for a class to which he or she belongs." *Id.* at 237, 630 P.2d at 814-15. The court unambiguously distinguishes between individual and class-based discrimination by utilizing distinct analyses for each under Article I, section 20. State v. Freeland, 295 Or. 367, 374, 667 P.2d 509, 512.

[147] Schuman, *supra* note 124, at 235.

[148] *Id.* at 233.

a court of appeals judgment within thirty days are examples of "pseudo-class" members.[149]

In Tanner, a pseudo-class is made up of those adversely affected by Defendants' policies—those denied insurance benefits because they are not married. Characterized in this manner, the pseudo-class consists of both homosexuals and heterosexuals, shifting the emphasis of the analysis to marital rights. Accordingly, Plaintiffs should try to avoid this classification; instead they should focus on a more identifiable characteristic: their own and their partners' sexual orientation.

Furthermore, characterizing Plaintiffs as a pseudo-class would be detrimental when it comes to the second step of the class analysis. Once a pseudo-class is identified, the crucial question is whether the policy reflects deliberate and unfair limitation of access. In Tanner, there is not a legal impediment preventing Plaintiffs or any other adult from not getting married. In actuality, the impediment exists in the converse—Plaintiffs are prevented from getting married. As long as there is not a legal impediment to entry then the policy/action is permissible.[150] Hence, pseudo-class classification is not viable for Plaintiffs. If for some reason, however, Plaintiffs are deemed a pseudo-class, the analysis could prove damaging because the focus will be on access to marriage. Accordingly, Defendants could assert that the real issue in Tanner is not that Plaintiffs are being denied benefits, but that they are being denied access to marriage: if not for the laws that prohibit same-sex marriage, Plaintiffs would be eligible for the insurance benefits. This strategy would open the case to a constitutional challenge to homosexuals rights to marriage which as previously asserted, is likely to be unsuccessful for Plaintiffs.

b. True Classes

A true class exists when a classification exists prior to and independent of the statutory scheme at issue. The Clark court described true classes as those defined by personal characteristics widely regarded as forming the basis for meaningful social or ethnic categories.[151] Gender, ethnic background, legitimacy, and geographical residency are considered true

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[149] *Id. See* State v. Clark, 291 Or. 231, 240, 630 P.2d 810, 816 *cert. denied*, 454 U.S. 1084 (1981) and Cole v. Oregon Dep't of Revenue, 294 Or. 188. 191-94, 655 P.2d 171, 173-74 (Or. 1982).

[150] Schuman, *supra* note 124, at 239.

[151] Clark, 291 Or. at 240, 630 P.2d at 816.

classes.[152] Other types of suspect classifications "stand or fall by analogy to these more obvious examples."[153] This definition was further developed in Hewitt v. State of Accident Insurance Fund Corp.[154] In striking down a gender-based workers' compensation regulation, the court said that "a classification is 'suspect' when it focuses on 'immutable' personal characteristics."[155] Hence, legislation and policies implicating a group of persons based on an immutable characteristic is constitutionally "suspect."

A true class analysis under Oregon's equal privileges and immunities clause bears a close resemblance to the federal "suspect class" adjudication under the equal protection clause.[156] To violate the Oregon Constitution, however, a "suspect" classification must also be invidious, reflecting a stereotype, prejudice, or other evaluation not based on a reasoned determination of general competence or ability to participate in society.[157] If an action that is based on a suspicious classification is based on "specific biological differences" for example, and not an irrational stereotype, then the action will likely be upheld.[158] In analyzing the Tanner facts, Plaintiffs will have to demonstrate that the policies at issue are irrationally based on either stereotype or prejudice.

Under Oregon's true class analysis, homosexuals are a true class. This seems logical since homosexuality is a personal characteristic that is widely recognized as forming the basis for meaningful social, legal, political, or ethnic categories. Judge Gallagher hinted at acceptance of this viewpoint by saying that it is beyond debate that the lesbian and gay communities have suffered invidious discrimination.[159] By distinguishing homosexuals as a pre-existing community, Judge Gallagher implies that gays and lesbians establish

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[152] *Id.*

[153] State v. Freeland, 295 Or. 367, 376, 667 P.2d 509, 516 (1983).

