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Watkins v. United States Army and The Employment Rights of Lesbians and Gay Men

By Arthur S. Leonard

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On May 3, 1989, an en banc panel of 11 judges of the United States Court of Appeals for the 9th Circuit voted seven to four to order the United States Army to allow former Staff Sergeant Perry Watkins, a gay man, to reenlist, even though an Army regulation forbids enlistment of homosexual persons.¹ Five members of the panel based their decision on the common law concept of equitable estoppel, reasoning that because Watkins had served excellently from his original enlistment in 1967 until the Army refused him reenlistment in 1982, "equity cries out and demands that the Army be estopped from refusing to reenlist Watkins on the basis of his homosexuality."²

Two members of the panel, who had constituted the majority of a three-judge panel that issued a similar order on Watkins' behalf on February 10, 1988,³ concurred on the ground that the Army's regulations excluding lesbians and gay

men from service violated the federal government's obligation of equal protection of the laws under the Fifth Amendment of the Constitution.⁴ The majority of the 1988 panel had concluded that the Army's regulations discriminated on the basis of sexual orientation, which the panel considered to be a suspect classification whose use was not sufficiently justified by the military to withstand judicial review. The three-judge panel decision, which was vacated by the en banc decision, was the subject of an earlier article in this Journal⁵ and has already served as precedent in another long-term court struggle over the military's regulations: *BenShalom v. Marsh*.⁶ Still pending before the 9th Circuit are two other cases presenting similar issues: *High Tech Gays v. Defense Industrial Security Clearance Office*,⁷ and *Pruitt v. Weinberger*.⁸

At the heart of the battle in these cases is the question whether sexual orienta-

¹ *Watkins v. United States*, 50 EPD ¶ 38,967 (9th Cir., May 3, 1989). The pertinent regulation is AR 635-200, ch. 15.

² *Id.* at EPD p. 57,155.

³ *Watkins v. U.S. Army*, 847 F.2d 1329, 46 EPD ¶ 38,063 (9th Cir. 1988).

⁴ Although the Fifth Amendment does not include the phrase "equal protection of the laws" found in the 14th Amendment, the Supreme Court has construed the Due Process Clause of the Fifth Amendment to require the federal government to extend equal protection of the laws to all persons in the United States on the same basis that binds the states under the 14th Amendment. See *Watkins v. U.S. Army*, 847 F.2d at 1335, n.9.

⁵ Robinson, Franklin, and Allen, "Watkins v. United States: New Insights on the Termination of Employees for Sexual Orientation," LABOR LAW JOURNAL, Vol. 40, No. 2, February 1989, 117-121.

⁶ 703 F.Supp. 1372, 49 EPD ¶ 38,784 (D.Wis. 1989). The 7th Circuit heard oral argument in the Army's appeal of this case on May 18, 1989. The case dates from Miriam BenShalom's discharge for homosexuality in 1976.

⁷ 668 F.Supp. 1361, 45 EPD ¶ 37,597 (N.D.Cal. 1987). This case challenges unequal treatment of lesbian and gay applicants for industrial security clearances to work on defense contracts for private employers.

⁸ 625 F.Supp. 625 (C.D.Cal. 1987).

tion⁹ should be treated as a suspect or quasi-suspect classification for purposes of equal protection analysis under the 5th and 14th Amendments. As the Supreme Court has developed doctrine under these Amendments, a finding that governmental classifications based on sexual orientation are suspect would mean that federal, state, and local governments could not adopt policies adversely affecting lesbians and gay men unless those policies were necessary to achieve a compelling governmental interest and narrowly tailored to meet that interest. This test is referred to as strict scrutiny. If sexual orientation were found to be quasi-suspect, such classifications would be subject to somewhat heightened scrutiny, requiring the government to show that the classification is substantially related to an important governmental interest. If the classification used by the government does not merit heightened scrutiny, it will be sustained if it is rationally related to a legitimate state interest.

The Supreme Court's approach to identifying suspect classifications was most recently articulated in *City of Cleburne v. Cleburne Living Center*,¹⁰ in which the Court determined that mentally retarded persons do not constitute either a suspect or a quasi-suspect classification. Justice Byron White, writing for the Court, stated that race, alienage, and national origin are suspect classifications because "[t]hese factors are so seldom relevant to the achievement of any legitimate state interest that laws grounded in such considerations are deemed to reflect prejudice and antipathy—a view that those in the burdened class are not as worthy or deserving as others."¹¹ Since such discrim-

ination is likely to reflect majoritarian prejudice and not to be correctable through the legislative process, the courts will subject it to strict scrutiny.

