Workplace Discrimination

by Gregory A. Johnson

Encyclopedia Copyright © 2015, glbtq, Inc.
Entry Copyright © 2004, glbtq, inc.
Reprinted from http://www.glbtq.com

American case law is replete with stories of lesbians and gay men suffering discrimination at work. Lesbian and gay employees have been verbally abused, physically assaulted, and fired because of their sexual orientation. Until recently, lesbians and gay men who were discriminated against at their jobs had little or no legal recourse.

The situation has changed considerably over the last twenty years with the passage of anti-discrimination laws and with the rapid growth of anti-discrimination policies among private employers. Although there is still work to be done, the expansion of protection from workplace discrimination based on sexual orientation stands as one of the significant accomplishments of the American lesbian and gay civil rights movement.

Private Employers

National organizations and many local grassroots groups have worked on two fronts to protect lesbian and gay employees from discrimination. First, activists have encouraged private employers to adopt anti-discrimination policies. This strategy has met with great success, and in some respects the business world has moved well ahead of government in protecting the rights of lesbians and gay men and in recognizing their value to the diversity of the workplace.

Anti-discrimination policies, and the training sessions that often accompany them, educate employees about workplace discrimination and set the tone for proper office behavior. They can also be used as the basis of a breach of contract claim in court by employees alleging discrimination. Some, but not all, courts have held that company anti-discrimination policies found in employee handbooks create a promise of protection enforceable in court.

According to the Human Rights Campaign (HRC), 320 of all Fortune 500 Companies have anti-discrimination policies that include sexual orientation. In all, HRC counts 2,295 employers, large and small, with anti-discrimination policies.

In a significant victory, Wal-Mart--with more than one million employees, the country's largest private employer--added sexual orientation to its anti-discrimination policy in June 2003. The change came about through dedicated advocacy from outside and inside the company. A Seattle gay rights group, The Pride Foundation, purchased shares in Wal-Mart and for two years lobbied the company to change its policy. In announcing the new policy, Wal-Mart recognized the role of The Pride Foundation and other lobby groups, but insisted that "the most important factor" in bringing about the change was a letter from several gay Wal-Mart employees describing how they felt "excluded" at the company.

Wal-Mart became the ninth of the top ten Fortune 500 Companies to adopt a policy protecting lesbian and gay employees. The only top ten company not to have such a policy is ExxonMobil. Exxon had an anti-discrimination policy that included sexual orientation, but when it merged with Mobil, the newly formed

company rescinded the policy. Activists continue to pressure ExxonMobil to re-adopt the policy. In 2001, HRC called for a nationwide boycott of the company until it changes its policy.

Statutory Protections

In addition to working with private employers, lesbian and gay civil rights groups have also campaigned for the passage of anti-discrimination statutes at the local, state, and federal levels.

Seattle, in 1973, and Minneapolis, in 1974, were the first large cities to pass ordinances protecting lesbians and gay men from discrimination in the workplace. Except for Aspen, Colorado (1977) and Detroit, Michigan (1979), all of the cities enacting anti-discrimination ordinances in the 1970s were liberal college towns: Alfred, New York (1974); Austin, Texas (1975); Amherst, Massachusetts (1976); Tucson, Arizona (1976); Champaign, Illinois (1977); Ann Arbor, Michigan (1978); Berkeley, California (1978); Yellow Springs, Ohio (1979); and Madison, Wisconsin (1979).

In the 1980s and 1990s the movement spread to include most of America's large cities (9 of the top 10 and 16 of the top 20 most populated cities), as well as many other smaller cities and towns as diverse as Fort Wayne, Indiana; Springfield, Massachusetts; Spokane, Washington; and Orlando, Florida.

As of July 2003, over 140 cities and counties prohibit discrimination based on sexual orientation in public and private employment, and another 125 have laws protecting public sector employees from discrimination, for a total of over 265 cities and counties with some form of workplace protection for lesbians and gay men.

The command of these ordinances to treat everyone in the workplace equally without regard to sexual orientation has helped make lesbians and gay men feel more secure in their jobs. If discrimination nevertheless occurs, employees can file complaints under the ordinances with their local human rights commissions.

The ordinances may have less value to lesbian and gay employees seeking to sue for relief in court. Some courts have held that local anti-discrimination ordinances can create rights enforceable in state court, but others have said that such ordinances exceed the local governments' home rule powers.

Wisconsin, in 1982, was the first state to pass a statewide sexual orientation anti-discrimination law. As of 2003, the following 14 states and the District of Columbia had statutes protecting workers from sexual orientation discrimination in public and private employment: California, Connecticut, Hawaii, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Rhode Island, Vermont, and Wisconsin. Another 9 states protect public employees from discrimination through executive order: Alaska, Colorado, Delaware, Illinois, Indiana, Michigan, Montana, Pennsylvania, and Washington.

