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Gay Rights Workplace Revolution, The

Arthur S. Leonard
New York Law School

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The Gay Rights Workplace Revolution

By Arthur S. Leonard

The legal status of lesbians, gay men, bisexuals, and transgender people (collectively referred to herein as sexual minorities) in American workplaces has undergone a partial revolution over the past half century: a revolution because that status has been significantly transformed, but only a partial one because in many parts of the country, there remains no statutory legal redress for overt discrimination against sexual minorities in the private sector workplace. In addition, the enforcement of nondiscrimination guarantees remains uneven.

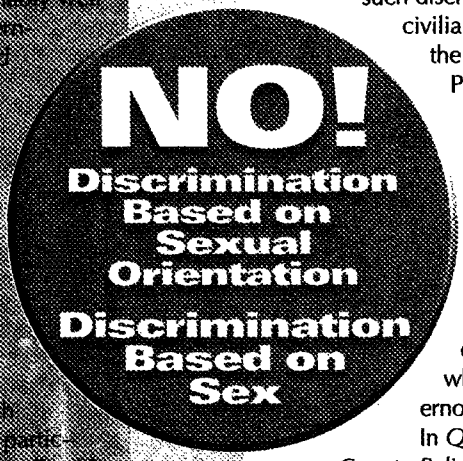
During the 1950s President Dwight D. Eisenhower issued an executive order banning the employment of homosexuals—labeled "sexual deviants"—by the federal government. At the time, decades before *Lawrence v. Texas*, the 2003 case challenging the Texas Homosexual Conduct Law, with a decision pending as this magazine went to press, gay sex was illegal everywhere in the country, and it was impossible for an openly gay person to find employment in almost any occupation one might name, and certainly in any occupation requiring a security clearance from the federal government. Discrimination against sexual minorities was not the subject of any affirmative legislation.

Toward the end of the twentieth century, President William J. Clinton issued executive orders banning sexual orientation discrimination in federal civilian employment, and ending discriminatory security clearance procedures. By then, a majority of American workers lived in jurisdictions where there was some form of statutory protection against sexual orientation discrimination.

However, so long as there is no express federal statutory ban on employment discrimination on the basis of sexual orientation or gender identity, the legal status of sexual minority workers in America remains complicated, being a patchwork of constitutional case law, state and local statutes and ordinances, and contracts and torts case law developments. Although most sexual minority employees may have some kind of legal protection against discrimination, and theoretically all public sector employees enjoy at least minimal constitutional protections against irrational discrimination, finding the appropriate legal theories and the venues in which to pursue them can require truly resourceful lawyering in those places where direct, express statutory protection is lacking.

Public sector employees arguably enjoy more protection as a group than private sector employees. In addition to the federal executive order, and similar orders from some governors, mayors, and other government agency heads, it has become reasonably well established that government employers need at least a rational nondiscriminatory reason other than sexual orientation (and, maybe, gender identity) if they want to discriminate against sexual minorities, although whether a court will find that a rational basis for such actions exists in any particular case can be unpredictable. Further, those public employees who pass a probationary period may also summon both constitutional due process principles and civil service protection against arbitrary discrimination, and a significant number of state and local government employees work in jurisdictions that have legislated to ban sexual orientation or gender identity discrimination. Public sector unions may also provide protection through the job security provisions of collective bargaining agreements. (The shrinking presence of unions in the private sector outside of those urban areas where ordinances are most likely to provide protection makes them a negligible source of added protection for private sector employees.)

In *Romer v. Evans*, 517 U.S. 620 (1996), the Supreme Court ruled for the first time that governmental discrimination on the basis of sexual orientation is cognizable under the Equal Protection Clause of the Fourteenth Amendment, and that anti-gay policies that lack a nondiscriminatory rational justification violate the equal protection guarantee. Prior to *Romer*, several states had acted to ban sexual orientation discrimination in employment by statute, and some governors had issued executive orders banning such discrimination in state employment, some in states that lacked statutory bans, such as Pennsylvania. At the federal level, the heads of all the executive branch departments had issued executive orders banning sexual orientation discrimination in civilian federal employment. After *Romer*, the number of states banning such discrimination increased, and shortly before leaving office in 2000, President Clinton issued an executive order banning such discrimination for all civilian employment in the executive branch. President George W. Bush has not rescinded the Clinton order, despite having stated opposition to government bans on sexual orientation discrimination while serving as governor of Texas.



