Tanner v. Oregon Health Sciences University
Oregon Court of Appeals
157 Or.App. 502, 971 P.2d 435
December 9, 1998

LANDAU, P.J.

At issue in this case is the lawfulness of Oregon Health Science University's (OHSU) denial of health and life insurance benefits to the unmarried domestic partners of its homosexual employees. Plaintiffs, who are three lesbian employees of OHSU and their domestic partners, initiated this action for judicial review of State Employees' Benefits Board (SEBB) orders affirming the lawfulness of the denial and for declaratory and injunctive relief. Plaintiffs contend that OHSU's actions violate ORS 659.030(1)(b), which prohibits discrimination in employment on the basis of the sex of an employee or the sex of any other person with whom the employee associates, as well as Article I, section 20, of the Oregon Constitution, which prohibits granting privileges or immunities not equally belonging to all citizens. Plaintiffs named as defendants OHSU, the State of Oregon, the State Board of Higher Education, the Executive Department, and SEBB.

The matter was tried to the court. Following the trial, the 1995 Legislative Assembly enacted legislation transforming OHSU from a state university to a nonstate agency public corporation. The trial court ultimately concluded that OHSU's denial of benefits violated both ORS 659.030(1)(b) and Article I, section 20, of the Oregon Constitution and entered an order enjoining the state from denying group insurance benefits to unmarried domestic partners of its homosexual employees.

Defendants appeal, arguing that the trial court erred in concluding that OHSU violated either the statute or the constitution. Plaintiffs contend that the trial court's judgment was correct in all respects. On our own motion, we requested briefing from the parties on the question whether the conversion of OHSU from a state university to a nonstate agency public corporation renders the action moot as to any defendants.

We conclude that the action is moot as to all state agency defendants and that the case must be remanded with instructions to dismiss all claims against those defendants. We conclude that the case is not moot as to OHSU. As to the merits of the controversy, we conclude that the trial court erred in declaring that OHSU violated ORS 659.030(1)(b). The evidence in this record does not support a claim for violation of that statute. We also conclude, however, that the trial court was correct in declaring that OHSU's denial of insurance benefits to domestic partners of homosexual employees violates Article I, section 20, of the Oregon Constitution.

FACTUAL BACKGROUND

The relevant facts are not in dispute. Before this controversy arose, OHSU provided group health insurance benefits to its employees. It provided each employee a certain amount of money and authorized each employee to select insurance benefits within the

limits of the money provided. In accordance with SEBB eligibility criteria, OHSU permitted employees to purchase insurance coverage for "family members." Under the SEBB criteria, unmarried domestic partners of employees were not "family members" who were entitled to insurance coverage.

Plaintiffs are three lesbian nursing professionals employed by OHSU and their unmarried domestic partners. Each of the couples has enjoyed a long-term and committed relationship, which each wishes to continue for life. Each of the couples would be married if Oregon law permitted homosexual couples to marry.

All three OHSU employees applied for medical and dental insurance benefits for their domestic partners. The OHSU benefits manager refused to process the applications on the ground that the domestic partners of the employees did not meet the SEBB eligibility criteria. Plaintiffs appealed to SEBB itself, and, in a series of 1991 letters, SEBB's Case Management Committee upheld OHSU's denial of benefits.

Plaintiffs filed their complaint initiating this action. They petitioned for judicial review of a final order in other than a contested case, alleging that the 1991 SEBB letters constituted final orders and that the orders should be reversed on the ground that the denial of benefits violated ORS 659.030(1)(b) and Article I, section 20. In the same complaint, plaintiffs requested a declaratory judgment on the same grounds as to the lawfulness of the denial and an injunction prohibiting OHSU from denying insurance benefits to domestic partners of homosexual employees that are made available to spouses of married OHSU employees.

The case was tried to the court in February 1995. At trial, the parties stipulated that OHSU paid the same amount of money for a fringe benefit package to all employees in a given category, without regard to marital status or sexual orientation. The parties further stipulated that, in administering its employee benefits program, OHSU treated heterosexual unmarried couples and homosexual unmarried couples the same. Plaintiffs declined to stipulate that OHSU did not intend its administration of the benefits to discriminate against gay and lesbian employees. In response, OHSU elicited testimony from the State Administrator of the Human Resource Management Division of the Department of Administrative Services that the sex or sexual orientation of employees was not taken into account in any way in the administration of state benefits programs. Plaintiffs offered no contrary testimony.