[154] Hewitt v. State of Accident Insurance Fund Corp., 294 Or. 33, 653 P.2d 970 (1982).

[155] *Id.* at 45, 653 P.2d at 977.

[156] *Compare with* San Antonio School Dist., 411 U.S. at 17.

[157] Schuman, *supra* note 124, at 235.

[158] For example, a statute requiring women to have mammograms and men to undergo prostrate screening both involve suspect classification, however, they are based on biological differences between men and women are therefore not invidious. Schuman, *supra* note 124, at 235.

[159] Tanner, No. 9201-00369, at *1.

a true class. Furthermore, this view has been espoused by the state itself. In Hale v. Port of Portland, [160]then-acting Attorney General Frohnmayer recognized that sexual orientation is an "antecedent personal or social characteristic by which persons have traditionally been identified as social groups," and thus, discrimination on the basis of sexual orientation violates Oregon's guarantee of equal privileges and immunities.[161]

Plaintiffs can also argue that sexual orientation is immutable by citing numerous available studies indicating that sexual orientation is not the result of conscious decision, nor is it changeable.[162] Additionally, Plaintiffs can cite the growing number of studies indicating that homosexuality is genetically linked.[163] Though the "nature" aspect of sexual orientation is controversial, even within the homosexual community, the scientific trend is toward sexual orientation being nonmalleable and/or inherited. If this trend and data are accepted by the court, then homosexuals are a true class because sexual orientation falls under the Hewitt definition of a true class. At the very least, sexual orientation is an integral part of one's identity and is not easily changeable unlike a person's length of hair or style of dress which can be adopted or abandoned at will.[164]

Having a unique equal privileges and immunities analysis enables Oregon to define sexual orientation as a true class, whereas other states can not or have not done this. For example, in High Tech Gays v. Defense Ind. Sec. Clearance Off., the Ninth Circuit held that sexual orientation

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[160] Hale v. Port of Portland, 308 Or. 508, 525, 783 P.2d 506 (Or. 1989).

[161] Attorney General Frohnmayer aptly captured the essence of Plaintiffs' true class claim:

> [W]e think that the Oregon courts would hold that an express authorization to discriminate on the basis of sexual orientation violates Oregon's guarantee of equal privileges and immunities, Article I, section 20. Sexual orientation is an 'antecedent personal or social characteristic' by which persons have traditionally been identified as social groups... and it has frequently been a basis for discrimination. *See* Hewitt v. SAIF, 294 Or. 33, 46, 653 P.2d 970 (1982). It is probably immutable or nearly so. As such, sexual orientation defines 'classes' within the meaning of section 20, and we can conceive of no legitimate reason for the Board or the institutions to make personnel decisions based on sexual orientation.

Respondent's Motion to Dismiss at App. B, p. 4, Merrick v. Oregon Board of Higher Education, Or. Ct. App. No. A60997.

[162] *See supra* note 44.

[163] *See supra* note 45.

[164] Schuman, *supra* note 124, at 235.

classifications are not suspect.[165] The federal court, however, operates under the more restrictive federal equal protection analysis and is not bound by precedent defining a suspect class as those with an immutable personal characteristic. Unlike Oregon, the federal equal protection examination then balances the state interest against the parties' interests. It is to Plaintiffs' advantage that Oregon cases do not indicate a willingness to justify an invidious classification on the basis of a state interest, "compelling," "important," or otherwise,[166] because this is the reasoning used by other states to strike similar attacks on benefit plans and same-sex marriages.[167]

4. Step Four: Proving Invidiousness

Once the class has been defined, the court must determine if the classification was "invidious." The parameters of Oregon's inquiry will insure that the Oregon court must find sexual orientation a true class; however, the court's interpretation and analysis will determine if the classification is in fact invidious. A suspect classification is permissible as long as it is not invidious.[168] Whether a "suspect" classification is "invidious" depends on whether the system of classification reflects prejudice or stereotypical thinking, thus the virulence of Defendants' policies and practices is an essential element in deeming Defendants' actions unconstitutional.[169]

Plaintiffs can assert that Defendants' policies are steeped in stereotypical and prejudicial views of those historically associated with homosexuality and same-sex partners. The *amicus curiae* memorandum submitted by the ACLU is useful in supporting this contention. The memorandum is replete with examples in which homosexual relationships are disadvantaged as compared to heterosexual relationships. These disadvantages stem from historical beliefs that homosexual behavior is wrong and immoral to the denial of some of the most basic privileges extended to heterosexual couples.[170] For example, access to visit their hospitalized loved

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[165] High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573-74 (9th Cir. 1990).

