



# American Association for Single People

*Protecting the rights of single people, unmarried couples, and nonmarital families*

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Paul Foray and his domestic partner Jeanine Muntzner are members of AASP.

## *Foray v. Bell Atlantic*

A lawsuit to end sex discrimination in compensation and to provide equal benefits to domestic partners of employees regardless of gender.

### **Principles at Issue:**

- \* Equal pay for equal work regardless of sex, sexual orientation, or marital status.
- \* Freedom of choice of employees to structure a family unit without discrimination.
- \* Respect for family diversity and acknowledgment of the value of human bonding.

### **Legal controversy:**

Bell Atlantic has a program extending employment benefits to workers with domestic partners. The program is restricted to same-sex partners only. Paul Foray works for Bell Atlantic. He and Jeanine Muntzner have lived together as a family for several years. Foray applied for benefits for his domestic partner. The company refused because Foray is a male. If he were a female, the company would grant the benefits. Bell Atlantic informed Foray that in order for him to receive benefits for his partner, they must get legally married. Foray filed a lawsuit alleging sex discrimination under Title VII of the federal Civil Rights Act as well as the Equal Pay Act which prohibits discrimination in wages or other compensation on the basis of sex. Bell Atlantic filed a motion to dismiss. AASP executive director Thomas F. Coleman wrote the motion opposing dismissal. The motion was argued in August 1998. The parties are still waiting for a ruling from federal district court judge Robert Patterson.

### **National trends:**

- \* Domestic partnership was intended for all unmarried couples, not just for gays and lesbians.
- \* The Census Bureau reports that 69% of unmarried partner households are opposite-sex couples.
- \* All states with domestic partner benefits allow both same and opposite-sex partners to participate.
- \* 36 out of 43 municipalities with domestic partner benefits are open to opposite-sex partners.
- \* 29 out of 32 municipalities with domestic partner registries are open to opposite-sex partners.
- \* The majority of private employers with domestic partner plans have gender-neutral programs.
- \* 1,270 businesses contracting with San Francisco offer benefits to same and opposite-sex partners.
- \* Non-sexist domestic partner plans are not costly--on average, enrollment only goes up by 1%.
- \* NOW supports fair domestic partner plans that do not discriminate on the basis of sex.
- \* Seniors organizations support programs that include same and opposite-sex domestic partners.
- \* Many gay rights groups encourage employers to adopt plans for same and opposite-sex partners.
- \* A bill proposed by Rep. Barney Frank covers same and opposite-sex partners of federal workers.
- \* The state labor commissioner in California ruled that excluding opposite-sex partners is illegal.
- \* Pennsylvania's Insurance Department ruled that a "same-sex only" health insurance plan is illegal.
- \* Santa Barbara and Oakland ended "gays only" plans and opened them up to all domestic partners.

# *Foray v. Bell Atlantic*

## **Legal Theory**

Under current federal law, an employer may decide to restrict benefits to an employee, a legally married spouse, or dependent children. However, neither federal nor state law requires an employer to limit the granting of health or other benefits solely to the lawful spouse of an employee.

For example, many companies have a cafeteria-style benefits plan where the employer contributes an identical amount of money to the benefits account of each employee in a particular pay scale and job classification. The employee is then allowed to use this benefits contribution in the way that best suits his or her particular personal or family needs.

Other employers, such as Bank of America, have created an “extended family” benefits program. This plan is over and above what the employer contributes to health, dental, and vision benefits for dependent children of an employee. Under the “extended family” plan, each employee may designate one adult household member to receive benefits, so long as the beneficiary is either: (1) a spouse; or (2) a domestic partner of either sex, as defined; or (3) a close blood relative (parent, adult child, grandparent, adult grandchild, sibling) who is a dependent of the employee as defined by the Internal Revenue Service for income tax purposes. Only 1.4% of employees signed up for this program, with 1% being for domestic partners and the remaining .4% for dependent blood relatives.

Hundreds of employers have adopted domestic partner benefits plans whereby the employer pays all or a portion of health, dental, vision, or other benefits for the domestic partner of an unmarried employee. The majority of these employers do not restrict this benefit to gay and lesbian couples but allow all domestic partners to participate regardless of gender. On a national average, about 1% of employees sign up for participation in inclusive domestic partner programs of this sort.

