

SEXUAL PREFERENCE AND EMPLOYMENT RIGHTS

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ABSTRACT

This article addresses the hotly debated topic of sexual preference and the legal rights of gays in employment. We focus on federal and state legislation and policies regarding sexual preference in employment and the related court decisions. Toward the end of the article, we discuss same-sex sexual harassment. Generally, we show that a person's sexual orientation is protected much more strongly in the public sector than in the private sector and that the courts are gradually strengthening the employment rights of people that we commonly call "gay" today, e.g., homosexuals, lesbians, bisexuals, or transgendered persons. When we later use the term "gay," we will be referring to this broad classification unless we specifically narrow the term to include fewer groups of people.

Sexual orientation, more specifically, gay rights, is one of the most divisive and emotional subjects of our time. This issue has once again attracted the nation's interest because of several recent events: 1) the Supreme Court ruling in *Lawrence and Garner v. Texas* striking down a Texas law prohibiting consensual homosexual activity in the privacy of one's home [1], 2) Massachusetts' high court finding that the state constitution requires recognizing same-sex marriages [2], 3) the failed attempt to pass a constitutional amendment outlawing gay

marriage [3], and 4) the rejection of same-sex marriage in all eleven states where it appeared on the 2004 ballot [4]. Moreover, certain recent rulings regarding the Civil Rights Act, of which many employers may not be aware, are affording those of differing sexual orientations greater employment protections than ever before [5].

While there are no reliable statistics on the broad classification of people we have termed “gay,” it is clear that they comprise a significant share of the population and a significant part of the workforce. We can use statistics available on the homosexual population as a surrogate measure to provide at least a floor estimate for those with sexual orientations other than heterosexual. Ten percent seems to be the most agreed-upon number for gay residents in the United States [6]. Studies based on interviews of males have placed the number of male homosexuals at least at 2.3 percent, while studies based on anonymous surveys place that number as high as 22 percent, and also suggest that gay women could comprise about 17 percent of the population [6]. Exit polls in the 2004 presidential election put the number of male homosexuals at 4 percent of those who voted [7]. It is clear that millions of people in this country with sexual orientations other than heterosexual are employed by a multitude of employers.

Because gays often confront both explicit and subtle discrimination in the workplace [6], employers should understand the applicable statutes and corresponding case law. To that end, we conducted a review of the most relevant case law (more than fifty cases) on this subject, utilizing a Lexus Nexus keyword search. Most of the cases were filed by homosexuals. The results of our analysis and the guiding principles are discussed within the context of public and private sector employment.

PUBLIC SECTOR

There is no federal law that prohibits sexual orientation discrimination for all public sector organizations. The central protection on the topic of sexual orientation for anyone employed in the public sector is the Constitution, particularly its Equal Protection Clause. “The Equal Protection Clause is designed to police group-based discrimination by the government [7, p. 429].” Depending on the level, pattern, and pervasiveness of the discrimination against an identifiable group, the courts may review cases under the Equal Protection Clause based on strict, intermediate, and rational standards of review [7]. The legal standard in sexual orientation cases has until recently been one of rational review.

Under this standard, the government need only demonstrate that “the classification itself is rationally related to a legitimate government interest [7, p. 429].” In general, this means that a person’s sexual orientation cannot adversely affect the functioning of the unit or its public reputation [7]. For example, a district court refused to dismiss a case involving a White House employee with an excellent performance record who was terminated after he voluntarily admitted to

his supervisor that he was homosexual. The courts stated, “the government may not discriminate against homosexuals for the sake of discrimination [8, p. 602].”

Public Openness

A common theme in many of the sexual orientation cases concerns whether the plaintiff’s homosexuality was kept private. In one such case heard during the height of the Cold War, a National Aeronautical and Safety Administration (NASA) employee was arrested for soliciting a homosexual encounter and, despite his record of good performance, was subsequently terminated by the agency because of his “immorality” [9]. The court found the immorality prohibition to be overly broad and difficult to enforce. There was also evidence that it was “custom” at the agency to terminate anyone who was found to be homosexual, regardless of whether there was a real or imagined security problem. In the end, the court determined that the individual had kept his homosexuality private, had not made offensive overtures on the job, and since NASA could not demonstrate a legitimate security concern, ruled for the plaintiff [9].

