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Arthur S. Leonard

New York Law School, arthur.leonard@nyls.edu

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Sexual Orientation and the Workplace: A Rapidly Developing Field

By Arthur S. Leonard

Mr. Leonard is a Professor of Law at New York Law School

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Lauren Smedley was an associate at the law firm of Capps, Staples, Ward, Hastings & Dodson. She began working there on April 4, 1990. She was discharged on April 1, 1991, shortly after an article appeared in *The Daily Journal*, a legal newspaper in the San Francisco Bay area, quoting Smedley about "being out" at work in an article about the Bay Area Lesbian Feminist Bar Association, an organization of which she was an officer. According to Smedley, she had previously received a note from one of the firm's partners, stating that "given our clientele it would not be appropriate to discuss lesbian rights, groups, activities, etc." The firm apparently found out she was a lesbian when an employee distributing paychecks noticed a photograph of Smedley and her lesbian companion on Smedley's desk. The firm had never previously knowingly employed a lesbian or gay attorney.

Had this all happened twenty years ago, Smedley would have had no basis for legal redress, for the law had barely begun to address issues of sexual orientation and the workplace. But in 1979, the California Supreme Court ruled in *Gay Law Students Association v. Pacific Telephone & Telegraph Company*¹ that Section 1101 of the state's Labor Code, protecting Cali-

fornia employees from retaliation for their political activities, should be interpreted to protect lesbian and gay employees from discrimination. California thus became the first state in which lesbian and gay employees would be protected as a matter of state law. (The District of Columbia had previously included "sexual orientation" in its employment discrimination ordinance.²) After her discharge, Smedley filed suit under a variety of legal theories, including violation of Section 1101. Her case is pending in the U.S. District Court for the Northern District of California.³

In 1992, after two successive governors vetoed attempts by the legislature to amend California's Fair Employment and Housing Code to make such protection explicit, the legislature amended the Labor Code to codify the *Gay Law Students* decision and make clear that it applied to all California employers.⁴ By that time, California was joining a growing list of states expressly banning sexual orientation discrimination.

State Laws Proliferating

When California's Supreme Court first ruled on the issue in 1979, a bare handful of local ordinances and executive orders protected lesbian and gay employees, some applying only to the public sector.

¹ 24 Cal. 3d 458, 156 Cal. Rptr. 14, 595 P.2d 592 (1979).

² D.C. Code Ann. Sec. 1-2541(c) (1977).

³ *Smedley v. Capps, Staples, Ward, Hastings & Dodson*, 61 FEP 1360, 1993 Westlaw 170409 (N.D. Cal. 1993).

⁴ See Cal. Lab. Code Sec. 1101, 1102 and 1102.1 (1992).

The California ruling came at a time when public attention to this issue was being stirred by ballot measures seeking repeal of local "gay rights" ordinances, most prominently in Dade County, Florida, where singer Anita Bryant successfully led a religiously inspired repeal crusade in 1977. Despite several such referendum setbacks, the movement to extend protection to lesbian and gay employees was picking up steam at that time, with several major cities passing civil rights ordinances and the state of Wisconsin becoming the first to legislate on the subject in 1981.⁵

Then the epidemic of Acquired Immunodeficiency Syndrome (AIDS) hit the gay community, and political efforts were diverted to securing government funding for treatment, research, and prevention activities. Although activists continued the struggle to pass local ordinances, less effort was expended on statewide bills. In 1986, however, after the Supreme Court ruled in *Bowers v. Hardwick*⁶ that the constitutional right of privacy did not prevent states from criminalizing homosexual intercourse, the gay rights movement was jolted into renewed political action. State lobbying efforts were revived, and soon the pace of enactment of state laws forbidding sexual orientation discrimination picked up dramatically: Massachusetts⁷ in 1989, Connecticut⁸ and Hawaii⁹ in 1991, California,¹⁰ New Jersey,¹¹ and Vermont¹² in 1992, and Minnesota¹³ early in 1993, with serious legislative efforts pending in New York, Rhode Island, and Washington State as this was written in June 1993.