Identification of Suspect Classifications

The Court subjects sex classifications to heightened scrutiny because "[t]hat factor generally provides no sensible ground for differential treatment."¹² "[T]he sex characteristic frequently bears no relation to ability to perform or contribute to society."¹³ Gender classifications in government policies frequently "reflect outmoded notions of the relative capabilities of men and women."¹⁴ Illegitimacy is at least quasi-suspect as well, because it "is beyond the individual's control and bears 'no relation to the individual's ability to participate in and contribute to society.'"¹⁵

The Court has refused to apply heightened review or strict scrutiny to classifications based on age or mental retardation because of its view that neither the aged nor the mentally retarded have been historically singled out for unequal treatment based on "stereotyped characteristics not truly indicative of their abilities."¹⁶ Such unequal treatment as has existed, according to the Court, has usually been based on actual characteristics of elderly or retarded persons, and, as often as not, the unequal treatment was to provide special protections to those individuals. Consequently, in the Court's view, one has little reason to suspect that prejudice rather than rationality is at work when the government uses age or retardation as a classifying characteristic in a statute, so normal rationality review

⁹ "Sexual orientation" is a term of art in the social sciences, referring to the gender of sexual object choice. In New York City's ordinance forbidding discrimination on the basis of sexual orientation in employment, it is defined as "heterosexuality, homosexuality, or bisexuality." N.Y.C. Admin. Code, section 8-108.1(3).

¹⁰ 473 U.S. 432 (1985).

¹¹ *Id.* at 440.

¹² *Id.*

¹³ *Id.* at 440-41, quoting *Frontiero v. Richardson*, 411 U.S. 677, 686, 5 EPD ¶ 8609 (1973) (plurality opinion).

¹⁴ *Id.* at 441.

¹⁵ *Id.* at 441, quoting *Mathews v. Lucas*, 427 U.S. 495, 505 (1976).

¹⁶ *Id.* at 441, quoting *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307, 313, 12 EPD ¶ 10,998 (1976).

is the relevant test for the reviewing court to employ in evaluating the constitutionality of the government's policy.

Nonetheless, in *City of Cleburne*, the Court struck down a zoning ordinance which required special approval for the operation of a group home for the retarded. The Court found that the justifications articulated for the special approval requirements were pretextual, because they would have applied to other types of group homes for which special approval was not required, leading the Court to conclude that the real motivation for the ordinance was dislike or prejudice against retarded persons based on stereotypes rather than the reasons articulated by the city. Thus, rationality review is not a meaningless formality, at least as applied by the Court in *Cleburne*.

This review of the Court's determinations regarding suspect classifications shows that there is no fixed checklist of factors, but rather an approach of evaluating each challenged classification with an eye toward determining whether there is a substantial likelihood that unfavorable governmental treatment is motivated by unjustified prejudices and stereotypes. Various factors may contribute to that determination, but no one factor is determinative by itself. The reason the Court applies heightened scrutiny to suspect or quasi-suspect classifications is that when such classifications are used, it is likely that the principle of constitutional equality (that equally situated individuals must receive equal treatment from their government) is being violated. For the government to prevail in such a case, it must show that the unequal treatment is objectively justified because the persons involved are not equal with regard to characteristics that are relevant for the legitimate purposes of the governmental policy at issue.

Caselaw on Policies Excluding Homosexuals

The 1988 Ninth Circuit decision in *Watkins* was particularly significant because it marked the first time that a federal appellate court used the Supreme Court's equal protection doctrines to declare unequivocally that sexual orientation, i.e., the status of being heterosexual, homosexual, or bisexual, was a suspect classification when used to treat homosexuals adversely. The 1988 *Watkins* decision superficially appeared contrary to a 1987 decision by the D.C. Circuit Court of Appeals, in *Padula v. Webster*,¹⁷ that the Federal Bureau of Investigation's policy of refusing to hire as special agents persons who were "practicing homosexuals" did not violate the equal protection requirement. The *Padula* decision was primarily based on the Supreme Court's 1986 ruling in *Bowers v. Hardwick*¹⁸ that the practice of "homosexual sodomy" could be criminalized by the states without offending the Due Process Clause of the 14th Amendment because the ability to engage in such sexual conduct was not, in the Court's view, a fundamental right and the presumed moral views of a majority of a state's citizens regarding such conduct provided a sufficient basis under rationality review to sustain such criminal laws.