In another case, a homosexual male employed as a clerk typist with the Equal Employment Opportunity Commission (EEOC) was terminated because of his homosexuality [10]. However, this employee had been publicly open about his life style. At the time of his employment he informed the agency that he was a homosexual. He had also told those in his office, had been interviewed several times for local newspapers, had appeared on TV as a result of attempting to obtain a marriage license, and had been seen publicly kissing and embracing a man. He apparently did all of these activities while identifying himself as a member of a federal agency. As a result, the Ninth Circuit ruled that the public flaunting of his sexuality impaired the efficient operation of the EEOC and therefore it upheld his dismissal [10].

Those singled out for ridicule and harassment based on sexual orientation may find shelter under the Equal Protection Clause as well. In fact, the Seventh Circuit reversed a summary judgment for the city of Belleville, Illinois, involving the harassment of two sixteen-year-old heterosexual male laborers who were thought to be homosexual [11]. They were singled out and treated differently in part, because one wore an earring and their co-workers did not feel that this conformed to an appropriate male appearance. As a result they were subjected to name calling and sexually related comments about their “gayness,” along with unwanted physical touching [11].

Freedom of Association

Equal protection under the law in the public sector is not the only possible defense for a sexual orientation case; other constitutional protections may be invoked as well. In *Shahar v. Bowers* a job offer was withdrawn after the deputy attorney general of the Georgia Department of Law learned that a prospective female attorney was marrying another woman [12]. She argued

that her marriage was protected under the Supreme Court ruling that intimate relationships are constitutionally protected from unjustified government interference [12, 13].

While the court found that the union was protected activity under freedom of association, it also noted that she had not kept the matter private. She had told a number of department employees, indicated on a personnel form that she was marrying a woman, and was planning a wedding for which she had sent out a large number of invitations (some to department employees) [12]. As a result, it could be legitimately argued that her activities would affect the efficient and creditable operation of the department because she would be expected to prosecute cases involving homosexual unions and violations of the state sodomy law. It would not be creditable to employ someone who would likely be viewed by the public as supporting the very illegal activity that she would be expected to enforce. As a consequence, the court ordered a summary judgment for the employer [12].

Although the decision was later overturned on procedural grounds, the basic principles remain [14]. First, she did not keep her personal sexual preference private. Second, while citizens have the right to associate with those of their own choosing, they cannot do so when it is likely to jeopardize the efficiency and operation of the organization in which the person is employed.

Free association was also an issue in another case where a female graduate assistant was romantically involved with one of her female students [15]. Because of this relationship the university transferred her to a nonteaching position at the end of the term, precipitating her lawsuit. However, she lost the case because of several complicating factors:

1. There was evidence that the relationship was not private. Many other students were aware of the relationship, and there had been a public confrontation requiring police intervention between her and the student's parents both at a local shopping mall and at a campus location [15].
2. The court also concluded that her actions could have violated the mission and effectiveness of the university, because teachers are supposed to be role models for students, and such a relationship could impede or intrude upon the teaching process [15]. The relationship also could adversely affect the opinions of students about the university and hamper the university's student-enrollment efforts.
3. But her rights to free association were not violated because the university had never told her to quit dating the student [15].
4. Her equal protection rights were not contravened either. Apparently, other instructors had had heterosexual sexual relationships with students without university action, but the court found these relationships had been kept much more private, and there had been no complaints filed against the instructors because of their intimate relationships with their students [15].

Workers in the public sector are free to choose their friends. However, the employer is also free to change the employee's work assignment if it determines that such a relationship adversely affects the functioning of the organization.

