PRESENTATION FOR THE UC SYSTEMWIDE STAFF PERSONNEL BOARD
REGARDING DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION

Submitted by
Barry Warren
March 7, 1980

I. We are introducing two new and separate cases on the subject of discrimination on the basis of sexual orientation and responding to the written decision and study of the Board on our case concerning health benefits.

Since the health benefits case is an important issue affecting an entire category of people and all cases of discrimination on the basis of sexual orientation, we feel it is necessary to respond to the Board's decision--especially since the rationale offered does not appear to us to be valid even within its own assumptions and, more importantly, does not deal directly with the major issue we have raised.

We do not intend constantly to return the same issue to the Board; but since this case will be appealed within and without the University, we believe the Board should give careful consideration to our objections.

II. Quoting from the Board's decision:

"This prevailing practice is founded on the concept of legally required support, not actual financial dependency." Since we never said anything about "financial dependency" and since "financial dependency" is in fact one of the concepts incorporated in the University's rules concerning health benefits, we think you have already lost your bearings. Don't you know that "financial dependency" is your idea, not ours? (see Appendix, pp. 1-3).

"Legally required support" is not co-extensive with marriage. There are marriages where there is no requirement (de facto or de jure) of support. There are non-marriages where the support is absolutely binding and legal. And however much the employee may be obligated, the University has no such obligation. If the University chooses to pick up that obligation, why does it do so in a discriminatory way?

"(T)he case of gay domestic partners is only one of a variety of situations of persons living together with one voluntarily assuming financial responsibility for another." NO! "Financial responsibility" is not a necessary characteristic of gay domestic partners.

"These include unmarried heterosexual couples, sons and daughters responsible for mothers or fathers, and persons responsible for any other relative or even a close friend. If health insurance coverage is extended to gay couples...others mentioned above might require similar treatment as a matter of equity." Yes, the others might. The question is, must you accede to those requests? We maintain that we can reasonably and legally be distinguished from those groups.

"Unmarried heterosexual couples" represent probably the largest contingent and the easiest to exclude. These people all could marry, but they have chosen not to do so. They have a readily available means of obtaining the benefits. They can not be confounded with a group of people who cannot make that choice.

"Sons and daughters responsible for mothers or fathers and persons responsible for any other relative". Actually, "minor" relatives are already covered if they are financially dependent. The University could easily require the same test for adult relatives and additionally could limit every employee to only one adult (i.e., spouse or dependent adult). Only a small number of people would fall into this category--most of them very deserving. Whether or not the University considers them deserving, they form a category which can be defined distinctly from the one we are proposing: they are financially dependent blood relatives--we are same-gender domestic partners.

"Even a close friend." Every close friend of an employee is either of the same or the opposite gender. Friends would thus be subject to the appropriate criteria: "marriage" for the opposite gender or "domestic partner" criteria for the same gender. If the concern here is the possibility of phoney claims of "domestic partner", that issue should be addressed by tightening the criteria, not by refusing to allow the category. (See our earlier submission detailing our proposed criteria.)

"Costs would be a serious problem if all additional household members falling in the mentioned categories were permitted to enroll." Undoubtedly. So don't do it. We have not asked you to do so.

"6.4 million annually." How can such a figure be arrived at? Does the University claim to know the number of non-marriage/live-in relationships its employees have? This figure has no bearing on the cost of our inclusion. The overwhelming proportion is for other groups. You can sink any project if you attach enough extraneous weight to it.

The issue is not 6.4 million dollars--that is a fanciful figure. The issue is the difference in compensation paid to employees with heterosexual or homosexual spouses. Two employees, having the same pay scale, same position classification and same job duties, and differing only in the relative gender of their spouses, will receive different amounts of total compensation. How much are we worth compared to heterosexual employees? 95%? Will it be higher or lower next year?

III. The written decision and the studies of the Board have, in our opinion, entirely missed the main point of our case. Too much importance has been given to the subject of marriage and nowhere nearly enough emphasis to the subject of discrimination. Marriage is merely the device--it is the mechanism by which the discrimination occurs. To pretend that marriage is the central question in this case of discrimination is like claiming that literacy was the central question in racial discrimination when literacy tests were used to bar Blacks from voting.

The topic is discrimination. We are barred from benefits. We don't give a damn one way or the other about the material which was used to build the wall which excludes us--except as it affects our ability to tear down that wall. You have been examining the bricks! We are protesting the effect of the wall.