The court took the matter under advisement. Meanwhile, the 1995 Legislative Assembly enacted legislation declaring that OHSU no longer is part of the State Board of Higher Education, but is instead an independent public corporation. The new legislation further declares that the terms and conditions of employment at OHSU are to be determined and administered by the Board of Directors of OHSU:

> "ORS 243.105 to 243.585 [pertaining to fringe benefits and deferred compensation plans for employees of state agencies] shall apply to the Oregon Health Sciences University until the Oregon Health Sciences University Board of Directors, in accordance with the provisions of any collective bargaining

agreement, adopts a new personnel system or alternative employee benefit plan. Until such time as an alternative personnel system is adopted, the university shall exercise exclusive administrative authority and control over the system."

The new legislation became effective July 1, 1995. The transfer of employees from the State Board of Higher Education was to be completed by January 1, 1996. On the basis of the new legislation, defendants filed a supplemental memorandum of authority and requested that the case be dismissed as moot. Plaintiffs opposed the motion.

On June 14, 1996, the trial court issued a letter opinion concluding that the denial of benefits to plaintiffs and their domestic partners violated ORS 659.030(1)(b) and Article I, section 20. The court did not address defendants' request that the case be dismissed as moot. Shortly after that, plaintiffs prepared a proposed form of judgment. Defendants objected to the form of judgment, contending that, among other things, it applied to state agency defendants that no longer had any interest in the controversy.

On August 12, 1996, the court entered its judgment, containing findings of fact and conclusions of law. The judgment enjoined the State of Oregon, OHSU, SEBB, and the State Board of Higher Education from continuing the practice of denying group life, health, and dental insurance coverage to domestic partners of homosexual employees when those benefits are offered to spouses of heterosexual employees. The judgment defines "domestic partners" as homosexual persons not related by blood closer than first cousins who are not legally married, who have continuously lived together in an exclusive and loving relationship that they intend to maintain for the rest of their lives, who have joint financial accounts and joint financial responsibilities, who would be married to each other if Oregon law permitted it, who have no other domestic partners, and who are 18 years of age or older. The judgment awarded plaintiffs their costs and attorney fees.

Defendants appealed. While the appeal was pending, the legislature enacted legislation abolishing SEBB and transferring all of SEBB's duties to a newly created Public Employees' Benefits Board (PEBB). The parties submitted a stipulated motion for substitution of PEBB for SEBB and for an order directing the trial court to enter an amended judgment reflecting that change. The motion was allowed, and the trial court amended the judgment accordingly. That legislation otherwise has no effect on this litigation.

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

ANALYSIS OF THE PARTIES' CLAIMS ON THE MERITS

We turn to the portion of the case that remains a live controversy, that is, the lawfulness of OHSU's denial of insurance benefits to domestic partners of its homosexual employees. Following the traditional "first things first" decisional methodology of

Oregon judicial opinions, we begin with the question whether OHSU's denial violated applicable employment statutes and, if not, turn to whether the denial violates the state constitution. *See Planned Parenthood Assn. v. Dept. of Human Resources*, 297 Or. 562, 564 (1984); *Young v. Alongi*, 123 Or.App. 74, 77-78 (1993).

A. Violation of ORS 659.030(1)(b)

Plaintiffs allege, and the trial court held, that OHSU's denial of benefits to domestic partners of OHSU's employees violated ORS 659.030(1)(b). That statute provides, in part:

> "(1) * * * [I]t is an unlawful employment practice:
> " * * * * *
> "(b) For an employer, because of an individual's race, religion, color, sex, national origin, marital status or age if the individual is 18 years of age or older, or because of the race, religion, color, sex, national origin, marital status or age of any other person with whom the individual associates * * * to discriminate against such individual in compensation or in terms, conditions or privileges of employment."