The D.C. Circuit in *Padula* declared that the F.B.I.'s policy, applying as it did to persons who had engaged in conduct declared criminal by half the states, was a rational policy for a national law enforcement agency. So long as the states could constitutionally criminalize "homosexual sodomy," the D.C. Circuit opined that it would be incongruous to subject the F.B.I.'s policy to heightened or strict scrutiny because "there can hardly be more palpable discrimination against a class than making the conduct that defines the

¹⁷ 822 F.2d 97, 43 EPD ¶ 37,174 (D.C.Cir. 1987). The 1988 *Watkins* decision also seemed contrary to prior 9th Circuit precedent for the same reason. See *Beller v. Middendorf*, 632 F.2d 788, 24 EPD ¶ 31,378 (9th Cir. 1980),

which ruled with regard to superseded Army regulations premising dismissal on *conduct* rather than *orientation*.

¹⁸ 478 U.S. 186 (1986).

class criminal."¹⁹ The D.C. Circuit's approach to this issue has since been followed by the Federal Circuit in *Woodward v. United States*.²⁰

In its now-vacated 1988 *Watkins* decision, which has been followed to the letter on this point by the United States District Court in *BenShalom*, the panel majority focused on a key distinction between the F.B.I. policy challenged in *Padula* and the Army policy challenged in *Watkins*: the F.B.I.'s alleged policy was a policy of discrimination based on an applicant's *conduct*, while the Army's policy was to discriminate based on *orientation* or *status*. Indeed, the Army's regulation would allow continued military service by heterosexual persons who had engaged in homosexual conduct, but would exclude homosexuals who were entirely celibate or engaged solely in heterosexual conduct. While *Hardwick* settles, at least for now, that the government can outlaw certain same-sex *conduct* without offending the Due Process Clause, differential treatment based on *status* presents a different issue, as the Supreme Court itself recognized in 1962 when it ruled that California could not impose criminal sanctions on a person for the status of being addicted to controlled substances without violating the Eighth Amendment's ban on cruel and unusual punishment, even though there was no constitutional bar to criminalizing the use of controlled substances.²¹

By analogy to this distinction, Judge Norris of the Ninth Circuit contends in

*Watkins*²² that the *Hardwick* decision is not relevant to constitutional evaluation of the Army's policy. For one thing, the *Hardwick* decision concerns only conduct of the type defined by Georgia as "sodomy" (anal or oral intercourse), and there is a wide range of same-sex contact that falls short of that definition and is not necessarily subject to criminalization under the authority of that decision. (District Judge Henderson makes the same point in his decision in *High Tech Gays*,²³ which held unconstitutional certain barriers to lesbian and gay applicants obtaining security clearances for work on defense contracts. Judge Henderson concluded that sexual orientation was at least a quasi-suspect classification requiring heightened scrutiny.) Furthermore, Judge Norris demonstrates that the Army's policy does not define the excluded class in terms of conduct, but rather in terms of orientation, thereby leaving open for evaluation the question of whether such a status-based exclusion meets the criteria for designation as a suspect classification.²⁴

Sexual Orientation as a Suspect Classification

Once the tests described in *City of Cleburne* are applied, it becomes clear that some form of heightened scrutiny should be given to governmental policies that discriminate on the basis of sexual orientation.²⁵ The history of prejudice, and indeed violence, against persons on the basis of their sexual orientation is long

¹⁹ 822 F.2d at 103.

²⁰ 871 F.2d 1068, 49 EPD ¶ 38,877 (Fed.Cir., March 29, 1989).

²¹ *Robinson v. California*, 370 U.S. 660 (1962). The Second Circuit has also recently noted this distinction in *Falk v. Secretary of the Army*, 870 F.2d 941 (March 30, 1989), commenting that a rule that would "penalize military personnel for their status as homosexuals . . . may be constitutionally infirm." See also, Sunstein, "Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection," 55 U. Chi. L. Rev. 1161, 1162 (1988).

²² Judge Norris's concurring opinion in the May 3 en banc decision essentially replicates his opinion for the 1988 panel. 50 EPD ¶ 38,967 at pp. 57,156-57,173. Concurring Judge

Canby stated his total agreement with Judge Norris's equal protection analysis. *Id.* at p. 57,173.

²³ 668 F.Supp 1361 (N.D. Cal. 1987).

²⁴ *Watkins v. U.S. Army*, 50 EPD ¶ 38,967 at pp. 57,158-57,160 (May 3, 1989).