The University cannot legally discriminate on the basis of sexual orientation. The California Supreme Court has spoken clearly on this matter. Like other groups which are defined by "attitudes" (religious, political, business, labor or fraternal groups), so too do homosexuals have the basic rights of freedom of association and of equal protection of the laws. The question before the board is not whether the University may discriminate (it may not) but whether the University is excluding us from benefits effectively because of our sexual orientation. If we show this exclusion, then the clear duty of the Board is to make recommendations to end this illegal (and silly) discrimination.

As we have described twice before, a clear pattern results from the application of the marriage criterion to the extension of fringe benefits to the "dependents" of employees. These benefits are given only to those who have chosen a person of the opposite gender; no one who has chosen a person of the same gender can ever receive these benefits. The exclusion of homosexual couples is total; there is no tokenism here.

The intentions of the University are no more relevant here than in any other discrimination case. The Board is now clearly cognizant of the result of the University's criterion and must now accept responsibility for its effect. If any criterion used by the University resulted in the total exclusion of a "popular" minority group, we are certain the Board would move to remedy the situation. If a criterion gave benefits to some men (and only to men), excluding all women, we cannot believe the Board would accept as justification the exclusion of some men, too. Likewise, the exclusion of all Blacks cannot be justified by the exclusion of some Whites, or the exclusion of all Socialists cannot be justified by the exclusion of some Republicans. But in the case of homosexuals, you have done nothing to mitigate our total exclusion.

You have maintained a system which is 100% effective against us but which leaks like a sieve when it comes to excluding unmarried heterosexuals. If the Board were rabidly anti-homosexual it could not adopt policies which exclude us more effectively in this particular area.

As a group, homosexuals have suffered such obvious discrimination that the courts of this state recognize us as a "suspect class." Like other groups which have the dubious distinction of being well-known for their oppression, we are accorded a presumption that discrimination is very likely to be occurring. The courts will carefully scrutinize the effects of your rules. The burden will fall to the University to justify the pattern of exclusion. "It just happens" will hardly be an adequate defense.

What justification can you put forward?

You cannot argue that the result is unavoidable. Not only could the particular result be corrected by the proposal we have made or by other changes of detail, but the whole situation could be avoided by placing the distribution of benefits on some entirely different basis. We strongly desire not to disrupt the general basis of distribution. But if you cannot or will not administer that basis in a non-discriminatory way, then you must choose another basis.

You cannot argue that married (i.e., heterosexual) employees have earned the additional benefits. Work is not distributed on the basis of marital status or sexual orientation. All categories of employees have equally earned the benefits.

You cannot argue that married (i.e., heterosexual) employees need more benefits. The needs of all employees and their dependents for health coverage are the same per person. These plans expand with family size, and nothing we have proposed would in any way interfere in this expandability.

You cannot argue that some higher authority has imposed this criterion or result on the University. The University is virtually independent of legislative or executive power from without, except indirectly through appropriations. The University is free to create programs subject only to basic constitutional principles.

You cannot argue that the University is legally responsible for providing for the private responsibilities of its employees. The University is not in loco parentis to its employees or their spouses. The University may wish to help, but it is not required.

You cannot argue that married (i.e., heterosexual) employees require compensation for past discrimination. Everywhere, married/heterosexual people control all branches of all governments and all other major institutions.

There is, in fact, no acceptable argument that can be made to justify the pattern of exclusion of homosexual people. And we note that in your written decision you do not even attempt a justification for our exclusion. The Board has avoided the issue of justifying our exclusion per se by speculating on (and exaggerating) the number of others who might be encouraged to request benefits if we get them. As law or logic, such an argument is useless.

Homosexual couples represent a clearly distinguished group. There is no logical or legal need to confuse them with the other groups mentioned by the Board as comprising the putative hordes massed outside the marriage criterion. We believe the estimated number of such people to be grossly exaggerated: The University cannot possibly know how many relationships its employees have in these categories. The 6.4 million dollars quoted would be enough for over 16,000 additional adults. Do you actually believe in these numbers? In the first years we believe only a small number of employees would claim benefits under the changes we are proposing. We think that even 1% of your estimate--160 people--would be a generous estimate for the next four years. Your estimate of 16,000 is 99% other categories and has nothing to do with our proposal. We would certainly like to see some break-down and substantiation of the 6.4 million dollar figure.