By June 1, 1993, approximately 23 percent of the United States population lived in states (including the District of Columbia) where it was unlawful for employers to discriminate on the basis of sexual ori-

entation as a matter of state law. Some of those laws also extended to employers performing contracts for the state, and thus might have extraterritorial impact.

In ten states (comprising about 40 percent of the population), sexual orientation discrimination in state executive branch employment was also forbidden by executive order of the governor. These states include Colorado, Louisiana, Minnesota, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island and Washington.

Local Laws Proliferating Even Faster

The increasing pace of enactment of laws forbidding sexual orientation discrimination at the state level followed an earlier trend of passage of such laws at the local level. Shortly after the American Psychiatric Association adopted its historic 1973 statement that homosexuality was not a mental illness, lobbyists for adding "sexual orientation" to local civil rights ordinances began to achieve local victories. Although there were some setbacks, beginning with the 1977 Dade County referendum mentioned previously, the pace of enactment of such laws accelerated sharply through the 1980s, and now they are being passed at the rate of one or more each month. Most are municipal ordinances, although in some cases they are enacted by county governments.

Unfortunately, labor law reporting services do not systematically collect and publish local laws, and treatises on employment discrimination either ignore them or only mention those enacted by the largest cities. Consequently, employers and attorneys researching this issue have to fall back on direct inquiries to local government offices or lesbian and gay rights organizations that attempt to maintain up-to-date lists. Perhaps the

⁵ Wisc. Stat. Ann. Sec. 111.36 (1981).

⁶ 478 U.S. 186 (1986).

⁷ Mass. Gen. Laws, Ch. 151B, Sec. 3(6) (1989).

⁸ Conn. Gen. Stat. Sec. 46a-81(c) (1991).

⁹ Haw. Rev. Stat. Sec. 368-1, 378-2 (1991).

¹⁰ Cal. Lab. Code Sec. 1101, 1102, 1102.1 (1992).

¹¹ N.J. Stat. Ann. Sec. 10:5-4 (1991).

¹² Vt. Stat. Ann. Tit. 3, Sec. 961(6) (1992).

¹³ Minn. Stat. Sec. 363.01-363.15 (1993).

most reliable source for a reasonably up-to-date list is the Lambda Legal Defense and Education Fund, Inc.,¹⁴ a national lesbian and gay rights public interest law firm.

As of June 15, 1993, thirty-one of the fifty largest cities by population had laws banning discrimination on the basis of sexual orientation, with most applicable to private sector employers. This included seven of the ten largest cities; the three largest cities *without* such laws are in Texas. The seven cities are New York, Los Angeles, Chicago, Philadelphia, San Diego, Detroit, and Phoenix. Other major cities (from the top fifty by population) with such laws include Atlanta, Austin, Baltimore, Boston, Cincinnati, Columbus, Denver, Honolulu, Kansas City (Missouri), Long Beach, Milwaukee, Minneapolis, New Orleans, Oakland, Philadelphia, Pittsburgh, Portland (Oregon), Sacramento, San Francisco, San Jose, Seattle, and Tucson.

Because of municipal and county ordinances, in some jurisdictions that lack state sexual orientation discrimination laws most citizens are covered by discrimination bans. In New York state, for example, ten cities (including New York City, which comprises five counties) and two counties, with a total population comprising well over half of the state's residents, ban sexual orientation discrimination in employment, with all but a few of those policies applicable to private sector employers.

In California, on the other hand, an intermediate appellate court recently ruled in *Delaney v. Superior Fast Freight*¹⁵ that the state's Fair Employment and Housing Code, which does not cover sexual orientation, preempts the seventeen municipal ordinances that deal with this subject. The California Supreme Court denied review of the case, giving it the imprimatur of a state-wide precedent.

