



## Anti-discrimination Statutes and Ordinances

by Gregory A. Johnson

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In the thirty-plus years of the modern lesbian and gay civil rights movement, Congress's response to sexual orientation issues has ranged from deafening silence to overt hostility, with very little to show after a generation of activism. The results have been dramatically different in a growing number of states and many cities and towns.

State statutes and local ordinances are important because they help prevent discrimination, and they can serve as the basis of a lawsuit if discrimination nevertheless occurs. They also symbolize society's acceptance of lesbians and gay men.

Some scholars have suggested that anti-discrimination laws are a necessary precursor to obtaining civil union or same-sex marriage. Professor William Eskridge, of Yale Law School, espouses a "progressivity thesis" of lesbian and gay civil rights. He argues that gains in civil rights occur incrementally and sequentially, and that the process "proceeds in little steps taken in a particular order." Thus, the "decriminalization of sodomy makes it easier to adopt anti-discrimination laws, which in turn make it easier to recognize same-sex unions." Seen in this light, the spread of anti-discrimination laws at the state and local levels are a very encouraging sign for the future of glbtq rights.

### Statutes

Fourteen states have passed statutes protecting lesbians and gay men from discrimination. The "deluxe" anti-discrimination statutes prohibit discrimination in employment, education, public accommodations, housing, and credit. Seven of the fourteen states (Connecticut, Massachusetts, Minnesota, New Mexico, New York, Vermont, and Wisconsin) have this type of across-the-board protection. The remaining seven states (California, Hawaii, Maryland, Nevada, New Hampshire, New Jersey, and Rhode Island) protect lesbians and gay men from discrimination in some or most of these categories, but stop short of complete protection.

Other states are considering anti-discrimination measures, with much attention focused on Illinois as the next big state likely to enact such a law.

Maine's anti-discrimination statute was repealed by voters in a statewide referendum in 1998.

Opponents of lesbian and gay civil rights, wary of the progressive nature of the movement as highlighted by Professor Eskridge, often push for language in anti-discrimination statutes stating they do not extend to marriage or family rights. For example, Vermont's anti-discrimination statute, passed in 1992, states that "prohibiting discrimination on the basis of sexual orientation shall not be construed to change the definition of family."

More offensive language can be found in the Massachusetts anti-discrimination statute (1990), which prohibits discrimination based on sexual orientation, but then gratuitously states that the term sexual

orientation "shall not include persons whose sexual orientation involves minor children as the sex object."

The latest trend in state legislation is to prohibit discrimination based on gender identity. Minnesota (1991) was the first state to pass a law protecting the transgendered and others who do not conform to gender stereotypes. In the last two years, three states (Rhode Island, New Mexico, and, most recently, California) have added gender identity to their anti-discrimination statutes.

Conflict sometimes arises within the lesbian and gay community as to whether proposed anti-discrimination bills should include gender identity. When the New York legislature was considering an anti-discrimination bill in 2002, the state's largest gay lobbying group fought an effort by transgendered activists to include gender identity, saying such a move would "cripple" the bill's chances of passing. The bill eventually passed without protections for the transgendered.

Four months after the New York law took effect, New Mexico passed an anti-discrimination statute extending full protection not just to lesbians and gay men, but to the transgendered as well. It is hard to fathom how adding gender identity could cripple the bill in New York but not in New Mexico, which, until recently, was a "gay rights backwater."

As other states consider anti-discrimination statutes, transgender activists such as Pauline Park of the New York Association for Gender Rights Advocacy are urging the lesbian and gay community not to "throw the transies overboard in the name of political expediency," as quoted by Mubarak Dahir.

## **Ordinances**

The Human Rights Campaign (HRC) reports that in 2002 more cities and counties added sexual orientation to their anti-discrimination ordinances than in any other year (a total of 15). In all, over 140 cities and counties have ordinances protecting lesbians and gay men from discrimination, and 53 cities and counties now also protect the transgendered. Fourteen cities and two counties added gender identity to their anti-discrimination ordinances in 2002, an increase of more than 300% over 2001.

Like state statutes, local ordinances vary in their coverage. Some just prohibit employment discrimination, while others include protection from discrimination in housing, education, credit, and public accommodations. Some ordinances go beyond even the most comprehensive anti-discrimination statutes.

In 1997 San Francisco became the first city to pass an "equal benefits" ordinance. It requires all contractors doing business with the city to offer employees in a domestic partnership the same benefits offered to married employees. According to the San Francisco Human Rights Commission, over 50,000 employees of contractors doing business with the city have taken advantage of the domestic partner benefits the contractors now must offer.

After the San Francisco ordinance was passed, United Airlines brought suit against the city, claiming the ordinance violated the interstate commerce clause of the Constitution. This suit eventually was settled and United now offers domestic partner benefits. Another suit, brought by S.D. Meyers Inc., an Ohio electrical company, was dismissed by the Ninth Circuit in July 2003. Meyers has said it is considering an appeal to the Supreme Court. It believes that "giving health insurance to unmarried partners would be approving a lifestyle contrary to its Christian principles."

The San Francisco ordinance has become the model for other cities to follow. Six other cities have passed "equal benefits" ordinances (Los Angeles, Oakland, Berkeley, Minneapolis, Seattle, and Tumwater, Washington). According to HRC, these ordinances collectively are responsible for more than 4200 companies instituting domestic partner benefits.

Some courts have held that local anti-discrimination ordinances cannot create rights enforceable in state

court since this would exceed the city or county's home rule powers. A growing number of courts, however, have concluded that local ordinances can be enforced in state court.

Anti-discrimination ordinances are subject to repeal by referendum. From the time of Anita Bryant and her notorious "Save the Children" campaign in Florida in the 1970s, opponents of lesbian and gay civil rights have had some success in repealing anti-discrimination ordinances through referendum. The tide finally appears to be turning. As HRC notes, in 2002, referenda to repeal local ordinances "failed everywhere they were able to collect enough signatures to get on the ballot."

State and local anti-discrimination laws have made a real difference in the lives of millions of lesbians and gay men. Activists are now pressing other states and cities, and Congress, to pass such laws in the continuing effort to protect glbtq people from discrimination.

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