²⁵ An alternative analysis would suggest that discrimination on the basis of sexual orientation is merely a variation of sex discrimination, and thus entitled to heightened scrutiny as such. See Chang, "Conflict, Coherence, and Constitutional Intent," 72 Iowa L. Rev. 753, 825-26, 868-70 (1987). This contention comes up against caselaw holding that sexual orientation discrimination is not covered by Title VII of the Civil Rights Act of 1964, such as *DeSantis v. Pacific Telephone & Telegraph Co.*, 608 F.2d 327, 19 EPD ¶ 9271 (9th Cir. 1979).

and well-documented. In the numerous cases challenging the exclusionary policies of the military, courts have found again and again that the personnel involved had extraordinarily good records, indicating that their sexual orientation was not necessarily a disqualifying factor. Watkins, through a military career of 14 years, had been repeatedly promoted and rated highly, and his various commanding officers had testified in favor of his retention in the service.

Furthermore, although scientists are not unanimous on the point, there is a growing consensus that sexual orientation as such is a fairly fixed component of personal identity, largely impervious to change.²⁶ Here, the status vs. conduct distinction comes into play again; it seems that therapists can in some cases induce changes in sexual behavior by individuals highly motivated to change, but that underlying sexual orientation is not changeable. As such, sexual orientation, in common with illegitimacy, would be a suspect classification because it "is beyond the individual's control and bears 'no relation to the individual's ability to participate in and contribute to society.'" ²⁷

Given these factors, Judge Norris concluded that when government uses sexual orientation as a classification for purposes of discrimination or exclusion, there is good reason to suspect that the policy is motivated by prejudice and stereotype, rather than by objective justification rele-

vant to legitimate government goals.²⁸ If the objective of the Army in maintaining its regulation is to advance the national interest and security of the United States, the regulation is counterproductive because it deprives the military of the services of an excellent soldier such as Perry Watkins. The regulation seems based on categorical dislike rather than on an individualized assessment of aptitude for service,²⁹ and the justifications advanced by the military ring hollow, in Judge Norris's view, because they appear based on the presumed prejudice and dislike of homosexual persons by society, rather than on proof of harm to the national interest or security from allowing gay people to serve.³⁰

The 1989 en banc panel resolved the matter without reaching these constitutional issues by determining that the Army's treatment of Watkins from 1967 through 1982 merited invocation of the doctrine of equitable estoppel. But implicit in the panel's decision was a rejection of the Army's proffered justifications for excluding homosexuals from the service, because one of the tests for the appropriateness of raising an estoppel against the government is whether the court's order will prejudice the public interest. The court resolved this question decisively against the government on the basis of Watkins's excellent military record and the obvious disservice to the country

²⁶ For summaries of current thought on this subject, see Isay, *Being Homosexual: Gay Men and Their Development* (1989); Lewes, *The Psychoanalytic Theory of Male Homosexuality* (1988); Money, *Gay, Straight, and In-Between: The Sexology of Erotic Orientation* (1988); Green, *The Sissy-Boy Syndrome and the Development of Homosexuality* (1987); Weinrich, *Sexual Landscapes: Why We Are What We Are, Why We Love Whom We Love* (1987); Bell, Weinberg & Hammersmith, *Sexual Preference: Its Development in Men and Women* (1981); Marmor, *Homosexual Behavior: A Modern Reappraisal* (1980).

²⁷ *Cleburne*, 473 U.S. at 441, quoting *Mathews v. Lucas*, 427 U.S. 190 (1976).

²⁸ There is considerable support in legal literature for this conclusion. See, e.g., J. Ely, *Democracy and Distrust* 248 n.52 (1980); L. Tribe, *American Constitutional Law* 1616

(2d ed. 1988); Note, "An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality," 57 S. Cal. L. Rev. 797 (1984); Note, "The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification," 98 Harv. L. Rev. 1285 (1985).

²⁹ This is well illustrated by another case now in litigation, where a cadet at the Naval Academy who had never engaged in any sexual contact with another man was dismissed for "lack of aptitude" after confessing his homosexual orientation to a superior officer. The cadet in question was near the top of his class and honored as a corps commander. Some lack of aptitude! *Steffan v. Cheney*, Civ. Action No. 88-3669 (D.D.C., filed December 29, 1988).