On appeal, OHSU argues that the trial court erred, because its denial of benefits was in no way predicated on the sex of any employee or of any individual with whom an employee associates. OHSU argues that its denial of benefits instead was based on marital status alone, without reference to the sexual orientation of the employees or their domestic partners. OHSU emphasizes that *any* unmarried domestic partners--heterosexual and homosexual alike--were denied insurance benefits.

Plaintiffs acknowledge that, at least on the surface, OHSU denied benefits to unmarried domestic partners of its employees without regard to their sexual orientation. They argue that OHSU's denial of benefits to domestic partners nevertheless violates ORS 659.030(1)(b) because, although OHSU's denials did not facially discriminate against homosexual couples, the denials had the effect of discriminating against homosexual couples. That is so, plaintiffs argue, because homosexual couples cannot marry. Heterosexual couples can marry and thus at least have the option of doing so to avail themselves of the employee benefits; homosexual couples cannot marry and have no such option. Because of the disparate impact on homosexual couples of denying benefits on the otherwise facially neutral basis of marital status, plaintiffs argue, OHSU has discriminated on the basis of the sex of persons with whom employees associate, in violation of ORS 659.030(1)(b).

OHSU rejoins that, even if its denial of benefits constitutes discrimination on the basis of sex, there is no unlawful employment practice, because a separate statute, ORS 659.028, provides that, when discrimination is a product of the terms of a bona fide benefits plan, the discrimination is actionable only if it is part of a subterfuge to evade the purposes of the fair employment statutes. There is no evidence in this case, OHSU argues, that the denials of benefits occurred as part of a subterfuge to evade the purposes of the fair employment statutes.

Plaintiffs respond that ORS 659.028 operates as an affirmative defense and that, to avail itself of the "safe harbor" that the statute affords, OHSU must demonstrate that its denials were not part of a prohibited subterfuge. According to plaintiffs, OHSU, having failed in its burden of proof under ORS 659.028, is left with its violation of ORS 659.030(1)(b).

Whether OHSU's denial of insurance benefits to domestic partners of its homosexual employees amounts to unlawful discrimination "because of the * * * sex * * * of any other person with whom the [employee] associates" involves two subsidiary issues. First, we must determine whether discrimination on the basis of sexual orientation constitutes prohibited discrimination because of the "sex * * * of any other person with whom the [employee] associates"; if it does not, then the dispute is at an end. Second, we must determine whether OHSU's denials of insurance benefits in this case constituted discrimination "because of" plaintiffs' sexual orientation.

Whether ORS 659.030(1)(b) encompasses discrimination because of sexual orientation is a matter of first impression. The Supreme Court has suggested that it is at least possible to construe the statute to apply to discrimination on the basis of sexual orientation. *ACLU v. Roberts*, 305 Or. 522 (1988) ("It is possible to construe some Oregon statutes as prohibiting discrimination based on sexual orientation. *See, e.g.,* ORS 659.030(1)(b)"). The court did not purport actually to construe ORS 659.030(1)(b) or any other statute to say that, however. It remains for us, therefore, to determine the intended meaning of the statute, looking to its text in context and, if necessary, its history and other interpretive aids. *PGE v. Bureau of Labor and Industries*, 317 Or. 606, 610-12 (1993).

In our view, the Supreme Court's suggestion in *Roberts* is the only plausible construction of the statutory language. The statute prohibits discrimination on the basis of the "sex * * * of any other person with whom an individual associates." Plaintiffs allege that OHSU discriminated against them by denying them the option of providing their domestic partners insurance benefits because their domestic partners are of the same sex. Discrimination of that sort hinges on the sex of the individual with whom plaintiffs associate. It plainly falls within the wording of the statute.

Whether OHSU's denial of insurance benefits to domestic partners of its homosexual employees amounted to discrimination "because of" their sexual orientation may not be so readily answered. OHSU's denial of benefits to plaintiffs ostensibly was based on the fact that plaintiffs were unmarried. As OHSU contends--and as plaintiffs concede--its practice of denying benefits to domestic partners was based on a definition of eligible family members that applied both to unmarried heterosexual couples and unmarried homosexual couples. Ostensibly, therefore, OHSU did not discriminate "because of" sexual orientation; it discriminated "because of" marital status, without regard to sexual orientation.