[166] Schuman, *supra* note 124, at 237.

[167] *See* Rutgers Council of AAUP Chapters v. Rutgers State Univ., 1997 WL 106864 (N.J. Super. App. Div. 1997).

[168] Schuman, *supra* note 124, at 237.

[169] *Id.* at 235.

[170] *See* Memorandum of Amicus Curiae American Civil Liberties Union of Oregon, Inc., Tanner No. 9201-00369.

ones and intestacy rights are denied gay and lesbian couples. It is conceivable that much of this discriminatory behavior derives from the belief that homosexuals are not as deserving of these advantages as are heterosexuals. These reasons are non-merit based; consequentially, the only explanation for this proliferation of discrimination is invidiousness.[171]

Judge Gallagher's opinion also supports this conclusion. At trial, Defendants asserted that their fringe benefit insurance provisions were designed to make insurance coverage available to individuals for "whose debts the State employee was legally responsible."[172] They argued that an employee was legally responsible for debts of a spouse, but not a domestic partner, and therefore, the SEBB provisions were reasonable.[173] Judge Gallagher found this explanation to be pretextual because the policy offers benefits to employee's children between the ages of nineteen and twenty-three years old, even though the employee's legal responsibility for their children's debts ends when the child reaches eighteen.[174] Defendants' assumption that same-sex partners do not bear responsibility for one another simply because no legal responsibility is imposed is based both on the false stereotype that people who are not married have no responsibility toward one another and prejudice against nontraditional relationships. Consequently, Defendants' policies and practices are invidious.

5. Constitutional Conclusion

It is feasible and even probable that if Plaintiffs' claim reaches a state constitutional analysis, Defendants' actions will be held to violate Oregon's equal privileges and immunities clause. Both the true class and invidiousness analyses can be construed in Plaintiffs' favor. The final outcome will hinge on the Plaintiffs' and the court's ability to keep the issue limited to discrimination based on sex instead of letting the issue become the prohibition of same-sex marriages. By limiting the issue, the court will be able to justify a favorable ruling for Plaintiffs that is fact-specific enough to circumvent the issue of same-sex marriage. Even though Oregon is often viewed as a legally liberal state, it is unlikely that the courts will want to push Oregon into the spotlight by deeming sexual orientation a protected class and thereby forcing the court to permit same-sex marriages. However, as Judge Gallagher said,

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[171] This is similar to the reasoning that was used in the Supreme Court in striking down an anti-gay rights amendment to the Colorado constitution in Romer v. Evans. *See* Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620 (1996). *See also infra* Section V(2).

[172] Tanner, No. 9201-00369, at *3.

[173] *Id.*

[174] *Id.*

"[c]onstitutional law may mandate, like it or not, that customs change along with an evolving social order."[175]

IV. ALTERNATIVE LEGAL ANALYSIS

Two other legal arguments are available to the Tanner Plaintiffs.

A. Federal Equal Protection Analysis

Since Judge Gallagher ruled that Defendants' policies and practices were unconstitutional under the Oregon Constitution, Tanner did not proceed to a federal constitutional analysis under the equal protection clause, even though it is an element of Plaintiffs' complaint.[176] If the Court of Appeals rules that OHSU's policies are constitutional under the Oregon Constitution, Plaintiffs can then make an equal protection argument under the United States Constitution. This approach, however, would prove challenging in light of the equal protection framework which permits Defendants to justify their actions based on a compelling state interest. Defendants can assert an interest such as promoting traditional family values as a compelling state interest. The court then balances the state's interests against the interests of those affected. Such a balancing would likely weigh in favor of Defendants.