More recently, a female police officer was disciplined for having an affair with a female subordinate [16]. In an unpublished opinion, the Ninth Circuit made clear in denying her free-association claim that "sexual relations among officers in a police department may be an appropriate matter of inquiry with respect to employment in light of their possible adverse effect of morale, assignments, and command-subordinate relationships" [16, p. 775]. As a result the court upheld her discipline. This ruling further illustrates the right of public sector organizations to interfere in a person's right to free association when that right adversely affects the organization's operations.

Freedom of Speech

Further complicating matters in the public sector is the issue of free speech. In matters relating to free speech, the Supreme Court requires the judiciary to evaluate restraints on a public sector employee's speech to balance "the interests of the employee commenting on matters of public concern and interest to the State in promoting the efficiency of the public services it performs through its employees" [17, 18, p. 2].

For example, in *Acanfora v. Board of Education*, a teacher was dismissed after the board learned that he was a homosexual from his appearance on a Public Broadcasting System television program designed to help parents and their homosexual children cope with problems related to their sexual orientation [19]. He "spoke about the difficulties homosexuals encounter, and, while he did not advocate homosexuality, sought community acceptance. He also stressed that he would not discuss his sexuality with his students" [19, p. 500]. The court went on to state, "The record discloses that press, radio and television commentators considered homosexuality in general, and *Acanfora's* plight in particular, to be a matter of public interest about which reasonable people could differ" [19, p. 500]. As a result, even though his sexual orientation was made public, such speech is protected by the First Amendment because it relates to issues of public concern [19].

Consistent with this case, homosexuals working in an official capacity for a public entity are protected even if they testify in favor of civil rights for those of sexual orientations other than heterosexual [20]. Basically, public statements about matters of public concern, as those articulated in *Acanfora* [19] and *Ooteghem v. Gray* [20] are protected regardless of how public the statements and openness of their sexuality are. But organizations may take action against those of differing sexual orientations who address these issues under the rubric of public concern when such behavior is inconsistent with the mission of those organizations.

For example, a homosexual assistant scoutmaster was a member of several homosexual rights organizations. His superiors terminated him because they believed that this conduct was incongruous with the mission and values of the Boy Scouts, which espouses being “morally straight” and “clean” [21, p. 642]. The Supreme Court ultimately ruled that a person’s First Amendment rights are not absolute and may be overridden by compelling state interests [21]. In this case the First Amendment rights of the Boy Scouts to espouse the values it deems important. Given that the plaintiff was a community leader who was open and honest about his gay sexual orientation, the court found that the mission of the Boy Scouts would be jeopardized because he would not be supportive of the Boy Scouts’ mission and exemplary role model to his scouts [21].

Speech pertaining to matters of purely personal concern is not sheltered by the free speech provisions of the First Amendment [22]. The circumstances surrounding *Rowland v. Mad River Local School District* illustrate this point [23]. A non-tenured guidance counselor told a secretary, the assistant principal, and several other teachers that she was bisexual and had a female lover; these revelations led to her dismissal. At the time there was no evidence of any public concern in the community or at the school pertaining to the issue of bisexuality among school personnel. Moreover, she had requested those she told of her bisexuality and love for another woman to keep her disclosure confidential. In ruling for the school system the Sixth Circuit noted that its actions did not violate her free speech rights and that “Ms. Rowland’s requests for confidentiality and the context of her discussions with others indicate that she did not consider her statements to be matters of public concern” [23, p. 448].

In another, more recent, sex-related case, the Supreme Court provided further guidance as to when the state may take action for off-the-job sexual activity as it relates to free speech protections under the First Amendment. In *City of San Diego v. John Roe*, a San Diego police officer sold videos of himself on the adults-only section of eBay performing sex acts in a police uniform [18]. He also sold custom videos and other items including police equipment and official uniforms of the San Diego Police Department while identifying himself as being employed in law enforcement [18].

His supervisor was able to detect and discover his identity through his police-related user name. He was first warned and then terminated when he did not cease his unauthorized activities. The court noted that although his actions took place outside of the workplace, he “took deliberate steps to link his videos and other wares to police work, all in a way injurious to his employer” [18, p. 2]. Moreover, the court found that his activities were matters of personal and not public interest [18]. Free speech is protected only when a citizen speaks upon matters of public concern and not when it relates to matters of personal interest [18].