But accurate or not, the estimate you present has no bearing on the central question: how do you justify our exclusion? Your decision focuses on other people. You "justify" including married couples and excluding other non-married people, but you studiously avoid talking about us and how you exclude us per se. This is a poor performance. The closest you come to "justifying" your decision is to imply that your "legally required support" concept somehow imposes on the University the responsibility to provide benefits for the spouses of married employees and by some vague implication requires the exclusion of others. This is neither true nor logical.

There is no Constitutional Right to have one's married spouse taken care of by one's employer. The University voluntarily picked up this burden. (An admirable action!--but voluntary). Now the University must make a choice: whether to drop that burden or additionally pick up the much lighter burden of covering the same-gender spouses of its employees. The University can no more choose an all-heterosexual burden than it can choose an all-white burden or an all-Christian or all-Republican burden.

The issues we have raised are complex and important; we and other gay people will be raising related cases. We cannot demand a "yes" answer. But we believe you owe us and the University community a decision on the central issues we have raised. Because you have not addressed those questions in your decision, we are asking you to reconsider your written decision.

IV. We wish now to draw the Board's attention to another area in which the University's policies discriminate against homosexual employees: the use of the University's recreational facilities by employees and their spouses.

On the Berkeley campus, employees and their spouses may purchase a membership card which entitles them to use the swimming pool, tennis courts, clubrooms, and other facilities at Strawberry Canyon and at the Gymnasiums. Similar arrangements exist on other UC campuses throughout the state. Like the health benefits programs, extension of this benefit is restricted to the spouses of married employees but denied to the same-gender spouses of homosexual employees.

We have shown that the primary justification put forth by the University for limiting health benefits to married spouses--namely, the principle of "legally required support"--is dubious at best; but to invoke that same concept with regard to the University's recreational facilities would be absurd. Could anyone claim with a straight face that either a married person or an employer is "legally required" to provide swimming pool and tennis court privileges?

The other main objection put forth by the Board with regard to health benefits was that the inclusion of gay domestic partners would lead to great costs. Yet in the case of recreational facility use, the employee's spouse must actually pay a fee for the privilege of membership. Far from costing the University more if membership eligibility were extended in the way we are requesting, the increase in membership would actually generate more money for the University.

The University's policy regarding membership eligibiity for the use of its recreational facilities cannot be justified either on the basis of the "legally required support" concept or on the basis of increased cost to the University. Nor is Associate Vice-Chancellor Norvel Smith's defense that the University "regularly" does it this way adequate (see Appendix, p. 4). This form of discrimination serves no good purpose, can be easily remedied, and should therefore be changed as soon as possible.

We ask the Board to make a separate judgement on this case.

V. Section 200.1 of the University of California's Staff Personnel Policies(Non-discrimination in Employment) neglects to forbid discrimination on the basis of sexual orientation. We request that the Board recommend amendment of this policy to forbid such discrimination.

Discrimination on the basis of sexual orientation by the state or any governmental entity is illegal in California. While opinions may differ over what constitutes instances of such discrimination, there is no room for doubt that it is not permissible for the University to so discriminate.

Amending the policy is necessary because no statement on this matter exists which has been widely distributed in the University community.

Amending the policy is consistent with the directive on this subject by President Saxon.

Amending the policy would provide an administrative basis for handling alleged cases of such discrimination. At present, an aggrieved employee has no established recourse within the University.

Amending the policy would discourage instances of discriminatory practices and promote good working conditions within the University.

And amending the policy would improve the working morale of homosexual employees.

We request that the Board make a separate decision on this issue.

APPENDIX

SOME EXPLANATORY DEFINITIONS

In this proposal we use the phrase "discrimination on the basis of choice of sexual partner according to gender." By this we mean (1) effectively categorizing people into two groups depending on the relative gender of the person they have chosen to be their sexual partner, and (2) granting some privilege or benefit to one group which is denied to the other (without sufficient reason).

This formulation is based on a perceptible factor: a manifest choice, rather than on a mere mental attitude. This formulation is not novel: it is standard in gay rights ordinances and has been utilized and found valid by courts including the California Supreme Court.

We use the word "homosexual" to describe the relationship formed by two persons of the same gender who have mutually chosen each other as sexual partners; we also use "homosexual" to describe either of these two persons.

We use the word "heterosexual" to describe the relationships formed by two persons of the opposite genders who have mutually chosen each other as sexual partners; we also use "heterosexual" to describe either of these two persons.

Nowhere in this proposal do we use either "homosexual" or "heterosexual" to describe a mere mental attitude.