However, as the court in *Delaney* observed, the 1992 amendment of the Labor Code created protection against sexual orientation discrimination outside the purview of the Fair Employment and Housing Code, so such protection remains as a matter of state law in all those municipalities. Moreover, on August 17 the California Supreme Court agreed to hear an appeal in three consolidated cases, under the name *Runkle v. Superior Court*, from decisions by a San Francisco Superior Court judge dismissing complaints under the San Francisco municipal human rights law in reliance on *Delaney*. Apparently, the California Supreme Court will be addressing this issue after all, and *Delaney* is not the last word on the preemption issue.

If all state, county, and local laws and policies are added together, it appears that the number of United States residents either living in jurisdictions forbidding such discrimination or working in jobs subject to such rules approaches half the population. An exact figure is difficult to determine, because some local laws also apply to government contractors and may have extraterritorial effect as a result.

What Does "Sexual Orientation" Mean?

Although some of these laws use the older nomenclature of "sexual preference" or "affectional preference," almost all laws on the subject now use the term "sexual orientation" in describing the characteristic as to which discrimination is forbidden. Many of the laws define "sexual orientation" to mean "homosexuality, bisexuality, or heterosexuality," without further explanation. Some laws, reacting to specific concerns of legislators responding to recent hot news items, also specify certain people whom the laws are not intended to protect. For example, the Massachusetts law, enacted shortly after a major FBI action against the North

¹⁴ 666 Broadway, 12th Floor, New York, N.Y. 10012; 212-995-8585.

¹⁵ 14 Cal. App. 4th 590, 18 Cal. Rptr. 2d 33 (Ct.App., Mar. 24, 1993), rev. denied, 6/93.

American Man-Boy Love Association, a pedophile organization, specifies that sexual orientation "shall not include persons whose sexual orientation involves minor children as the sex object."¹⁶ The 1993 Minnesota law contains a similar express exclusion from coverage.¹⁷

The Minnesota law provides perhaps the most detailed description of what coverage is intended: "Sexual orientation means having or being perceived as having an emotional, physical, or sexual attachment to another person without regard to the sex of that person or having or being perceived as having an orientation for such attachment, or having or being perceived as having a self-image or identity not traditionally associated with one's biological maleness or femaleness."¹⁸ In fact, this definition goes beyond what a sexologist would consider to be "sexual orientation" and appears possibly to include transvestism and transsexualism, characteristics that are distinct from sexual orientation and are not normally considered to be covered by sex or sexual orientation discrimination laws.¹⁹

It is important in thinking about the scope of coverage of sexual orientation laws to recognize the distinctions between sexual orientation, core gender identity, and gender role, as these terms are used by scientists concerned with human sexuality. A good discussion of these concepts in terms understandable by the lay reader can be found in a useful book by Dr. James Weinrich, *Sexual Landscapes: Why We Are What We Are, Why We Love Whom We Love* (1987). The brief summary that follows uses terminology and concepts from Dr. Weinrich's book. A detailed review of the history and current state of knowledge about human sexuality can be found in the first three chapters of

Judge Richard Posner's recent book, *Sex and Reason* (1992).

Core gender identity refers to the degree to which an individual's self-identity is consonant with his or her biological gender. The tiny proportion of the population which is "transposed" on the element of core gender identity is sometimes labelled "transsexual." Transsexuality has no necessary correlation with a particular sexual orientation. Some transsexuals are sexually attracted to members of the opposite sex, some to members of the same sex.

Gender role refers to the degree to which an individual is comfortable behaving and dressing in a manner that society deems appropriate for his or her biological gender. Someone who is "transposed" on this element and desires to cross-dress is called a "transvestite." Once again, there is no necessary correlation between a strong desire to cross-dress and sexual orientation. Many male transvestites who prefer feminine or sexually-ambiguous clothes are nonetheless heterosexual in orientation, as are many women who prefer traditionally masculine clothes.