B. Romer v. Evans

Judge Gallagher indicated that his decision was influenced by the then-recent Romer v. Evans decision.[177] Though favorable to homosexuals' rights, Romer does not provide the Tanner Plaintiffs with persuasive authority because the facts are so dissimilar. In Romer, the Supreme Court held that Colorado's amendment was unconstitutional under the Equal Protection Clause because it imposed a disability upon homosexuals by denying them access to political redress. Under the Colorado amendment, homosexuals were forbidden the safeguards that others were free to enjoy. Because the amendment was too broad—its spectrum too far-reaching into every avenue of life and the disability too huge—the Supreme Court could not draw a connection between the statute and its purpose. Since the Court could not find a rational basis for the amendment, it inferred that the statute's purpose was to inflict harm against certain people, which is a clear violation of Constitutional rights.

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[175] *Id.* at 1.

[176] *See* Second Amended Petition at 17 - 20, Tanner No. 9201-00369.

[177] *See* Romer v. Evans, 517 U.S. 620, 116 S. Ct. 1620 (1996).

Romer is of little help to the Tanner plaintiffs because the Court did not give sexual orientation suspect or semi-suspect classification. Additionally, the privileges denied in Romer cannot be compared on a one-to-one basis with the insurance benefits plans being denied in Tanner. In fact, the Romer opinion suggests that discrimination against homosexuals may be permissible under the right circumstances. This means that a more narrowly tailored regulation or law excluding homosexuals from a particular benefit or restricting their activity could be constitutional. Though not persuasive authority for the Tanner Plaintiffs, some of the reasoning and dicta in Romer may be useful, especially in determining if Defendants' actions are invidious.[178]

V. PUBLIC POLICIES

A state constitutional analysis should be done under the color of a state's historical, political, and cultural context[179] The historical treatments, social attitudes, and policies toward homosexuals in Oregon, therefore, will be a significant factor in the Court of Appeals adjudication of Tanner.

A. Historical Discrimination

Gays and lesbians have a long history of discrimination targeted at their "unorthodox" lifestyle that has precipitated into a legacy of unequal treatment by both public and private institutions. In recognizing this historical discrimination, Judge Gallagher said "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 . . . but which, in fact and in practical effect, merely disguise the very discriminatory practices constitutional consideration proscribes."[180] Judge Gallagher was undoubtedly influenced by the ACLU's *amicus curiae* memorandum which cites numerous examples of discriminatory practices that disadvantage the homosexual community. In its memorandum, the ACLU asserts that Defendants' practice of denying Plaintiffs insurance benefits is a continuation of the legacy of virulent discrimination and violence

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[178] *See supra* Section IV(4).

[179] David Schuman, A Failed Chance of State Constitutionalism, 91 Mich. L. Rev. 274, 275 (1992).

[180] Tanner, No. 9201-00369, at *1.

targeted at the gay and lesbian community.[181] The memorandum states that the family relationships and intimate sexual relations of lesbians and gay men have been ignored, viewed as wrong, and punished by both government entities and private individuals and institutions.[182]

The following entities and practices are adversely discriminatory toward homosexuals: the Employment Retirement Income Security Act (ERISA) because it does not recognize homosexual families;[183] inability of same-sex couples to marry;[184] limited recognition for the purposes of tort cases[185] and death benefits;[186] inapplicability of evidentiary privileges;[187] intestacy laws ignoring a partner for purposes of intestate inheritance;[188] conjugal visits for prison inmates,[189] discharge from the armed forces;[190] targeted for criminal victimization and violence at rates much higher than other populations;[191] and for gay youth poor school performance, high drop-out rates, alienation from school activities, and hostility and rejection from

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[181] Memorandum of Amicus Curiae American Civil Liberties Union of Oregon, Inc., at 2, Tanner, No. 9201-00369.

[182] *Id.* at 6.

[183] *Id.*

[184] *Id.*

[185] *Id. See, e.g.*, Coon v. Joseph, 192 Cal. App. 3d 1269, 237 Cal. Rptr. 873 (Ct. App. 1987).

[186] Memorandum of Amicus Curiae American Civil Liberties Union of Oregon, Inc., at 6 -7, Tanner, No. 9201-00369. *See, e.g.*, Rovira v. AT & T, 817 F.Supp. 1062 (S.D.N.Y. 1993).

[187] Memorandum of Amicus Curiae American Civil Liberties Union of Oregon, Inc., at 7, Tanner, No. 9201-00369.

[188] *Id. See, e.g.*, In re Cooper, 564 N.Y.S.2d 684 (Sup. Ct. 1990).

