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NEWS REPORT

Country: SPAIN
Title: Right to non-discrimination based on sexual orientation in public assisted human reproduction
Date: 21 October 2015
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Context

Issue at stake: Recognition of the right to public assisted human reproduction to a couple of women, regardless of their sexual orientation
Ground of discrimination: Sexual orientation

Source: Court decision
Field: Access to goods and services
Applicable law: Law 14/2006 of 26 May, on assisted human reproduction techniques; Royal Decree 1030/2006, of 15 September, establishing the portfolio of common services of the National Health System; Order SSI / 2065/2014, of October, amending Royal Decree 1030/2006 31.

Content

Case development:

Tania and Veronica (fictitious names) are two women united in marriage. One of them began in April 2014 a treatment of assisted human reproduction (AHR) at the Fundacion Jimenez Diaz, concerted clinic¹ of the Community of Madrid. When the SSI / 2065/2014² ministerial order was published, the clinic suspended (in November 2014) the provision of the treatment on the grounds that they did not satisfy the requirement of having had "sexual relations with vaginal intercourse" for a minimum of 12 months. The couple continued the treatment in a private clinic personally paying all expenses.

The couple then sued the Clinic Fundacion Jimenez Diaz, the Ministry of Health of the Community of Madrid and the Ministry of Health, Social Services and Equality on the grounds of the protection of fundamental rights. Although the Clinic Fundacion Jimenez

¹ A private clinic that receives public funds.

² Under the framework of constraints on public services that the government established in relation to policies of budgetary constraint held since 2011, the Ministry of Health, Social Services and Equality approved the Order SSI / 2065/2014, of October 31, which reduced the portfolio list of services of the National Health System (established by the RD 1030/2006). This Ministerial Order states that "assisted human reproduction treatments that require therapies are facilitated to persons who have been subjected to a study of infertility and are in one of the following conditions: 1) Existence of a documented disorder of reproductive capacity, observed after the appropriate diagnosis and not susceptible to medical treatment protocol or after the apparent ineffectiveness of treatment. 2nd) Absence of achieving pregnancy after at least 12 months of sex with vaginal intercourse without using contraception." This last clause is discriminatory based on sexual orientation for female couples.

Diaz incorporated her again to the AHR program on 29 April 2015, the couple still filed a lawsuit for the protection of fundamental rights before the social courts in Madrid on 24 June 2015. The Social Court no 18 ruled on 15 September 2015.³

Decision of the Court:

The ruling condemns the Clinica Fundacion Jimenez Diaz for discrimination on the ground of sexual orientation and notes that the applicant was entitled to AHR treatment by direct application of Law 14/2006;⁴ and by not providing this treatment the couple was discriminated on the basis of their sexual orientation. This conviction is ruled in spite of the recognition in the judgment that Clinica Fundacion Jimenez Diaz had no intention of discriminating against these women because of their sexual orientation, but was merely applying the provisions of the Order of the Ministry of Health (but ignoring Law 14/2006). The judgment also recognizes that the Clinica restarted the treatment in April 2015 (before the ruling of the case).

The judgment also condemns the Consejeria of Health of the Community of Madrid since it is responsible for healthcare provision, regardless of sexual orientation. The judgment rules the Jimenez Diaz Foundation and the Consejeria of Health of the Community of Madrid have to compensate the plaintiff economically for moral and material damages. The judgment acquitted the Ministry of Health because the Ministry has no competence in the management of health in the Community of Madrid. And although it was not formally stated, the judge clearly indicated that the Order of the Ministry on sexual orientation is discriminatory and runs against a higher standard as Law 14/2006.

Key points of analysis:

- Women have the right to public assisted human reproduction regardless of their sexual orientation (or marital status).

³ Auto 672/2015.

⁴ Law 14/2006 of 26 May 2006, on assisted human reproduction (AHR) states that "Every woman over age of 18 with full capacity to act may be recipient or user of the techniques regulated in this Law (...). The woman may be user or recipient of the techniques covered in this law regardless of her marital status and sexual orientation" (Article 6). The law expressly excludes any discrimination based on sexual orientation. Royal Decree 1030/2006, of 15 September, established the portfolio list of common services of the National Health System and includes among these services assisted human reproduction (Annex III, 5.3.8) without any discrimination based on sexual orientation.