In *Quinn v. Nassau County Police Department*, 53 F. Supp. 2d 347 (E.D.N.Y. 1999), a federal court ruled that a county police officer who claimed to have suffered workplace discrimination because he was gay could bring an equal protection claim against his employer, and the officer subsequently won a substantial jury verdict. The *Quinn* case was fairly typical in that the public employer was unable or unwilling to attempt to articulate any justification for an anti-gay employment policy. Indeed, one of the aspects of the gay rights revolution of the past quarter-century has been that many public officials who half a century ago would have had no compunctions about publicly stating that gay people were disgusting "perverts" who should not hold public employment would be quite inhibited about taking such a stance today. Now, when gay people charge discrimination against public

employers, the most likely defense is a denial that there is any discriminatory policy and a claim that the employee's poor work performance merited whatever adverse decisions they are protesting.

Public school teachers provide a major exception to this generalization. Having openly lesbian or gay teachers remains controversial in some parts of the country, and some public school authorities continue to display discomfort with sexuality issues. Until quite recently, public school teachers who were discharged on morality grounds when their sexual orientation came to light consistently lost lawsuits to vindicate their rights, but some recent cases suggest that the tide may be turning in that sphere as well. For example, in *Weaver v. Nebo School District*, 29 F. Supp. 2d 1279 (C.D. Utah 1998), the court found a constitutional violation when the school district relieved a lesbian teacher of sports coaching activities and sought to restrict her from discussing her sexuality publicly.

When sexual orientation equal protection claims against public employers were new, it was not unusual for courts to find that the plaintiffs had stated a potentially valid claim, but that the defending public officials enjoyed qualified immunity, because antidiscrimination protection for gay people was not yet well established as a constitutional principle. With *Romer* and subsequent courts of appeals decisions, immunity arguments are losing their force and suffered a recent decisive rejection by the U.S. Court of Appeals for the Ninth Circuit in *Flores v. Morgan Hill Unified School District*, 324 F.3d 1130 (9th Cir. Apr. 8, 2003). *Flores* involved six former high school students who were harassed by other students. The school failed to take reasonable steps to remedy the harassment. The court rejected a qualified immunity defense, finding that gay equal protection rights have become so well established that officials are on notice that anti-gay discrimination may violate the Constitution.

This constitutional protection is limited, however, by the requirement that intent to discriminate be shown, and by the traditional deference that courts have shown to the "expertise" of military commanders in rejecting equal protection challenges to the only federal statute that expressly authorizes workplace discrimination against sexual minorities, 10 U.S.C. Section 654, a measure that requires the Defense Department to process for discharge any service member whose sexual minority status becomes known to it through some overt action or speech by the military member in question. *See Able v. United States*, 155 F.3d 628 (2d Cir. 1998).

In the private sector, individuals who suffer workplace discrimination or harassment due to their sexual orientation have fewer options for legal redress. Fourteen states (in which about a third of the nation's population resides) have state statutes banning discrimination on the basis of sexual orientation. In three of those states the law also expressly bans discrimination on the basis of gender identity or expression. Enforcement mechanisms and remedies under these laws vary widely, and there are also differences concerning which workplaces may be exempt from coverage based on the number of employees or the religious status of the employer, and whether disparate impact theories are available or plaintiffs are restricted to claims of overt discrimination.

