May 25, 1999

No. 8268

This opinion is in response to a question from The Honorable Jackie Taylor, State Representative, concerning state income taxation of health insurance coverage of domestic partners.

QUESTION PRESENTED

Does the state violate Article I, section 20, of the Oregon Constitution by allowing a state income tax exemption for health insurance coverage that employers provide for their employees' spouses without allowing a corresponding exemption for health insurance coverage that employers provide for their employees' same-sex domestic partners?

ANSWER GIVEN

Yes.

DISCUSSION

In ***Tanner v. OHSU***, 157 Or App 502, 525, 971 P2d 435 (1998), the Oregon Court of Appeals held that Oregon public employers violate Article I, section 20, of the Oregon Constitution[(1)] when they provide health insurance benefits to their employees' spouses but do not provide the same benefits to their employees' same-sex domestic partners.[(2)] The court's holding is premised on several conclusions. First, "unmarried homosexual couples" are a "class * * * clearly defined in terms of ad hominem, personal and social characteristics." *Id*. at 524. Second, "homosexuals * * * have been and continue to be the subject of adverse social and political stereotyping and prejudice." *Id*. Third, when benefits are granted to some but denied to a class of persons defined by personal characteristics and subject to sterotyping and prejudice, the denial must be based on genuine differences between class members and others who receive the benefit. *Id*. at 523. Fourth, no justification for denying benefits based on homosexuality has been presented or can be envisioned. *Id*. at 524. Finally, the state's proffered and allegedly "facially neutral" basis for discrimination – married versus unmarried employees – does not withstand scrutiny when the state does not permit same-sex couples to marry.[(3)] *Id*. at 524-525.

The question presented in this opinion is whether, in light of ***Tanner***, the state may apply different tax treatment for health insurance coverage provided by employers for their employees' same-sex domestic partners than for their employees' spouses. For federal tax purposes, the value of health insurance coverage for an employee's same-sex domestic partner is includable in the employee's federal taxable income unless the domestic partner qualifies as the employee's "dependent."[(4)] *See* Internal Revenue Service Private Letter Ruling 9850011, and authorities cited therein.[(5)] For Oregon residents, state taxable income is equal to federal taxable income "with the modifications, additions and subtractions" provided in ORS chapter 316. ORS 316.048. ORS chapter 316 contains no modification or subtraction for the value of employer-provided health insurance coverage for employees' same-sex domestic partners. Accordingly, the value of such coverage is includable in the employee's state taxable income unless the domestic partner qualifies as a dependent for federal tax purposes.

In contrast, the value of employer-provided health insurance coverage for an employee's spouse is excluded from the employee's federal taxable income even if the spouse does not qualify as a dependent for federal tax purposes. 26 USCA § 106 (West Supp 1998); *see also* 26 USCA §§ 104, 105. The value of such coverage is also excluded from the employee's

state taxable income. ORS 316.048.

The question is whether Article I, section 20, of the Oregon Constitution requires the state to provide equal tax treatment for employer-provided health insurance coverage of same-sex domestic partners of employees and spouses of employees.(6) Under ***Tanner***, the state, when acting as a public employer, must provide the same health insurance coverage to same-sex couples that it provides to married couples. We see no reason why, under ***Tanner***, the state would not have the same constitutional obligation when it acts in its capacity as a taxing authority. If the disparate provision of health coverage is not justified by any genuine difference between the favored and disfavored classes, as ***Tanner*** holds, 157 Or App at 524, then we can see no reason why the court would be likely to conclude that the disparate tax treatment of health insurance coverage would be justified.(7) We conclude therefore that, by allowing a state tax exemption for the value of health insurance coverage that employers provide for their employees' spouses without allowing a corresponding exemption for health insurance coverage that employers provide for their employees' same-sex domestic partners, the state violates Article I, section 20, of the Oregon Constitution as interpreted by ***Tanner***.(8)

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1. Article I, section 20, 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.

2. The trial court judgment defined "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." ***Tanner v. OHSU,*** 157 Or App 502, 508, 971 P2d 435 (1998).

3. The ***Tanner*** court did not address the constitutional rights of unmarried opposite-sex domestic partners, and we express no opinion on that issue.

4. Generally, to qualify as an employee's dependent for federal tax purposes, a domestic partner must: (1) receive over half of his or her support for the taxable year from the employee, (2) have the employee's home as his or her principle abode and (3) be a member of the employee's household. 26 USCA § 152(a)(9) (West Supp 1998).

5. Internal Revenue Service (IRS) private letter rulings (PLRs) are not binding on the IRS and may not be cited as precedent. 26 USCA § 6110(j)(3). Nevertheless, they frequently are helpful in determining how the IRS is likely to rule on a particular issue. This is particularly true where, as on this issue, the IRS has repeatedly issued consistent rulings. *See, e.g.,* PLR 199911012, PLR 9717018, PLR 9603011, PLR 9231062. We believe these rulings correctly interpret federal law.

6. Although the Internal Revenue Code provides the same disparate tax treatment, the Supremacy Clause of the United States Constitution preempts the application of Article I, section 20, to federal laws. US Const Art VI, cl 2.

7. We recognize that courts typically allow legislatures significant latitude in establishing categories of persons for purposes of taxation. *See, e.g.,* ***Tharalson v. Department of*** *Revenue*, 281 Or 9, 573 P2d 298 (1978); ***Savage v. Munn,*** 317 Or 283, 856 P2d 298 (1993); ***Nordlinger v. Hahn,*** 505 US 1, 112 S Ct 2326, 120 L Ed2d 1 (1992). That latitude, however, applies to economic or geographic categories. Classifications based on traits such as race or religion that have historically subjected persons to bias, stereotype or other irrational treatment arouse judicial suspicion regardless of the benefit or burden that is granted or withheld. That suspicion may be overcome only if the classification reflects genuine and relevant

differences between those who receive the privilege or immunity and those who do not.

8. We base our conclusion on the Oregon Court of Appeals' holding in ***Tanner***. The Oregon Supreme Court has not addressed this issue, and we offer no opinion here on the likely outcome of that court's analysis. The question of what remedy would be available to rectify the disparate tax treatment of health insurance coverage, whether excluding the value of such coverage for an employee's same-sex domestic partner from the employee's state taxable income or eliminating the exclusion for the value of coverage provided for an employee's spouse, is outside the scope of this opinion.

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