Merely because discrimination is not obvious, however, does not mean that it is not actionable. We have held that ORS 659.030 prohibits not only employment practices that facially discriminate against a protected class of employees, but also practices that are facially neutral concerning the protected class but have a disparate impact on that class.

Spurgeon v. Stayton Canning Company, 92 Or.App. 566, 570-71 (1988); *Sch. Dist. No. 1 v. Mission Ins. Co.*, 58 Or.App. 692, 700 (1982). To make out an employment discrimination claim based on disparate impact, a plaintiff must show: (1) membership in a class protected by the employment statutes, and (2) that the employer's facially neutral employment rule "has the effect of screening out members of a protected class at a significantly higher rate than others." *Spurgeon, supra*.

In this case, as we have held, plaintiffs are members of a protected class under ORS 659.030(1)(b). Moreover, there can be no question but that the effect of OHSU's practice of denying insurance benefits to unmarried domestic partners, while facially neutral as to homosexual couples, effectively screens out 100 percent of them from obtaining full coverage for both partners. That is because, under Oregon law, homosexual couples may not marry.

There remains the question whether plaintiffs' claims are subject to the more limited liability described in ORS 659.028, which provides, in part:

> "It is not an unlawful employment practice for an employer, employment agency or labor organization to observe the terms of a * * * bona fide employee benefit plan, such as a retirement, pension or insurance plan, which is not a subterfuge to evade the purposes of this chapter."

The parties do not dispute that the insurance benefits at issue in this case and OHSU's policy of denying benefits to the domestic partners of unmarried employees are part of a "bona fide employee benefit plan." The only question is whether OHSU's denial of benefits was part of a "subterfuge to evade the purposes" of the employment statutes. Answering that question, however, entails addressing three more: First, precisely what does "subterfuge" mean; more specifically, does it require proof of intent? Second, who has the burden of proving the presence or absence of a subterfuge? Third, has the burden of proof been satisfied in this case?

We begin with the meaning of the statutory term "subterfuge." Once again, we are presented with an interpretive question of first impression, which we resolve on the basis of the text in context and, if necessary, legislative history and other aids to construction. *PGE, supra*. In examining the text of a statute, we give words of common usage their "plain, natural and ordinary meaning" unless there is textual or contextual evidence that the legislature intended some other meaning to apply. A "subterfuge" ordinarily refers to "a deception by artifice or stratagem to conceal, escape, avoid or evade." *Webster's Third New Int'l Dictionary* 2281 (unabridged ed 1993). The term obviously entails intentional conduct; one does not accidentally or negligently deceive by artifice or stratagem. Nothing in the text or context of the statute suggests a contrary definition.

We note in that regard that our reading of the statute comports with the construction given the nearly identical language of the federal legislation on which ORS 659.028 was based. The federal Age Discrimination in Employment Act of 1967 (ADEA) forbids arbitrary discrimination by public and private employers against their employees because of age. Section 623(f)(2) of the ADEA provides that decisions made pursuant to the terms

of "any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of" the ADEA are exempted from the general prohibition against age discrimination. In *Public Employees v. Betts*, 492 U.S. 158 (1989), the United States Supreme Court construed section 623(f)(2) and specifically addressed the meaning of the reference to "subterfuge" in that section. The Court began by noting that the ordinary meaning of the term is "a scheme, plan, stratagem, or artifice or evasion." It then concluded that nothing in the text of the ADEA or its legislative history required a different definition. Applying the ordinary meaning of the term, the Court held that proof of actual intent to discriminate is required.

There remain the questions as to who has the burden of proof and whether it has been satisfied. Plaintiffs contend that ORS 659.028 states an affirmative defense, thus placing the burden upon defendants to establish their lack of intent to discriminate to avoid liability under ORS 659.030. OHSU contends that ORS 659.028 merely describes the type of conduct that is prohibited in a context that is more specific than the more generally worded ORS 659.030. Thus, according to OHSU, when discrimination occurs as part of the terms of a bona fide employee benefit plan, it is the plaintiff who must prove that the defendant did so intentionally to prevail on his or her claim.