[189] Memorandum of Amicus Curiae American Civil Liberties Union of Oregon, Inc., at 10, Tanner, No. 9201-00369.*d.* at 10.

[190] *Id.*

[191] *Id.* at 10-13. *See* Suzanne B. Goldberg & Bea Hanson, Violence Against Lesbians and Gay Men, 28 Clearinghouse Rev. 417 (1984); Newsweek Poll, Newsweek, June 27, 1994, at 47; The Advocate, Nov. 29, 1997, at 6 (recounting a white supremacist's guilty plea to murdering William Metz, a gay man).

their families.[192] In addition, gay and lesbian couples are not recognized as "family" for the purposes of insurance coverage;[193] denied family discounts such as frequent flier mileage benefits to homosexual couples;[194] refused access to their loved ones because they are not considered family members;[195]deprived of government services and privileges routinely provided to heterosexual couples such as social security and veteran's benefits,[196] and denied workers' compensation.[197] Continuation of well-established, historical practices is not a reason to continue to discriminate against homosexuals. Instead, the Oregon Court should view this history of discrimination with contempt and make a decision that can perpetuate a trend toward compensating for past injustices.

B. Social Policies

1. Gay and Lesbian Families Reflect the Changing Dynamic of Family

"[T]oday's families are not restricted to a standard format of mom, pop, and 1.9 kids."[198] Gay and lesbian families are but one of the many diverse types of families that exist in the United States and Oregon today.[199] Only twenty-five percent of the Oregon households consist of "traditional" families:[200] other family situations include group living, several families sharing a single household, single parents and their children, unmarried

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[192] Memorandum of Amicus Curiae American Civil Liberties Union of Oregon, Inc., at 13, Tanner, No. 9201-00369.

[193] *Id.* at 8.

[194] *Id.* at 9.

[195] *Id.* at 9. *See* Heidi A. Sorenson, A New Gay Rights Agenda? Dynamic Statutory Interpretation and Sexual Orientation Discrimination, 81 Geo. L.J. 2105, 2107 n.14 (1993).

[196] Memorandum of Amicus Curiae American Civil Liberties Union of Oregon, Inc., at 9-10, Tanner, No. 9201-00369.

[197] *Id.* at 8.

[198] Michael Kane, Spousal Specials: When it Comes to Tax Purposes Changing Attitudes and Changing Latitudes From Employers and Government Put a New Spin on Domestic Partners, Vancouver Sun, Jul. 4, 1994, at D8c.

[199] Memorandum of Amicus Curiae American Civil Liberties Union of Oregon, Inc., at 22, Tanner, No. 9201-00369.

[200] *Id.*

opposite sex couples (with and without children), multi-generational families, foster children living in homes; and same-sex couples (with and without children).[201] The notion of what a family is must take into account the reality of what family structures actually exist and adopt a definition of family that encompasses these expanded notions of family.[202] As such, the Oregon court and other courts in the country, should reconcile these differences between reality and existing law.

2. Societal Needs

Extending insurance benefits to same-sex domestic partners meets several social needs. First, it provides needed medical insurance to those who otherwise may not qualify for or could not afford such benefits. Society as a whole benefits when individuals can seek necessary medical care without incurring a financial burden. Second, it limits the burden to society when uninsured persons become ill. Many hospitals cannot refuse to treat uninsured patients. To offset the loss from uninsured patients, hospitals and health care providers are forced to increase costs for insured patients. In essence, society pays the price for uninsured domestic partners. Third, it may enable some otherwise uninsurable persons, (*i.e.*, due to a pre-existing condition) to qualify for medical insurance. Fourth, promoting long-term, monogamous, homosexual relationships may help curb the spread of AIDS among the male homosexual population.

Extending benefits to homosexual domestic partners can also have positive effects in the workplace and on individuals' sense of worth. Such a policy sends a clear message that all persons, regardless of sexual orientation, are valued, capable, and competent members of the workforce. Benefits can increase worker morale and productivity[203] and create a positive aggregate effect for the country's economy. A revised policy will also help governmental agencies attract and retain qualified employees who might otherwise chose employment elsewhere.[204] Additionally, by allowing this

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[201] *Id.* at 21-22.

[202] *Id.* at 22.