Finally, sexual orientation refers to the direction or orientation of an individual's erotic attraction and has no necessary correlation with a desire to cross-dress or to assume the identity of the opposite gender through sex-reassignment surgery. Everybody has a sexual orientation, and, as Dr. Alfred Kinsey discovered in his wide-ranging research during the 1930s and 1940s,²⁰ a surprisingly large percentage of the adult population might be characterized by some degree of bisexuality in its orientation, whether measured by sexual fantasies or actual behavior.

Understanding of these concepts makes clear that sexual orientation laws do not

¹⁶ Mass. Gen. Laws. Ann. Ch. 151B, Sec. 4 (1989).

¹⁷ Minn. Stat. Sec. 363.01(45) (1993).

¹⁸ Minn. Stat. Sec. 363.01(45) (1993).

¹⁹ See, e.g., *DeSantis v. Pacific Telephone*, 608 F.2d 327 (9th Cir. 1979), and cases cited therein.

²⁰ Alfred C. Kinsey et al., *Sexual Behavior in the Human Male* (1948); Alfred C. Kinsey et al., *Sexual Behavior in the Human Female* (1953).

necessarily have any application to discrimination based on transvestism or transsexualism (barring the unusual sort of definition contained in the recent Minnesota law), and, by the same token, that they are not solely intended to protect lesbians and gay men from discrimination. Rather, sexual orientation laws are intended to make sexual orientation (whether heterosexual, bisexual, or homosexual) irrelevant to those employment situations where having a particular sexual orientation is not a bona fide occupational qualification. Thus, in a jurisdiction that fails to ban employment discrimination on the basis of sexual orientation, a heterosexual person who suffers discrimination because he is perceived to be gay or bisexual would have no protection and neither would a heterosexual who suffers discrimination because he is not gay.²¹

Which Employers Are Covered?

Sexual orientation discrimination laws also differ with respect to employer coverage. Sometimes, small firms are exempted from coverage. Religious and religiously affiliated institutions may claim varying degrees of exemption based on constitutional free exercise of religion arguments and express statutory exemptions. When the Massachusetts Law Against Discrimination was amended to add "sexual orientation" in 1989, the legislature also amended the law to provide a broad religious exemption applicable to all categories of discrimination. While this was immediately responsive to political concerns in gaining enactment of the law, it also may reflect the prior Massachusetts Supreme Judicial Court decision in *Madsen v. Erwin*,²² which held that *The Christian Science Monitor*, a church-affiliated

newspaper, was privileged by the First Amendment to discharge a reporter after discovering that she was a lesbian.

The Minnesota law provides a narrower religious exemption limited to "a religious or fraternal corporation, association, or society, with respect to qualifications based on religion or sexual orientation, when religion or sexual orientation shall be a bona fide occupational qualification for employment."²³

In neither Massachusetts nor Minnesota are purely secular employers entitled to a constitutional exemption on grounds of free exercise of religion. Indeed, in cases arising under the Minneapolis civil rights ordinance, the Minnesota courts have made clear that secular employers are not entitled to discriminate on the basis of statutorily identified characteristics merely because the secular employer (in those cases, health clubs) has personal religious beliefs inimical to homosexuality.²⁴ However, in a housing discrimination case, a California Court of Appeal has ruled that a secular landlord may invoke the free exercise of religion to deny housing to an unmarried heterosexual couple based on the landlord's religious convictions, despite a state law barring marital status discrimination in housing. The case is on appeal to the California Supreme Court.²⁵

Even in those jurisdictions where sexual orientation discrimination laws do not provide express exemptions on religious grounds, it is likely that they will be interpreted to require such exemptions for religious employers. The San Francisco municipal ordinance was so interpreted in 1980, when a church discharged an organist on grounds of homosexuality.²⁶ The

²¹ See, e.g., *Konarski v. New York Medical College*, 124 LC ¶ 57,197 (N.Y. Sup.Ct., N.Y. Co. 1985), aff'd without opinion, 513 N.Y.S.2d 905 (App. Div., 1st Dept. 1987), cert. denied, 485 U.S. 905 (1988).