³⁰ *Watkins v. U.S. Army*, 50 EPD ¶ 38,967 at pp. 57,170-57,173 (May 3, 1989).

of excluding such an outstanding soldier from further service in the Army.³¹

Protective Policies

The final word has yet to be written on the equal protection issue as it applies to the employment rights of lesbians and gay men by governmental bodies. However, many public and private sector employers are already bound by administrative or legislative policies and common law principles which affect their discretion regarding treatment of lesbian and gay employees. Because these are rarely articulated expressly in statutes, they are not as well known or as easy to research as the familiar statutory prohibitions against discrimination on the basis of race, sex, religion, national origin, or age. A brief review of these policies is useful in placing the outcome of the equal protection debate in proper perspective for employers.

In the public sector, it is reasonably well settled that various constitutional provisions other than the Equal Protection Clause provide protections for lesbian and gay public servants. As early as 1969, federal courts took the position that due process requirements preclude dismissal of most civil servants for "homosexuality" without a showing that their conduct has impaired their ability to perform their jobs.³² Pursuant to the Civil Service Reform Act of 1978,³³ the federal Office of Personnel Management issued a Policy Statement in 1980 that sexual orientation would not be the basis for removal of federal employees without a showing that the individual's conduct had impaired the

efficiency of the service. Federal courts have also held that the First Amendment would protect public employees who speak out in support of equal rights for lesbian and gay people.³⁴ These protections are amplified at the state level by gubernatorial executive orders and statutes in about a dozen jurisdictions.³⁵ At the county and municipal levels, ordinances and executive orders in 76 jurisdictions forbid such discrimination.³⁶

Lesbian and gay employees in the private sector have less protection from discrimination, but more than is commonly supposed. For one thing, labor arbitrators who have ruled on the subject seem to agree that homosexuality, including private sexual conduct, does not constitute just cause for discharge under the typical collective bargaining agreement.³⁷ For another, developing common law exceptions to the employment-at-will doctrine are likely to result in protecting lesbian and gay employees from discharge when their conduct has not affected their ability to do their jobs. In particular, the express contract exceptions premised on oral or written assurances of job security recognized in a majority of states and the covenant of good faith and fair dealing, which is growing in acceptance, would result in many employees having common law remedies for discharges premised solely on their sexual orientation or off-duty sexual conduct.³⁸

There is also a growing body of statutory protection. Wisconsin became the first state to enact a statutory prohibition on public and private sector employment discrimination on the basis of sexual ori-

³¹ *Watkins v. U.S. Army, Id.* at pp. 57,152-57,155 (May 3, 1989).

³² *Norton v. Macy*, 417 F.2d 1161 (D.C.Cir. 1969).

³³ P.L. 95-454, Title II, codified in pertinent part at 5 U.S.C. sections 7511-14.

³⁴ *Van Ooteghem v. Gray*, 628 F.2d 488 (5th Cir.), cert. denied, 455 U.S. 909 (1982); *National Gay Task Force v. Board of Education of Oklahoma City*, 729 F.2d 1270, 34 EPD ¶ 34,357 (10th Cir. 1984), aff'd by equally divided Court, 470 U.S. 903, 36 EPD ¶ 35,065 (1985).

³⁵ For a current list, see Leonard, *Gay & Lesbian Rights Protections in the U.S.: An Introduction to Gay and Lesbian*

Civil Rights (1989), available from the National Gay & Lesbian Task Force, 1517 U St., N.W., Washington, D.C. 20009.

³⁶ *Id.*

³⁷ See, e.g., *Hughes Air Corp.*, 73 L.A. 148 (Barsamian, 1979).

³⁸ See, generally, Leonard, *A New Common Law of Employment Termination*, 66 N.C.L. Rev. 631 (1988). Of course, adoption of just cause discharge statutes such as that recently enacted in Montana would similarly restrict employers.

entation in 1982.³⁹ Similar legislative proposals have been making headway in several states. In California, the legislature passed such a bill several years ago, which was vetoed by the governor. The California Supreme Court ruled in 1979 that regulated public utilities could not discriminate against employees known or suspected to be gay,⁴⁰ and the state's Attorney General has opined that existing civil rights laws in that state may provide equivalent protection to many employees.⁴¹ In Massachusetts, a bill passed both houses of the legislature in 1987, but final enactment was prevented by last minute procedural maneuvers by a few opponents in leadership positions. In 1989, new efforts at enactment were successful in at least one legislative house in Iowa and Massachusetts.