[203] Many companies report that extending benefits to unmarried partners has a positive effect on employee performance. Alice Rickel, Extending Employee Benefits to Domestic Partners: Avoiding Legal Hurdles While Staying in Tune with the Changing Definition of the Family, 16 Whittier L. Rev. 737, 748 (1995).

[204] During the week of June 30, 1994, about one hundred employees quit their jobs because their employer, Computer Associates International, Inc., refused to continue the group's policy of extending benefits to domestic partners. As a result of this exodus, Computer Associate" rivals benefitted. Lawrence M. Fisher, 100 Depart ASK Group Over Merger, N.Y. Times, Jul. 1, 1994, at D3. The employees who quit were part of the ASK Group located in

group to purchase benefits at a lower cost through group plans, the group will have more income available for food, clothing, and child care.

Equity and fairness seem to dictate that these benefits be extended to homosexual domestic partners because members of this group cannot, at least at present, make themselves eligible for the benefits by marrying. Finally, curtailing the denial of benefits is a true manifestation of the state's non-discrimination policies and constitutional privileges.[205]

3. Few Obstacles to Implementing and Maintaining Domestic Partner Benefits

Much of the resistance from the business community to adopting domestic partner benefit programs has come from a fear that increased costs could burden companies or governmental entities.[206] In reality, however, the costs are negligible. In many cases, it has been found that coverage for gay and lesbian domestic partners has been less expensive because this group tends to be younger and less likely to have a pregnancy.[207] Apparently these cost-lowering factors can offset expenses for AIDS and HIV treatment. Companies that have adopted domestic partner benefits also report that administration of the program is easily manageable and that the positive

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Mountain View, California, which is a division of Computer Associates International, Inc. based in Islandia, NewYork.

[205] This is one reason why several companies have elected to extend domestic partner benefits to their employees. For example, Levi Strauss, the first Fortune 500 company to extend health care benefits to unmarried couples, did so because omitting this group based on marital status would conflict with their overall nondiscrimination philosophy and policy. Firms Find It Profitable, Productive to Address Sexual Orientation Issues, 1994 Daily Labor Report 70 d18 (BNA) (Apr. 13, 1994). Many employers are fearful that homosexual male's risk of contracting AIDS will increase their insurance costs. In reality, this cost is less significant than other more prevalent medical conditions such as heart disease, cancer, and high-risk pregnancy. The Director of Employee Benefits at Levi Strauss summed up the situation: "[T]he place to worry about costs is with smokers or people who are overweight or have cardiovascular problems." Domestic Partnerships Raise New Questions About Benefits Equity, Pen. Rep. (BNA) Vol. 20, No. 46, at 2478 (Nov. 22, 1993).

[206] In a survey conducted by the International Foundation of Employee Benefit Plans cost concerns were listed by eighty-five percent of the employers not offering domestic partner benefits. Other reasons include legal issues (80%), administration concerns (70%), public relations (67%), moral objections (64%), employee backlash (59%), and lack of insurance coverage (35%). Employee Benefits: Most Firms that Offer Domestic Partner Benefits Include Health Care Coverage, 1995 Daily Labor Report 117 (BNA) (June 19, 1995).

[207] Domestic Partner Programs Praised for Business Value, Yet Few Exist, 1994 Daily Labor Report 11 d21 (BNA) (Jan. 18, 1994) (citing Liz Dayan, consultant for The Segal Co.).

publicity has boosted worker morale.[208] An additional criticism is that domestic partner benefit programs are easily abused by employees who want to trick the system. An affidavit system, the current federal income tax consequences, and falsification clauses all act to discourage employee abuse.[209]

4. Extending Domestic Partner Benefits Does Not Solve All of the Problems

Even if the Court of Appeals requires Defendants to offer the controverted benefits, obstacles still exist for homosexuals in receiving these benefits. For example, if registration is required, individuals run the risk of their sexual orientation becoming public. There are also tax implications since domestic partner benefits are considered taxable income to the employee; however, this is not the case for married couples. Despite these obstacles and impediments, the benefit of extending group insurance and group medical and dental benefits to homosexuals far outweighs the burdens on the state, the employee, and the domestic partners.