²² 395 Mass. 715, 481 N.E. 2d 1160 (1985).

²³ Minn. Stat. Sec. 363.02(1)(2) (1993).

²⁴ *Blanding v. Sports & Health Club, Inc.*, 373 N.W.2d 784 (Minn. Ct. App. 1985), aff'd without opinion, 389

N.W.2d 205 (Minn. 1986); *Potter v. LaSalle Sports & Health Club*, 384 N.W.2d 873 (Minn. 1986).

²⁵ *Donahue v. Fair Employment and Housing Commission*, 1 Cal.App.4th 387, 2 Cal.Rptr.2d 32 (Ct. App., 2nd Dist. 1991), rev. granted, Feb. 27, 1992.

²⁶ *Walker v. First Presbyterian Church*, 22 FEP 762 (Cal. Super. Ct. 1980).

New Jersey state law, which has religious exemption language that is not ideally clear, was challenged by the Orthodox Presbyterian church shortly after enactment. The church contended that the ambiguous religious exemption might subject it to burdensome litigation to establish its right to discriminate on the basis of sexual orientation in its employment and public accommodation activities. Ruling on a request for a preliminary injunction against the law taking effect, the federal district court noted the state attorney general's disavowal of any intent to enforce the law against the church, suggesting that such abstention by the state would be appropriate in light of free exercise concerns, and denied temporary relief.²⁷ A similar challenge to the Hawaii law was dismissed as premature, because no enforcement actions had been brought against the religious employer.²⁸

Another area of controversy in the employment of lesbians, gay men and bisexuals is jobs involving contact with children. The Minnesota statute specifically exempts from coverage private "service organization[s] whose primary function is providing occasional services to minors, such as youth sports organizations, scouting organizations, boys' or girls' clubs, programs providing friends, counselors, or role models for minors, youth theater, dance, music or artistic organizations, agricultural organizations for minors, and other youth organizations, with respect to qualifications of employees or volunteers based on sexual orientation."²⁹ This does not mean that the state requires exclusion of gays from such jobs, but rather that the state will not intervene to protect gays who are excluded.

A New Hampshire legislative proposal to ban employment of lesbians and gay men in child care facilities was held un-

constitutional by the New Hampshire Supreme Court, which found no rational basis to support the role model theory on which the legislation was premised.³⁰ In the same opinion, the court upheld a ban on lesbians or gay men becoming adoptive or foster parents. Thus, a court not inclined to be overly protective of the rights of gay people was, nonetheless, persuaded that lesbians and gay men presented no particular danger to the welfare of children who would come into contact with them in the context of "occasional services" rendered by "service organizations." The rationality of Minnesota's exclusion is thus subject to question.

What is the Experience Under Sexual Orientation Laws?

There are few reported court decisions construing or applying laws banning discrimination on the basis of sexual orientation. Most of the reported decisions have to do with claims by particular employers that they are exempt from the laws. The lack of officially published cases may be due to several factors: first, that most of the laws are too new to have generated a significant body of appellate cases; second, that most of the laws are enforced by administrative agencies that specialize in mediating and resolving discrimination charges short of litigation and those agencies frequently achieve settlements satisfactory to the parties; third, that officials responsible for selecting court decisions for publication are occasionally squeamish about lesbian and gay issues and avoid selecting such cases for publication.

(A surprising number of significant decisions on gay issues are not officially published, especially in jurisdictions where trial court decisions, if published, are done so on a highly selective basis, such as New York and California. Squeamishness may be the explanation for lack of official pub-

²⁷ *Presbytery of New Jersey of the Orthodox Presbyterian Church v. Florio*, No. 92-02641 (D.N.J. 1992) (not officially published).

²⁸ *Voluntary Association v. Waihee*, 800 F.Supp. 882 (D.Haw. 1992).

²⁹ Minn. Stat. Sec. 363.02(1)(3) (1993).