CURRENT FEDERAL AGENCY POLICIES

The Civil Service Reform Act of 1978 prohibits federal agencies from discriminating against a nonprobationary employee on the basis of “conduct which does not adversely affect the performance of the employee or applicant or the performance of others” [24]. Many federal agencies over the years have adopted more explicit policies banning discrimination on the basis of sexual orientation unless there is a job-related reason for doing so [7]. Some of these agencies include: Agriculture, Commerce, Education, Energy, Environmental, Health and Human Services, Housing and Urban Development, Interior, Justice, Labor, State, Transportation, Treasury, CIA, FBI, and the White House [7]. Even the military has adopted a policy that is more tolerant of homosexuals than its previous practices.

Military Service

In 1994 Congress enacted 10 U.S.C. Sec. 654 to replace an earlier antihomosexual policy for military personnel which stated “homosexuality is incompatible with military service” [25, p. 93]. The new law does not require recruits to divulge their sexual orientation (“don’t ask/don’t tell”), but once their orientation is revealed, to remain in the military they must demonstrate that they will not engage in homosexual acts [26]. More specifically, the act states that it 1) requires discharge of any service member who engages in or intends to engage in homosexual acts; 2) makes statements that s/he is homosexual and fails to rebut the presumption, raised by the state, that s/he has a propensity to engage in homosexual acts; or 3) who has married or attempted to marry a person of the same biological sex [26].

This law has been upheld by the courts [27; cert. denied, 28] on the basis of rational review, where “the military has at least a legitimate interest in excluding service members who engage in homosexual conduct. . . . Military leaders have determined that excluding those with a propensity to engage in homosexual acts, like providing separate housing for men and women, reduces sexual tensions that would jeopardize unit cohesion, the cornerstone of an effective military” [27, p. 1135]. There have since been circumstances where once a soldier’s homosexuality was revealed, the person clearly stated that s/he would not engage in such acts and was thereby retained within the military [27]. In other situations, soldiers who did not rebut the presumption that they would engage in such acts or did not pledge to refrain from such behavior were dismissed from their respective services [27].

PRIVATE SECTOR

In general, the constitutional protections afforded those in the public sector do not apply to the private sector workforce [7]. In fact, in all but one state (Montana), private sector companies are under the employment-at-will doctrine [29]. This

means that employers may terminate a person's employment for any reason absent an opposing federal or state law.

Civil rights laws (which, with few exceptions also apply to the public sector) do restrict firms from discriminating against various protected classes in the private sector without a job-related reason (actions must also be equally applied). Some protection is afforded homosexuals with AIDS and those who are HIV-positive under the Americans with Disabilities Act (ADA). In 1998, the supreme Court ruled in *Bragdon v. Abbott* that someone who is HIV-positive does have an impairment that substantially limits one or more major life activities in that it is a condition that is inherently disabling [29, 30]. However, ADA does not explicitly prohibit sexual orientation discrimination.

It is under the Civil Rights Act (as amended) that those of differing sexual persuasions usually file for protection [29]. However, until recently, charges filed by homosexuals, transgendered persons, et al. under the sex discrimination provisions of the civil Rights Act had been uniformly denied by the courts because Congress had clearly intended to shield *gender* but not *sexual preference* [29, 31]. However, the legal landscape began to change innocently enough in 1989 with the Supreme Court's landmark decision in *Price Waterhouse v. Hopkins* [32].

Price Waterhouse v. Hopkins

In *Price Waterhouse v. Hopkins*, a senior female manager was denied a partnership in the firm, in part because she was perceived to be acting in too masculine a manner. Management felt that she needed to walk, talk, and dress in a more feminine manner, wear more jewelry, and be less aggressive [32]. Because such comments bespeak of gender discrimination, the Supreme Court found that she was discriminated against because she failed to act like a woman [32]. The court made clear that discrimination "because of 'sex' includes sexual stereotyping under which an employer who acts on the basis of a belief that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender" [32, p. 250]. The Court emphasized that "we are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group" [32, p. 250].