Local governments throughout the United States have legislated to ban private sector employment discrimination on the basis of sexual orientation. A count by the National Gay and Lesbian Task Force at the end of 1988 showed such laws in effect in 41 municipalities and three counties, including five of the ten most populous cities in the United States.⁴² Contrary to the views of some that the AIDS epidemic would slow the enactment of such local laws, 20 were enacted since AIDS began to emerge as a subject of public discussion in the early 1980s, including most notably in New York City (1986) and Chicago (1988). Furthermore, lesbian or gay employees who encounter discrimination because of employer or co-employee fear of AIDS may find protection under disability discrimination laws.⁴³

Conclusion

If the federal courts finally resolve the Equal Protection debate in favor of heightened scrutiny for governmental classifications that disadvantage persons because of their sexual orientations, public employers will have further reason to reconsider existing policies or biases against lesbian and gay people as employees or clients of public programs. Heightened scrutiny for such classifications seems justified under the approach developed by the Supreme Court and most recently described in *City of Cleburne*. Cases now pending in the 7th and 9th Circuits may provide the vehicles for Supreme Court consideration of the issue early in the 1990s.⁴⁴

Regardless how the Equal Protection issue is resolved, however, there is an existing growing body of law restricting the discretion of employers in dealing with lesbian and gay employees. Consequently, employers in both the public and private sectors cannot assume that lesbian and gay employees necessarily lack legal recourse for discrimination or discharge which is not objectively defensible.

The continued trend of enactment of protective local laws and the developing federal caselaw seem part of a more general move by society to recognize the central role of employment in people's lives, which may eventuate in general protection against discharge without just cause. Until such time, however, employers would be well advised to educate themselves about the existing restrictions on their discretion to discharge lesbian and gay employees. Furthermore, employers may well take a factual lesson from the case of Staff Sergeant Perry Watkins.

³⁹ Leonard, *supra* note 36.

⁴⁰ *Gay Law Students Association v. Pacific Telephone & Telegraph Co.*, 595 P.2d 892 (Calif. 1979).

⁴¹ Attorney General Opinion No. 85-404.

⁴² Leonard, *Gay & Lesbian Rights Protections, supra*.

⁴³ E.g., *Poff v. Caro*, 228 N.J.Super. 370, 549 A.2d 900 (1987) (housing discrimination against gay men due to fear of AIDS violates state law against handicap discrimination).

⁴⁴ *BenShalom v. Marsh*, 703 F.Supp. 1372, 49 EPD ¶ 38,784 (D.Wis. 1989); *High Tech Gays v. Defense Industrial Security Clearance Office*, 668 F.Supp. 1361, 45 EPD ¶ 37,597 (N.D. Cal. 1987); *Pruitt v. Weinberger*, 625 F.Supp. 625 (C.D. Cal. 1987).

There are millions of lesbian and gay employees in this country who render valuable and faithful service to their employers, and whose sexual orientation should

not serve as a barrier to their continued contributions in the workplace.

[The End]

Corporation Charged with Manslaughter

A corporation is sufficiently a "person" to be charged with manslaughter, the Michigan Court of Appeals ruled in remanding *People v. General Dynamics Land Systems, Inc.*, 1989 OSHD ¶ 28,467) for trial. Lower courts erred in refusing to bind over the corporate defendant on an involuntary manslaughter charge for the death of an employee who was overcome by Gensolv-D (Freon) fumes. Conflicting evidence on the corporation's negligence created an issue of fact to be resolved by a jury. The solvent was used to clean the interior of army tanks, and the worker was killed when he attempted to drive a recently sprayed tank. There was conflicting evidence regarding whether General Dynamics had a procedure for safely cleaning the tanks and whether safety bulletins containing the procedure were seen by workers. A lower court's dismissal of a charge of willful violation of a Michigan OSH ventilation standard was affirmed, since the head and shoulders of the employee remained above the level of the hatch cover, outside the tank interior.

Employer Convicted of Homicide by Reckless Conduct

A jury verdict convicting a corporate employer of homicide by reckless conduct was affirmed by a Wisconsin Circuit Court of Appeals *Wisconsin v. Shoreline Support Corp.*, 1989 OSHD ¶ 28,505). An employee fell to his death from a 75-foot cliff while working unsupervised. The jury's conclusion that failure to provide trained supervision for an inexperienced employee constituted recklessness was a reasonable determination, the court found. The court rejected the employer's argument that state criminal action was precluded because an action had also been instituted under the federal OSH Act. Previous state court decisions have established that OSHA regulations do not preempt criminal prosecution for reckless homicide.

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