We need not attempt to resolve that issue in this case, however. Regardless of who bears the burden of proof, the fact is that, on the record in this case, it is clear that OHSU did not engage in a subterfuge. Appellate review of the evidence on the issue is *de novo. Wincer v. Ind. Paper Stock Co.*, 48 Or.App. 859, 862-63 (1980). Our review of that evidence reveals that there is unrebutted testimony that sexual orientation was not taken into account in the administration of OHSU's employee benefits program and that OHSU did not intend, directly or indirectly, to discriminate on the basis of sexual orientation. Accordingly, although OHSU's practice of denying insurance benefits to unmarried domestic partners of its homosexual employees had an otherwise unlawful disparate impact on a protected class, because there is no evidence that OHSU engaged in a subterfuge to discriminate against that protected class--and because there is affirmative evidence that it did not--it did not engage in an unlawful employment practice. The trial court erred in reaching a contrary conclusion.

B. Violation of Article I, section 20

Finally, we address whether OHSU's denial of insurance benefits to the unmarried domestic partners of its homosexual employees violated Article I, section 20, of the Oregon Constitution, which provides:

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

Plaintiffs allege, and the trial court held, that OHSU's denial of benefits to domestic partners of its employees violated Article I, section 20. On appeal, OHSU argues that the trial court erred because OHSU's denials did not discriminate on the basis of sexual orientation but instead on the basis of marital status, discrimination that is justified by the entirely rational purpose of promoting the institution of marriage. Plaintiffs reply that

OHSU's practices have the effect of denying a privilege--insurance benefits--to a class of citizens--homosexuals--without any justification and that the practice runs afoul of the constitution. OHSU acknowledges that its denials have the effect of discriminating against homosexual couples. It contends that such a discriminatory effect is not actionable in the absence of an intentionally discriminatory classification.

We begin with a matter that, although not raised by the parties, is necessary to the disposition of their constitutional contentions, namely, the implications of the legislation that transformed OHSU from a state agency to a public corporation. Article I, section 20, by its terms, does not constrain the conduct of wholly private entities. It prohibits the passage of laws granting citizens or classes of citizens privileges or immunities on unequal terms. The courts have construed the reference to "laws" to include both legislative enactments and the administration of laws under delegated authority. *State v. Freeland,* 295 Or. 367, 370 (1983) (district attorney charging practices subject to Article I, section 20). But in all cases, those constrained by that section of the constitution are government entities of one sort or another.

The legislature has declared that OHSU no longer is a "state agency." Nevertheless, the legislature also declared that OHSU remains "a governmental entity performing governmental functions and exercising governmental powers." We conclude therefore that, although the legislature has declared OHSU to be a nonstate agency public corporation, it remains a governmental entity subject to the prohibitions of Article I, section 20.

The parties' constitutional arguments on the merits present still further matters of first impression. In addressing those arguments, we do not pretend that the cases construing Article I, section 20, describe a completed, coherent jurisprudence. It is perhaps best to view the cases at this juncture as something of a work in progress. Nevertheless, we draw from the cases the following rules, which we conclude are sufficiently clear to enable us to dispose of the arguments presented.

Article I, section 20, prohibits granting privileges or immunities to one citizen or class of citizens that are not equally available to all citizens. That generally is understood to express two separate prohibitions. As the Supreme Court explained in its seminal opinion, *State v. Clark*, 291 Or. 231, 237 (1981), the clause "forbids inequality of privileges or immunities not available upon the same terms, first, to any citizen, and second, to any class of citizens." In this case, plaintiffs contend that they are members of a class of citizens--homosexual couples--to whom certain privileges--insurance benefits--are not made available.

As used in the Article I, section 20, case law, the term "class" takes on special meaning; only laws that disparately treat a "true class" may violate that section of the constitution. *State ex rel Huddleston v. Sawyer,* 324 Or. 597, 610. In attempting to describe precisely what is meant by a "true class," the cases draw a distinction between classes that are created by the challenged law or government action itself and classes that are defined in terms of characteristics that are shared apart from the challenged law or action.