³⁰ *Opinion of the Justices*, 525 A.2d 1095 (N.H. 1987).

lication in *Dillon v. Frank*,³¹ an important case of first impression on the appellate level concerning workplace harassment of employees perceived as gay.)

In addition, many lesbians and gay men who encounter workplace discrimination may not file charges because they are not fully "out of the closet" and fear the possible notoriety of litigation. While some jurisdictions allow such complainants to proceed on an anonymous basis, some others do not, which can be a significant deterrent for those who wish to avoid future discrimination by concealing their sexual orientation from potential employers and coworkers.

Perhaps the most noteworthy discrimination ruling under a sexual orientation law is the case of *Collins v. Shell Oil Company*,³² brought under Section 1101 of the California Labor Code. Jeffrey Collins was a respected executive at Shell Oil Company. He was discharged after a secretarial employee found a sheet of paper Collins had left in a photocopying machine, describing the rules for a "safe sex" party he was planning to host with some friends. The trial judge found that holding such a party was a form of political activity within the meaning of Section 1101 as construed by the California Supreme Court in the *Gay Law Students* case, and assessed compensatory and punitive damages against the employer in the amount of approximately \$5 million. The pending case of *Smedley v. Capps, Staples, Ward, Hastings & Dodson*, discussed at the beginning of this article, will give the California courts an opportunity to clarify further the extent of employee activity protected under Section 1101.

Other Sources of Workplace Protection

Sexual orientation discrimination laws are not the only source of protection against discrimination for lesbian, gay,

and bisexual employees. Public employees may also have constitutional and civil service protection. Union-represented employees may find protection under collective bargaining agreements. Marital status discrimination laws in many jurisdictions may also apply to certain situations where unmarried lesbian and gay employees encounter unequal treatment.

Public employment was one of the first areas where courts began to develop a theoretical basis for protection against discrimination on the basis of sexual orientation. Just days after the Stonewall Rebellion in New York City that launched the modern lesbian and gay liberation movement in June 1969, the United States Court of Appeals for the District of Columbia Circuit ruled in *Norton v. Macy*³³ that the due process clause was offended when a federal agency discharged a closeted gay employee who had been arrested for sexual solicitation while off duty.

The employee, a military veteran employed as a budget analyst by the National Aeronautics and Space Administration, was discharged on two grounds: that the conduct leading to his arrest was "immoral, indecent, and disgraceful" and that his admission of past homosexual conduct indicated that he had "traits of character and personality which render him . . . unsuitable for further government employment." The court held that the agency bore the burden of showing that the employee's conduct had some rational relationship to his fitness for service and that mere assertions of moral disapproval were insufficient for this purpose. The decision, accompanied by several others over the next few years, eventually led to reconsideration of federal government policies, resulting in adoption of the view that homosexuality, as such, was not a barrier to civilian government service. This was confirmed as

³¹ 58 EPD ¶ 41,332 (6th Cir. 1992).

³² 57 EPD ¶ 40,907, 1991 WL 147364 (Cal.Super.Ct., 1991).

³³ 417 F.2d 1161 (D.C.Cir. 1969).

mandatory in 1987, when a federal court ruled in *Swift v. United States*³⁴ that exclusion of civilians from federal service solely on the basis of sexual orientation, without any job-related justification, also violated the equal protection requirement of the 5th Amendment.

In 1992, the Department of Housing and Urban Development concluded a collective bargaining agreement that included a ban on anti-gay discrimination within the agency, and similar bans were adopted administratively by the Secretaries of Agriculture and Transportation early in the Clinton Administration.