Smith v. City of Salem

In August of 2004, seizing upon these same arguments, a transsexual was able to prevail in a sex discrimination claim filed under Title VII [5]. A lieutenant for the Salem Fire Department who had been diagnosed with gender identity disorder (GID) began exhibiting more feminine conduct and appearance. Co-workers began commenting that he did not look "masculine enough." Soon after that, he disclosed his condition and his medical treatment to supervision, where upon management fabricated a scheme to terminate him [5]. The department actually suspended him for an alleged infraction of a city/fire department policy, even

though he had worked for seven years without any negative incidents [5]. In ruling for the plaintiff the sixth Circuit noted:

Title VII's prohibition of discrimination because of sex protects men as well as women. After *Price Waterhouse*, an employer who discriminates against women because, for instance, they do not wear dresses or make-up, is engaging in sex discrimination because the discrimination would not occur but for the victim's sex. It follows that employers who discriminate against men because they *do* wear dresses and make-up, or otherwise act femininely; are also engaging in sex discrimination, because the discrimination would not occur but for the victim's sex [5, p. 572].

This ruling was also partly a natural outgrowth of sexual harassment cases involving same-sex harassment.

Same-Sex Sexual Harassment

It wasn't until 1998 that same-sex sexual harassment was found to be actionable under Title VII of the Civil Rights Act [33]. In *Oncale v. Sundowner* a roustabout was subjected to ongoing sexually related humiliation by coworkers, which included name calling, physical assault, and threats of rape [33]. Complaints to supervisory personnel produced no action. In its historic decision, the supreme Court said "that nothing in Title VII necessarily bars a claim of discrimination 'because of . . . sex' merely because the plaintiff and the defendant are of the same sex . . . Title VII does not prohibit all verbal or physical harassment in the workplace; it is directed only at discrimination . . . because of . . . sex" [33, p. 80]. Therefore, as long as a plaintiff can show the same-sex harassment was because of sex, s/he may prevail. Also, the victim must demonstrate to the court that the objectionable behavior is so offensive as to alter the "conditions" of the victim's employment [34]. Conduct not meeting this standard is not protected [34].

Soon after the *Oncale* decision, the Seventh Circuit upheld a same-sex harassment charge under Title VII in *Shepard v. Slater Steels Corporation* [35]. A stock clerk was repeatedly subjected to harassment by a male co-worker exposing himself to the victim and making obscene gestures (rubbing his private area, playing with himself, etc.) and verbalizing extreme sexually explicit remarks [35, p. 1007]. The victim frequently complained to the company, but remedial action was not forthcoming [35]. While the court found that the harasser had flashed at least one female, the bulk of his actions were directed at males and in particular the plaintiff. In addition, evidence revealed that the perpetrator's comments went beyond casual obscenity that might naturally occur in a workplace. As a result, the court found that the victim had been harassed because of his sex that of being a male [35].

A valid same-sex claim may also occur when the harasser is homosexual and makes sexual advances toward someone of the same sex (assuming the advances are unwelcome and sufficiently pervasive to change the conditions of the work

environment) [33, 36]. In one case, a known homosexual was making sexual overtures to a heterosexual male [36]. He continued making explicit homosexual-related comments after his advances were not reciprocated and even touched the victim in an unwelcome sexual manner [36]. The court found that these actions were directed at the victim because of his sex (male) and hence was covered under Title VII [36, 37]. The same principles would have applied if the victim had been a homosexual.

However, plaintiffs in these cases must clearly establish a causal link between the harassment and the adverse employment action. For example, in *Llampallas v. Mini-Circuits*, two lesbian lovers had worked together for a long time, suffered a bitter breakup, and then one began sexually harassing the plaintiff [38]. The plaintiff argued that her former lover, who was a supervisor, had attempted to persuade her to resume their affair under the threat of termination. In time, a higher-level male manager did terminate the plaintiff. However, he testified that he was never aware that the women were lesbians or sexually involved despite numerous visits to their home for dinner. The plaintiff was unable to demonstrate to the court that there was link between the supervisor's harassment and the higher-level manager's terminating her employment [38].