States with Statutes Banning Sexual Orientation Employment Discrimination in the Private Sector

- ✔ California
- ✔ Connecticut
- ✔ District of Columbia
- ✔ Hawaii
- ✔ Maryland
- ✔ Massachusetts
- ✔ Minnesota
- ✔ Nevada
- ✔ New Hampshire
- ✔ New Jersey
- ✔ New Mexico
- ✔ New York
- ✔ Rhode Island
- ✔ Vermont
- ✔ Wisconsin

States with Statutes Banning Sexual Orientation and Gender Identity Employment Discrimination in the Private Sector

- ✔ Minnesota
- ✔ New Mexico
- ✔ Rhode Island

Numerous counties and municipalities have enacted bans on sexual orientation (and in some cases gender identity) discrimination, thus extending statutory protection into many states that still lack such statutes. If the populations of all such communities are aggregated and added to the fourteen states with statutory protection, it is likely that a majority of the nation's workforce lives or works in places where there is some form of statutory protection against discrimination based on sexual orientation, although protection against gender identity discrimination is less widely available. As with state laws, there are differing approaches to enforcement and remedy, and some localities limit the remedy to an attempt at conciliation or mediation by a local agency. By contrast, New York City's 1986 ordinance provides more protection than a recently enacted state statute, by authorizing punitive damages for aggravated cases and allowing both disparate impact and disparate treatment claims. The differences between state and city law were emphasized by the New York Court of Appeals in *Levin v. Yeshiva University*, 96 N.Y.2d 484 (2001), where the court found that lesbian medical students could assert disparate impact discrimination claims under the city ordinance to challenge the exclusion of their domestic partners from university housing in which other students lived with their legal spouses, but could not use the state law's sex discrimination ban to make the same claim.

Apart from state and local laws, there has been much discussion in recent years over the degree to which Title VII of the federal Civil Rights Act of 1964 might provide remedies for sexual minority employees who encounter discrimination or harassment in the workplace. Title VII bans sex discrimination but does not define or specify the scope or meaning of "sex." The federal courts rejected straightforward sexual orientation or gender identity discrimination claims under Title VII in the early history of the statute. In the leading case of *DeSantis v. Pacific Telephone & Telegraph Company*, 608 F.2d 327 (9th Cir. 1979), the court agreed with the Equal Employment Opportunity Commission's conclusion that "sex discrimination" under Title VII is narrowly focused on discrimination against women or against men as such, and specifically rejected the contention that a person who suffers workplace discrimination because of gender nonconformi-

ty—failure to measure up to commonplace stereotypes about the sexes—could present a Title VII claim. Courts continue to cite *DeSantis* for the proposition that sexual orientation discrimination claims, as such, are not cognizable under Title VII.

But the Supreme Court's ruling in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), appeared to revive the gender nonconformity theory. In *Hopkins*, the Court held that a woman denied an accounting firm partnership because some partners considered her to be insufficiently feminine could challenge the partnership denial as an instance of sex discrimination. In a plurality opinion, Justice William J. Brennan Jr. asserted that evidence of stereotyped thinking about gender roles could support a finding of unlawful discrimination based on sex. During the 1990s, especially as men became less inhibited about filing lawsuits protesting workplace harassment directed at them by other men, federal courts had to grapple with scores of claims in which issues of sex, gender roles, identity and expression, and sexual orientation seemed to become hopelessly entwined.

While all the federal courts continued to agree that a straightforward sexual orientation discrimination claim could not be brought under Title VII, claims that raised these other issues began to achieve at least limited success, depending upon the pleading ingenuity of plaintiffs' attorneys, the receptivity of particular courts, and even the precise wording of deposition testimony in attempting to characterize the reasons for harassment or discrimination. The Supreme Court dismantled a significant barrier in *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75 (1998), unanimously rejecting the argument that Title VII was inapplicable to cases in which the plaintiff was alleging harassment by coworkers of the same sex. Without making any definite pronouncement about the ways in which some lower federal courts had begun to use *Price Waterhouse* to extend protection to persons who could make a credible gender nonconformity claim, the Court merely insisted without any illuminating discussion that plaintiffs must show that they suffered discrimination "because of sex" in order to prevail under the statute.