Federal employment in the non-civilian sector has proven a more difficult constitutional issue. In the wake of *Bowers v. Hardwick*, many federal courts have taken the view that deferral to the concerns of military and security agencies (FBI, CIA, NSA) is the appropriate course, rejecting a variety of constitutional challenges to the exclusion of gays from employment in those institutions. As political leaders debated whether and how to implement President Clinton's pledge to remove the ban on service by openly gay people in the military during 1993, several court challenges were in progress, including a case in which the Supreme Court refused to review a decision by the Ninth Circuit that would require the Defense Department at trial to provide a better justification for its ban than the one it had been providing, i.e., that gays could not serve because non-gay troops would not tolerate them.³⁵ Some doubt was cast on this ruling, however, by the Court's end-of-term decision in *St. Mary's Honor Center v. Hicks*.³⁶

Labor arbitrators have occasionally had to rule on claims of unjust dismissal brought by gay employees under typical just-cause provisions of collective bargain-

ing agreements. Arbitrators have normally applied the well established rule that conduct off the job, such as homosexual conduct, cannot constitute just cause for discharge unless the employer can prove a significant adverse impact on its business by retention of the employee. Thus, where a male airline flight attendant was charged with improper sexual advances to a young male employee at a hotel where the flight crew was staying, the arbitrator ordered reinstatement because the airline failed to show that continued employment of the now-repentant employee would damage its business in any way.³⁷ Similarly, an arbitrator found no cause for discharge of a grocery clerk for taking part in a lesbian party during off-hours.³⁸

About twenty states ban employment discrimination on the basis of marital status. While marital status and sexual orientation discrimination claims are conceptually quite distinct, the ban on same-sex marriage maintained by all the states means that any policy denying benefits to unmarried employees with same-sex partners who live in emotionally and financially interdependent relationships similar to married employees may be subject to challenge on grounds of marital status discrimination. While such claims have not been uniformly successful, they are being made with increasing fervor, and at least one appellate court has concluded that they are plausible claims deserving of a full airing at trial. In *Gay Teachers Association v. New York City Board of Education*,³⁹ the court accepted the argument that the plaintiffs, protesting the ineligibility of their domestic partners for inclusion on the school system's employee benefit plans on the same basis as employee spouses, had stated a valid cause of action under a state law

³⁴ 42 FEP 787 (D.D.C. 1987).

³⁵ *Pruitt v. Cheney*, 943 F.2d 989 (9th Cir. 1991), cert. denied, 113 S.Ct. 655 (1992).

³⁶ No. 92-602, 1993 Westlaw 220265 (U.S., June 25, 1993).

³⁷ *Hughes Air Corporation & Association of Flight Attendants*, 73 LA 148 (Barsamian, Arb., 1979).

³⁸ *Ralphs Grocery Co. & Retail Clerks Union*, 77 LA 867 (Kaufman, Arb., 1981).

³⁹ 585 N.Y.S.2d 1016 (App.Div., 1st Dept. 1992).

forbidding marital status discrimination and a city ordinance forbidding both marital status and sexual orientation discrimination. Private sector employers are probably immune from such suits because of preemption of state and local civil rights statutes by the federal pension and benefits laws (which do not apply to public sector employee benefit plans), but proposals floating around Congress to tinker with the preemption provisions may open up this new field for litigation in the future.

Although Title VII of the Civil Rights Act of 1964⁴⁰ does not cover sexual orientation, either expressly or by interpretation, several courts have accepted the view that same-sex sexual harassment is actionable under the quid pro quo theory.⁴¹ Under this theory, both gay and non-gay employees who suffer unwanted sexual advances from other employees or supervisors may find legal protection. On the other hand, federal courts have refused to extend the hostile environment theory of sexual harassment under Title VII to situations in which employees suffer such harassment because they are perceived to be gay.⁴² The courts have reasoned that the quid pro quo theory proceeds on the ground that the employee was harassed because of his or her gender, while the hostile environment theory fails to proceed because the harassment is due to sexual orientation rather than gender.

Of course, if gay employees suffer discrimination because they are perceived as having AIDS, being at risk for AIDS, or associating with persons with AIDS, they may seek protection under the Americans With Disabilities Act (ADA)⁴³ and similar state laws. As its express language, legislative history and interpretive regulations make clear, the ADA was not intended to ban discrimination on the basis

of sexual orientation, per se, but if AIDS is a motivation for discrimination, the discriminatee is protected, regardless of his or her sexual orientation.