Alleging that one is being harassed just because of one's sexual orientation will not usually succeed in court [38, 39, 40]. For example, in *Hamm v. Weyauwega Milk Products*, a heterosexual male was repeatedly called "faggot," "bisexual," and "girl scout" and threatened with physical harm by other males who thought he was a homosexual. He alleged "that his co-workers did not believe he fit the sexual stereotype of a man, and that their sexual stereotyping was evidence of discrimination 'because of' sex" [39, p. 1062]. Nevertheless, it was clear from the record that the worker himself perceived that the conduct of his co-workers related to their belief about his sexual orientation [39]. His close friendship with another male worker had led the other men to conclude that it was romantic in nature. Moreover, there was ongoing sexual horseplay among the workers (male and female alike). Consequently, the court determined that he was harassed because of his erroneously perceived sexual orientation and not because he was a male and dismissed the case [39].

Similarly, in *Bibby v. Philadelphia Coca Cola Bottling Co.*, abusive name-calling such as "Everyone knows you're a faggot," "Everyone knows you are gay," and other more intemperate remarks [41, p. 511] was ruled inactionable under Title VII because it was a result of the victim's sexual orientation. In this case, a homosexual worker was forced to admit his alternative sexual life style because of an illness, and this admission led to verbal abuse and numerous adverse employment actions. Likewise, the Seventh Circuit ruled in *Spearman v. Ford Motor Company* that a homosexual who had been sexually harassed by his co-workers (male and female), was harassed because of his different sexual orientation and not because of his gender [42]. In a review of the "because of sex" literature in 2000, Lewis noted that as long as

harassment actions are because of one's sexual orientation, there is no protection under the Civil Rights Act [37].

However, the Ninth Circuit has since taken a different position on the relevance of sexual orientation [43]. In *Rene v. MGM Grand* the plaintiff presented evidence that he was frequently harassed by male co-workers over a two-year period because he was a homosexual. Among other actions, they continually whistled and blew kisses at him, called him sweetheart, told crude jokes, and forced him to look at pictures of men having sex [43]. The district court dismissed the case on the basis that harassment based on sexual orientation is not actionable under Title VII. But the Ninth Circuit disagreed, noting that in *Oncale v. Sundowner* the plaintiff was able to demonstrate that the ill treatment he endured was because of his sex (male). In proving this, he "did not need to show that he was treated worse than members of the opposite sex. It was enough that he suffered discrimination in comparison to other men" [43, p. 1065]. The court went on to say:

Title VII prohibits offensive "physical conduct of a sexual nature" when that conduct is sufficiently severe or pervasive. . . . It prohibits such conduct without regard to whether the perpetrator and the victim are of the same or different genders. . . . And it prohibits such conduct without regard to the sexual orientation—real or perceived of the victim" [43, p. 1065].

Harassment Based on Sexual Stereotype

Not all sexual orientation-related harassment claims must be same-sex. While the First circuit sustained a lower court's summary judgment for an employer in a case involving a homosexual on procedural grounds, it admitted that the plaintiff's argument drawn from Price Waterhouse's prohibition of discrimination based on sex-role stereotypes was a viable legal argument [44]. The plaintiff contended that he failed to meet his co-workers' (male and female) stereotyped standards of masculinity and therefore he was harassed because of sex [44]. Apparently, there was "evidence that his peers mocked him by speaking in high-pitched voices and mimicking feminine movements" [44, p. 255]. However, he failed to enter these arguments at the district level, and the case was dismissed [44].

Nevertheless, the "stereotyped defense" is being successfully employed in other cases. For example, in *Heller v. Columbia Edgewater Country Club*, a harassment lawsuit brought by a lesbian was allowed to go to trial on the basis of disparaging and harassing comments related to gender stereotypes such as, "Oh, I thought you were a man," "Do you wear the [penis] in the relationship," and "I thought you wore the pants" [45, 46, p. 1214].