There is nothing legally suspect about the cafeteria-style plans, the extended family plans, or the inclusive domestic partnership programs. However, once an employer restricts participation to same-gender partners of employees, the limitation can be legally challenged as sex discrimination in violation of Title VII of the federal Civil Rights Act or the federal Equal Pay Act.

The health benefits programs of private employers are immune from legal attack under state or municipal civil rights laws. That is because a federal law, known as ERISA, preempts such local nondiscrimination laws when it comes to benefits. However, ERISA does not preempt lawsuits filed under federal civil rights laws.

As seen below, the denial of benefits to Paul Foray is clearly a case of sex discrimination:

### Example A

male cable splicer at Bell Atlantic  
with company for 28 years  
lives with female domestic partner  
DENIED benefits for partner

### Example B

female cable splicer at Bell Atlantic  
with company for 28 years  
lives with female domestic partner  
GRANTED benefits for partner

The only variable determining whether the company will allow the employee to participate in the domestic partner benefits program is the sex of the employee. As a result, the female cable splicer is being paid hundreds of dollars more per year than her male counterpart when the financial contribution of Bell Atlantic toward health, dental, and vision benefits is taken into consideration.

Bell Atlantic has argued that Foray can receive benefits for his domestic partner if the couple were to marry. However, this argument fails to take into account two important factors.

First, the constitutional right of privacy protects the freedom of choice of individuals in highly personal matters such as marriage, family, and procreation. It is not marriage or procreation which are the constitutionally protected rights, but rather the freedom of choice to marry or not to marry, and the freedom of choice to procreate or not to procreate.

An employer has no business telling an employee that he must choose marriage rather than domestic partnership in order to obtain equal compensation. This personal matter has no bearing on a worker's ability to perform his job in a competent and professional manner. Being a domestic partner rather than a spouse is a non-merit-related factor which is not a bona fide occupational qualification. In other words, the fact that Foray can marry his partner is not a legal defense to the allegation that Bell Atlantic's domestic partner benefits program involves sex discrimination.

An analogy will help. Ordinarily, an employer does not have to provide health benefits to employees. However, once a plan is provided, it *must* be nondiscriminatory. A health plan that interferes with an employee's procreational choice can be challenged immediately if it provides free medical services to those who choose to give birth but denies services to those who wish an abortion. The same reasoning applies to the choice to marry or to be domestic partners.

Secondly, the Bell Atlantic benefits plan constitutes illegal sex discrimination by imposing greater burdens on opposite-sex couples by requiring them to become legally married in order to obtain benefits while it imposes lesser burdens on same-sex couples who can gain such benefits by simply registering as domestic partners.

The disparity of burdens imposed by Bell Atlantic can be seen in the following comparison:

Requiring opposite-sex couples to marry in order to obtain benefits:

*Opposite-sex couples:*

- Must get marriage license
- Must pay a fee for the license
- Must have blood tests
- Must participate in formal ceremony
- Must assume obligation of support, potentially for a lifetime
- Are subjected to adultery laws
- Must share community property, in community property states
- Must go to court in order to divorce
- Must pay court fees for the divorce

Allowing same-sex couples to obtain benefits by registering as domestic partners:

*Same-sex couples:*

- No marriage license required
- No licensing fee required
- No blood tests required
- No formal ceremony required
- No lifetime obligation of support
- No adultery laws apply
- No community property required
- No divorce proceeding necessary
- No cost for dissolution
- Partners need only to live together and share basic living expenses

One can see why many opposite-sex couples may prefer to be domestic partners rather than spouses. The fact that same-sex couples can not legally marry is not the fault of Bell Atlantic or any of its employees. It is a legal reality which exists outside of the employment context.

It should be emphasized that Bell Atlantic does not have to impose a marriage requirement on anyone. The company is legally able to have a domestic partnership benefits program open to all couples, or a cafeteria-style program, or an extended family plan, or any other benefits package that does not discriminate. However, the current gender restriction violates federal civil rights laws.