The standard example of a nontrue class, drawn from the Supreme Court's decision in *Clark*, is the classification created by a statute that imposes a filing deadline for filing a petition for review. Such legislation creates two classes of persons: (1) those who timely file petitions for review, and (2) those who do not. Both are "classes" of persons, at least in the colloquial sense of groups having something in common. But in the absence of the statute, they have no identity at all. Legislation that disparately affects such "classes" does not violate Article I, section 20, because of the essentially circular nature of the argument: The legislation cannot disparately affect a class that the legislation itself creates. *Clark, supra*. *See also Sealey v. Hicks*, 309 Or. 387, 397 (1990); *Hale v. Port of Portland*, 308 Or. 508, 525 (1989).

In contrast, Article I, section 20, does protect against disparate treatment of true classes, those that have identity apart from the challenged law itself. Various formulations have been used to describe in some affirmative way what a true class is, as opposed to merely what it is *not* in reference to classes created by the challenged legislation. The cases refer to classification by "*ad hominem* characteristic," *Van Wormer v. City of Salem*, 309 Or. 404, 408 (1990), by "personal characteristic," *Zockert v. Fanning*, 310 Or. 514, 523 (1990), and by "antecedent personal or social characteristics or societal status," *Hale, supra*. Examples of true classes include gender, ethnic background, legitimacy, past or present residency, and military service. *Clark, supra*.

To say that disparately treated true classes are protected by Article I, section 20, does not end the matter. Depending on what type of true class is involved, the legislation or governmental action may or may not be upheld in spite of the disparity. In that regard, the cases draw a distinction between "suspect" classes and other true classes. The former classes are subject to a more demanding level of scrutiny, and legislation or government action disparately treating such classes is much more likely to run afoul of Article I, section 20, than is legislation or government action that disparately treats a nonsuspect class.

The leading opinion on suspect classes is *Hewitt v. SAIF*, 294 Or. 33 (1982). In that case, the plaintiff, a man, challenged the constitutionality of a statute that permitted an unmarried woman to collect death benefits upon the death of an unmarried man with whom she cohabited for over one year. He contended that the statute, which made no provision for death benefits to an unmarried man who had cohabited with an unmarried woman for the required period, violated Article I, section 20, of the Oregon Constitution. The court held that, under Article I, section 20, disparate treatment of classes that may be regarded as "suspect" is subject to particularly exacting scrutiny. The court did not define precisely what it meant by "suspect" class. It did say that a class is suspect when it is defined in terms of "immutable" characteristics and "can be suspected of reflecting 'invidious' social or political premises, that is to say prejudice or stereotyped prejudgments." The court held that gender constitutes such a class. It then held that the denial of benefits to the plaintiff, a member of the suspect class defined by his male gender, was "inherently suspect." That suspicion, the court held, could be overcome only by evidence that the denial of benefits to him is justified on the basis of "biological

differences" between those who are entitled to the benefits under the statute and those who are not. Finding no such justification in the record, the court declared that the statute violated Article I, section 20.

Although the court in *Hewitt* referred to "immutable" characteristics as being sufficient for defining a suspect class under Article I, section 20, subsequent cases make clear that immutability--in the sense of inability to alter or change--is not necessary. The court has since explained that, in addition to gender, such classes as alienage, *Greist v. Phillips*, 322 Or. 281, 300 (1995) (race, sex and alienage are "inherently suspect" classes), and religious affiliation, *State v. Buchholz*, 309 Or. 442, 446 (1990) (race and religion are "impermissible criteria" of classification); *Salem College & Academy, Inc. v. Emp. Div.*, 298 Or. 471 (1985) (religious affiliation an impermissible classification), also are suspect classes. Both alienage and religious affiliation may be changed almost at will. For that matter, given modern medical technology, so also may gender. We therefore understand from the cases that the focus of suspect class definition is not necessarily the immutability of the common, class-defining characteristics, but instead the fact that such characteristics are historically regarded as defining distinct, socially-recognized groups that have been the subject of adverse social or political stereotyping or prejudice. If a law or government action fails to offer privileges and immunities to members of such a class on equal terms, the law or action is inherently suspect and, as the court made clear in *Hewitt*, may be upheld only if the failure to make the privileges or immunities available to that class can be justified by genuine differences between the disparately treated class and those to whom the privileges and immunities are granted.