Apart from constitutional or statutory causes of action, lesbian and gay employees may also be protected by voluntarily adopted employer non-discrimination policies, contained in work place rules, personnel manuals and employee handbooks which, in many states, are treated as part of an enforceable contract of employment. Such policies first began to be adopted by major corporations in the 1970s in response to surveys of large companies undertaken by the National Gay and Lesbian Task Force. Many more such policies were adopted during the 1980s by employers determined to show support for employees battling the AIDS epidemic or responding to the recommendations of professional societies or accrediting organizations. For example, early in the 1990s many law schools adopted non-discrimination policies in response to adoption of a non-discrimination by-law by the Association of American Law Schools. In some cases, the policies were accompanied by voluntary recognition of employees' domestic partners for purposes of benefits entitlements. While some of these policies were not legally binding, they created an atmosphere in which employee complaints of discrimination might be taken seriously by company managers, even in the absence of legal intervention.

Conclusion

Over the past quarter century, the law has taken great strides in extending protection against discrimination in employment to lesbians and gay men, a group totally bereft of legal recognition at the beginning of this period. While comprehensive federal coverage does not yet exist, the debate on service by gays in the

⁴⁰ 42 U.S.C. Sec. 2000e (1991).

⁴¹ *Joyner v. AAA Cooper Transportation*, 597 F.Supp. 537 (M.D.Ala. 1983), affirmed without published opinion, 749 F.2d 732 (11th Cir. 1984); *Wright v. Methodist Youth Services*, 511 F.Supp. 307 (N.D.Ill. 1981).

⁴² *Dillon v. Frank*, 952 F.2d 403 (table), 58 EPD ¶ 41,332 (6th Cir. 1992); *Carrero v. Local 226 I.B.E.W.*, 54 FEP 81 (D. Kan. 1990).

⁴³ 42 U.S.C. Sec. 12101-12213 (1990).

military suggests that the time is soon coming when there will be a national consensus to forbid sexual orientation discrimination, at least in civilian employment. This conclusion arises from the tenor of the debate, in which even many conservative commentators agree that sexual orientation discrimination in employment is wrong, but contend that the special circumstances of the military make it justifiable in that sphere.

Meanwhile, a large minority of the population either lives in states or localities where sexual orientation discrimination is

unlawful or works for employers bound by express or implicit policies of non-discrimination, imposed either by constitutional mandate, administrative fiat, or well-established policy. At the rate new sexual orientation laws are being enacted by states and localities, it seems that coverage of a majority of employers is not far off, so this is an issue as to which labor relations practitioners need to be well-informed.

[The End]

Jury Award Reduced in ADA Suit

A jury award of \$572,000 in the EEOC's first lawsuit under Title I of the Americans with Disabilities Act was reduced to \$222,000 by the federal district court in Chicago. Statutory caps on compensatory and punitive damages required the reduction (*EEOC v. AIC Security Investigations, Ltd.*, 61 EPD ¶ 42,289). The defendant violated the ADA by firing an employee because he had terminal brain cancer, despite the fact that he was still able to perform the essential functions of the job at the time of the firing. The EEOC unsuccessfully sought to have the \$200,000 cap applied separately to the compensatory and punitive awards, but the court ruled that the statute applies the cap to both awards combined.

The EEOC also argued unsuccessfully that the cap applies only to businesses, not to business owners sued as individuals. The court rejected the defendant's argument that the \$50,000 compensatory award was excessive. However, the award of \$500,000 for punitive damage was excessive, the court ruled, lowering it to \$150,000 and bringing the combined awards to the statutory limit of \$200,000 (the statute prohibits informing juries of the limit in order to avoid influencing their deliberations). The award of \$22,000 in back pay was not affected by the cap.