A recent en banc ruling by the U.S. Court of Appeals for the Ninth Circuit shows the lengths to which this theory may be stretched. In *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002), an en banc panel resolved a gay man's Title VII sexual harassment discrimination claim. A plurality of the judges stated that the sexual orientation of the plaintiff is irrelevant to the validity of a Title VII claim, so long as the plaintiff is alleging that he was subjected to harassment of a sexual nature. A different plurality from the same panel focused on the plaintiff's deposition testimony that his male coworkers were harassing him because he did not conform to gender stereotypes of a "real man." The dissenting minority agreed with the district court, which had dismissed the case on the ground that this was really a sexual orientation discrimination claim, finding support for that conclusion in other portions of the plaintiff's deposition testimony. The Supreme Court refused to review the case.

Setting aside statutory claims, there are growing possibilities for sexual minority employees to seek relief using common law claims. During the last quarter of the twentieth century, developments in contracts and torts have introduced remarkable changes into the legal relationship of employers and employees. In a majority of states, employer policies in personnel manuals and handbooks may become enforceable parts of the employment contract, depending upon the circumstances in which they are adopted and distributed and how they are worded. At the same time, a parallel trend of employers adopting nondiscrimination policies set the stage for an expansion of enforceable rights. During the 1970s, the National Gay Task Force (as it was then called) began to survey major corporate employers about their policies, and the very act of being asked about their policies stimulated some companies to ban sexual orientation discrimination in order to keep their policies up to date. This trend accelerated during the 1980s, as the AIDS epidemic prompted human resources professionals to focus on the concerns of the affected employees who, at least in corporate America, were disproportionately gay men. By the 1990s, the National Gay and Lesbian Task Force was reporting that a substantial majority of the largest corporate employers had antidiscrimination policies, and in line with the newest thinking some of them were also covering gender identity. *Available at* www.hrc.org/worknet/nd/index.asp. Thus, corporate policies were expanding to embrace nondiscrimination for sexual minority employees at a time when the common law framework was making voluntarily adopted policies potentially binding as contractual promises.

At the same time, the state courts were moving cautiously forward to recognize employee privacy rights. Once again, the AIDS epidemic contributed to these developments. The leading case is *Ozer v. Borquez*, 940 P.2d 371 (Colo. 1997). A gay attorney sought time off to care for his HIV-infected partner, and confided this information to the senior partner in his firm upon being pressed to give a reason for his absence. Word spread throughout the workplace as a result of the partner's comments to others, and the attorney was fired. He sued under Denver's gay rights ordinance as well as a Colorado law that banned discrimination in response to lawful off-duty conduct, and also asserted common law claims, including a privacy claim. At trial, there was considerable confusion about the doctrinal basis for his claims, but the jury rendered a verdict in his favor. On appeal, the state court of appeals found that the appropriate basis for the claim was the state off-duty conduct law, but the state supreme court rejected this holding on the ground that the jury had not been appropriately charged under that statute. Nonetheless, in remanding the case, the court adopted for Colorado a new privacy tort involving improper public disclosure of private matters, and the parties settled the case for an undisclosed amount.

Although contracts and torts claims would not provide access to the reinstatement with back pay judicial remedy common under employment discrimination statutes, they would open the possibility of substantial monetary damages. With such possibilities lingering in the background, employers would have incentives to offer settlements in meritorious cases, which might include the very reinstatement remedies that would be unavailable

continued on inside back cover

Vermonters seeking equal access to marriage. Their dedication and skill resulted in Vermont's civil union law, which has markedly improved equality for gay men and lesbians.

Their work began long before the limelight ultimately associated with the *Baker v. State of Vermont* case. In 1995 Murray and Robinson founded the Vermont Freedom to Marry Task Force, which served a crucial role in developing popular support for equal access to the legal benefits and responsibilities of marriage for gay men and lesbians. This grassroots public education effort helped to inform Vermonters about the concerns of same-sex couples who could not marry under state law. Two years later, Robinson and Murray, with co-counsel Mary L. Bonauto of the Boston-based Gay & Lesbian Advocates & Defenders (GLAD), filed suit on behalf of three couples denied marriage licenses, contending that the Common Benefits Clause of the Vermont Constitution precluded the state from denying same-sex couples the right to marry. In November 1998 Robinson adroitly argued the couples' cause in the Vermont Supreme Court, while the Freedom to Marry Task Force continued its statewide education efforts.