Some classes are not suspect, but nevertheless remain true classes for Article I, section 20, purposes. Geographical residence is the common example of a nonsuspect true class. *Clark, supra*. Disparate treatment of such classes may be justified on a "rational basis" examination, *Seto v. Tri-County Metro. Transportation Dist.*, 311 Or. 456 (1991), although the case law on that point is not entirely consistent. *Compare Hale, supra* (rational basis examination common to Equal Protection Clause cases "has been superseded by our more recent [Article I, section 20] decisions") *with State v. Tucker*, 315 Or. 321, 338 (1993) (Article I, section 20, challenge to death penalty statute rejected because the statute "established clear, rational and definitive criteria").

Turning to the facts of this case, there is no question but that plaintiffs are members of a true class. That class--unmarried homosexual couples--is not defined by any statute nor by the practices that are the subject of plaintiffs' challenges. Moreover, the class clearly is defined in terms of *ad hominem*, personal and social characteristics. The question then is whether plaintiffs are members of a suspect class. Here, too, we have no difficulty concluding that plaintiffs are members of a suspect class. Sexual orientation, like gender, race, alienage, and religious affiliation is widely regarded as defining a distinct, socially recognized group of citizens, and certainly it is beyond dispute that homosexuals in our society have been and continue to be the subject of adverse social and political stereotyping and prejudice.

Because plaintiffs are members of a suspect class to which certain privileges and immunities are not made available, we must determine whether the fact that the privileges and immunities are not available to that class may be justified by genuine differences between the class and those to whom the privileges and immunities are made available. Stated perhaps more plainly, we must determine whether the fact that the domestic partners of homosexual OHSU employees cannot obtain insurance benefits can be justified by their homosexuality. The parties have suggested no such justification, and we can envision none.

OHSU's defense is that it determined eligibility for insurance benefits on the basis of marital status, not sexual orientation. According to OHSU, the fact that such a facially neutral classification has the unintended side effect of discriminating against homosexual couples who cannot marry is not actionable under Article I, section 20. We are not persuaded by the asserted defense. Article I, section 20, does not prohibit only intentional discrimination. On point in that regard is the Supreme Court's decision in *Zockert*. In that case, the plaintiff parent challenged the constitutionality of a statutory scheme that provided indigent parents court- appointed counsel in parental termination proceedings but did not provide for court-appointed counsel in adoption proceedings that have the effect of terminating parental rights. After concluding that the plaintiff was a member of a true class--the court did not explain precisely which type of true class-- it observed that the legislature apparently was unaware of the disparity between the parental termination and adoption proceeding statutes and did not make a conscious policy to treat indigent parents in the two similar proceedings unequally. The court nevertheless concluded that the unintended side effect of providing counsel in termination proceedings was to treat a true class of citizens disparately in violation of Article I, section 20. Intentional conduct, the court held, is not required for discrimination to be actionable under that section of the constitution.

So also in this case, OHSU has taken action with no apparent intention to treat disparately members of any true class of citizens. Nevertheless, its actions have the undeniable effect of doing just that. As in *Zockert*, OHSU's intentions in this case are not relevant. What is relevant is the extent to which privileges or immunities are not made available to all citizens on equal terms.

OHSU insists that in this case privileges and immunities are available to all on equal terms: All *married* employees--heterosexual and homosexual alike--are permitted to acquire insurance benefits for their spouses. That reasoning misses the point, however. Homosexual couples may not marry. Accordingly, the benefits are not made available on equal terms. They are made available on terms that, for gay and lesbian couples, are a legal impossibility.

We conclude that OHSU's denial of insurance benefits to the unmarried domestic partners of its homosexual employees violated Article I, section 20, of the Oregon Constitution and that the trial court correctly entered judgment in favor of plaintiffs on that ground.

Reversed as to declaration that Oregon Health Sciences University's benefit program violates ORS 659.030(1)(b); remanded with instructions to enter judgment dismissing the State of Oregon, the State Board of Higher Education, the Executive Department and PEBB; otherwise affirmed.