Sexual orientation may also be protected under certain conditions, such as same-sex sexual harassment, because of sex under state anti-discrimination laws, and within the parameters of various state statutes that proscribe sexual orientation discrimination.

STATE LAWS

Nearly all states have anti-discrimination laws similar to the Civil Rights Act that include sexual harassment protections. At least thirteen states and the District of Columbia directly prohibit discrimination based on sexual orientation. These include: California, Connecticut, Hawaii, Kentucky, Massachusetts (except for pedophiles), New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, and Wisconsin (these laws apply to both the public and private sector) [7, 47, 48, 49]. At least nine states protect sexual orientation only in the public sector (Alabama, Arizona, Colorado, Delaware, Illinois, Indiana, Michigan, Montana, and Pennsylvania) [49]. A number of states actually outlaw gender stereotype discrimination in the workplace including California, Kentucky, Minnesota, Pennsylvania, Rhode Island and New Mexico [50]. Connecticut, New Jersey and Massachusetts have court and administrative rulings offering similar protections [50]. Several municipalities have also passed antisexual orientation discrimination legislation, such as New York City [51]. However, these laws still allow those of differing sexual orientations to have their employment adversely affected for job-related reasons [52].

CONCLUSIONS

The legal landscape surrounding this issue is complex and evolving. In 2003, the Supreme Court overturned the benchmark case in this area, *Bowers v. Hardwick* which had been adjudicated seventeen years earlier [47, 53]. In *Bowers*, the court held that homosexual activity was not a fundamental right protected by the Fifth Amendment [53]. But in its most recent decision, *Lawrence and Garner v. Texas* [1], the court found *Bowers* to be in error and held that consensual private sexual intimacy, homosexual or otherwise, is protected activity under the Fourteenth Amendment's Equal Protection and Due Process clauses and cannot be singled out by a state law [1, 54].

There is even some question as to whether the rational review standard under which these cases are heard will continue to be employed by the courts. In *Watkins v. United States Army*, the Ninth Circuit determined that "it is indisputable that homosexuals have historically been the object of pernicious and sustained hostility. . . . In any case, the discrimination faced by homosexuals in our society is plainly no less pernicious or intense than the discrimination faced by other groups already treated as suspect classes" [55, p. 1440]. As a result, the circuit court held the Army to the tougher, strict-scrutiny standard, whereby the government must establish that its actions are "necessary to promote a compelling governmental interest" [7, p. 429]. While the Supreme Court has not addressed this issue directly, it let the Ninth Circuit's ruling in *Watkins v. United States Army* stand by denying certiorari [cert. denied, 56].

A Model Uniform Employment Termination (META) bill is before Congress. It would require employers not to discharge workers without good cause [29]. META would protect sexual orientation. While this legislation has been in Congress for some times and appears stalled [29], one can never foresee what event or series of events might stimulate its ultimate passage. Besides, with the recent trends in the case law, it may not be long before the courts develop a legal theory that would effectively prohibit sexual orientation discrimination.

Given the complex and evolving nature of the case law, the simplest, fairest, and most prudent advice for employers is to treat those of differing sexual persuasions as they would any other employee unless there is a sound job-related reason to do otherwise. In fact, many companies including Hewlett-Packard, Best Buy, and Dell, have anti-discrimination and diversity policies inclusive of sexual orientation [57].

Employers must educate managers and employees alike not to judge people solely on the basis of their sexual orientation, just as they have schooled their workforces over the past four decades not to judge people's gender, religion, or national origin, or the color of their skin, but rather, by the strength of their deeds. At the end of the day, firms should be more concerned with attracting and employing workers who are motivated to perform at high levels of productivity rather than focusing on some peculiar personal characteristic unrelated to a firm's bottom line. In the passionate furor of our beliefs, religious or otherwise, let us temper that passion with tolerance, the same tolerance of others that has been one of the successful cornerstones of our democracy, no matter how different another's beliefs and actions are from our own.

ENDNOTES

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