In a landmark ruling in December 1999, the court held that the state must give gay and lesbian couples the same benefits and protections that flow from Vermont law to opposite-sex couples who marry. The court directed the state legislature to craft laws that would carry out the constitutional mandate. During spring 2000, as Vermont legislators wrestled with bills that would address the court's decision, Murray, Robinson, and supporters proved to be key lobbyists. Moreover, the public support the Freedom to Marry Task Force built proved essential in persuading lawmakers that Vermont voters favored equal benefits. In April 2000 a bill creating civil unions for same-sex couples that conferred the benefits and responsibilities of a marital relationship passed the Vermont legislature and was signed by Governor Howard Dean.

Robinson's and Murray's extraordinary work was not over. The decision of the Vermont Supreme Court and the passage of the civil union law ignited a firestorm of debate both in the state and throughout the country. In the fall of 2000 Vermont legislative elections became a focal point of activism by conservatives bent on defeating candidates who had voted for the law. Murray and Robinson founded Vermonters for Civil Unions, a political action committee supporting candidates who favor civil unions, and the Vermonters for Civil Unions Legislative Defense Fund, an organization to lobby against repeal efforts. In the end, the expert strategic work of Robinson, Murray, and their allies and supporters led to a narrow victory for candidates favoring civil unions and preservation of the momentous advances that their years of hard work had produced.

During the long battle, Robinson (whose practice is primarily in personal injury, workers' compensation, and family law) and Murray (who concentrates on family law, estate planning, and appellate work) were unswerving in their devotion to the cause of equality even though their service was entirely pro bono. At the peaks of their activity, their nonpaying work consumed all of their time, but LS&W backed them with unstinting support. LS&W's devotion to a matter of the highest public interest amply demonstrates its long-standing commitment to civil rights and pro bono service.

Among the firm's admirers is Senator Patrick Leahy (D-VT), who recently said:

> Peter and those in his office have true Vermonters' values of protecting people's privacy and individual dignity. Beth Robinson and Susan Murray carried out those values by making it part of our law. They had to face a lot of prejudice doing it, but ultimately they made sure that the good sense of Vermonters won out.

The professionalism and passion for public service that are exemplified by the firm, and in particular by Peter F. Langrock, Beth Robinson, and Susan M. Murray, remind us that the pressures of economic imperatives need not require that lawyers forgo vital and challenging pro bono work.

Patrick McGlone practices law in Washington, D.C. He is the co-chair of the Sexual Orientation and Gender Identity Committee of the ABA's Section of Individual Rights and Responsibilities.

Workplace Revolution

continued from page 16

from a court.

In addition to discrimination claims, of course, there are employee requests for recognition of their domestic partners in the context of benefits eligibility, including family and medical leave, bereavement leave, and insurance coverage. Many large private sector employers have voluntarily provided such benefits, which are also increasingly common for public employees in large cities. The city benefits usually result from legislation, but states and localities are preempted by federal law from attempting to mandate such benefits directly in the private sector. However, with San Francisco taking the lead, several cities have adopted policies limiting their city contracting to companies that have partner benefits programs. San Francisco officials claim that more than 3,000 private sector employers have adopted such benefits plans in order to maintain their eligibility to bid on city procurement contracts.

The bottom line for employees is that a variety of potential sources of legal protection may be available in many parts of the country, even lacking an outright ban on discrimination contained in state law. The bottom line for employers, especially those who do business in many different parts of the country, is that even in the absence of a federal statute, they are likely to have some legal obligations regarding sexual minority job applicants and employees, so they need to educate themselves to avoid embarrassing situations and potential liability. In addition, of course, many employers can attest to the valuable productivity of sexual minority employees, especially in workplaces where they are treated with the dignity and respect that will reinforce employee loyalty to the employer.

Arthur S. Leonard is a professor of law at New York Law School. He is the editor of the monthly newsletter Lesbian/Gay Law Notes *and author of* Sexuality and the Law: An Encyclopedia of Major Legal Cases.