CONCLUSION

The Court of Appeals decision in Tanner v. Oregon Health Sciences University will be much anticipated.[210] This Article illustrates that precedent, statutory language and history, legislative intent, and constitutional analysis can and should be interpreted to deem Defendants' policy and practice of denying homosexual domestic partners benefits afforded heterosexual married partners both illegal and unconstitutional. Depending on how the court construes the issues and analyzes the facts, the decision may be a landmark one—rendering sexual orientation a protected class under Oregon law and

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[208] Creating opportunities for lesbian and gay employees transforms "not only the gay and lesbian employees . . . but it has a very positive effect as it filters through the rest of the group. . . ." Firms Find It Profitable, Productive to Address Sexual Orientation Issues, 1994 Daily Labor Report 70 d18 (BNA) (Apr. 13, 1994) (citing Elizabeth Birch, senior litigation counsel of Apple Computer Inc. and co-chair of the National Gay and Lesbian Task Force in Washington D.C.).

[209] Rickel, *supra* note 203 at 745-748.

[210] At the time this article was written, it was speculated that the Court of Appeals of Oregon would not issue an opinion since significant settlement negotiations between the Attorney General's office and Plaintiffs continued for months. If settlement were reached, it would have been years before the issue of discrimination on the basis of sexual orientation would be addressed in Oregon. Fortunately, the Court of Appeals of Oregon rendered a decision and answered this daunting question for the state of Oregon. *See infra* note 212.

Oregon's constitution. For domestic partner benefits to catch on quickly, "[i]t would take a major victory in court."[211] Perhaps Tanner can be that victory.[212]

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[211] Domestic Partner Programs Praised for Business Value, Yet Few Exist, 1994 Daily Labor Report 11 d21 (BNA) (Jan. 18, 1994) (quoting Thomas Coleman, executive director, Spectrum Institute, a domestic partner advocacy group in Los Angeles).

[212] In fact Tanner was that victory. Prior to going to print (and one year after this article was written), the appellate decision was rendered. Tanner v. Oregon Health Sciences University, 157, Or. App. 502, 1998 WL 869976 (Or. Ct. App. 1998). In an unprecedented decision, the Court of Appeals held that "there is no question...that plaintiffs are members of a true class"–unmarried homosexual couples. *Id.*, at *13. In determining whether the class is suspect, the court's analysis focused on the fact that homosexuality is a characteristic that is historically regarded as defining distinct, socially-recognized groups that have been the subject of adverse social or political stereotyping or prejudice as opposed to focusing on the immutability of a characteristic. *Id.* Because the court found that sexual orientation, like gender, race, alienage and religious affiliation is widely regarded as defining a distinct, socially recognized group subject to adverse stereotyping, the court deemed homosexuals to be a "suspect" true class, thereby warranting the highest standard of protection available under the Oregon Constitution. *Id.* Application of the state's constitutional analysis lead to the court's determination that Defendant's health benefits were not made available on equal terms to Plaintiffs; therefore, Defendant's were held in violation of Article I, section 20 of the Oregon Constitution.

Though the court held that OHSU's policy was violative of the state constitution and that homosexuals are a protected class, it held that Defendants did not violate ORS § 659.030. The court reasoned that even though OHSU's practice of denying insurance benefits to the unmarried domestic partners of its homosexual employees had a disparate impact on this group, there was no evidence that OHSU engaged in a subterfuge to discriminate against the protected class. *Id.*, at *10. Since Defendants met their burden under ORS § 659.028, and were able to assert lack of subterfuge as a valid affirmative defense, the court held Defendants did not engage in an unlawful employment practice. *Id.*

Tanner is a first-of-its-kind decision. It is cause for celebration and it is a shot of encouragement for what proves to be a continued struggle for equality for the homosexual community. Hopefully, the Court of Appeals for Oregon set an example that will encourage other courts to ensure homosexuals are afforded the same privileges and immunities afforded others.

It is interesting to note that in January 1998 (prior to the Court of Appeal's decision), the Public Employees' Benefit Board (PEBB) reevaluated their benefits program and voted seven-to-one to extend employee benefit coverage to the domestic partners of all eligible state employees. The plan was scheduled to go into effect on or before June 1,1998. Health benefits were extended to same gender and opposite gender domestic partners of eligible employees as well as the family members of domestic partners to the same extent they are currently provided to an employee's family members.