HRC takes a somewhat pessimistic view of this development, saying, "At this rate, it would take more than 60 years for all 50 states to enact such laws." Yet the rate of change seems to be accelerating, with 3 states (Nevada, New Mexico, and New York) passing their anti-discrimination statutes in the last two years.

Other observers take a more optimistic view. Professor Arthur Leonard notes that, based on the 2000 census, "approximately 95 million people live in states that ban sexual orientation discrimination in employment . . . . This accounts for about one-third of the population. If one adds population for cities and counties that ban such discrimination in states that lack such laws, it is likely that a majority of the population is governed by sexual orientation non-discrimination principles."

Federal Law

Still, the biggest prize is yet to be won, and that is the passage of a federal anti-discrimination law. The

Employment Non-Discrimination Act (ENDA), which would ban workplace discrimination based on sexual orientation across the country, has been introduced in Congress for over twenty years, but it has never passed.

Without ENDA, lesbian and gay litigants seeking federal relief have had to shoehorn their discrimination claims into Title VII of the Civil Rights Act of 1964. That landmark legislation, which was aimed primarily at eliminating racial discrimination, also prohibits employers from discriminating with respect to "compensation, terms, conditions, or privileges of employment, because of . . . sex" (42 U.S.C. § 2000e-2(a)(1)).

The Supreme Court has held that sex discrimination under Title VII includes the "hostile work environment" where the harassment is so severe and pervasive that it alters the terms and conditions of employment (*Harris v. Forklift Systems, Inc.* [1993]).

However, despite some horrendous factual patterns of lesbians and gay men being relentlessly abused and assaulted at their jobs, and work environments that are clearly hostile toward them, federal courts have consistently rejected the argument that Title VII covers sexual orientation discrimination. From the late 1970s until 2002, every federal appellate court to consider the question has held that Title VII does not apply to sexual orientation discrimination, based on the assumption that Congress did not have gay men and lesbians in mind when it banned sex discrimination.

Observers have held out hope that the result might be different after the Supreme Court's holding in *Oncale v. Sundowner Offshore Services, Inc.* (1998). That case involved same-sex harassment of a most brutal nature on an all-male (and, at least ostensibly, all-heterosexual) oil rig in the Gulf of Mexico. In an opinion authored by Justice Scalia, the Court held that Title VII applies even when the harasser and the victim are the same sex. Justice Scalia conceded that "male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII," but said, "statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils."

Nevertheless, after *Oncale* several federal courts have held that in a same-sex harassment situation, if the victim is being harassed because of his/her sexual orientation Title VII does not apply. This has led to the startling result that if the victim of workplace same-sex harassment is heterosexual (as is Joseph Oncale) Title VII applies, but if the victim is lesbian or gay it does not.

Some Promise of Relief

The uninterrupted string of negative precedents from the federal appellate courts was finally broken in 2002 with the Ninth Circuit's decision in *Rene v. MGM Grand Hotel*. The majority there held that a gay employee ridiculed and abused by other male employees at the MGM Grand in Las Vegas had a cause of action under Title VII. The court said that an employee's sexual orientation is "irrelevant for purposes of Title VII." Instead, it held the focus should be solely on whether "the harasser engaged in severe or pervasive unwelcome physical conduct of a sexual nature."

The MGM Grand asked the Supreme Court to review this ruling, but the Court declined, so *Rene* is now the law for the nine Western States in the Ninth Circuit. It is hoped that other circuits will follow the Ninth Circuit's lead and extend coverage of Title VII to include lesbian and gay employees.

Another theory of relief under Title VII lesbians and gay men have relied on is "sex stereotyping." This theory achieved its greatest fame in the Supreme Court case of *Price Waterhouse v. Hopkins* (1989). In *Hopkins*, a female employee sued after she was passed up for partnership. Partners at the firm criticized her for being "macho" and "overly aggressive." One partner told her she should "walk more femininely, talk more femininely, dress more femininely" to improve her chances at partnership, and another partner told her to "take a course in charm school." The Supreme Court, in an opinion by Justice Brennan, held that this

kind of "sex stereotyping" is not allowed under Title VII.

In *Rene*, two of the concurring judges felt that the plaintiff could state a claim under *Hopkins* because his harassers treated him "like a woman," and therefore engaged in unlawful sex stereotyping.

Most claims by lesbians and gay men under *Hopkins* have failed. One federal court, for example, recently threw out a sex stereotyping claim by a gay corrections officer because there was no evidence that the plaintiff acted "in an effeminate manner" (*Martin v. New York Dep't of Corrections* [2002]). Since not all gay men are effeminate and not all lesbians are "macho," the *Hopkins* case may have limited value to employees harassed because of their sexual orientation.

Title VII shows some renewed promise after *Rene*, but the patchwork of protections across the country can only be cured by the passage of ENDA. Until then, some lesbians and gay men will be legally protected from workplace discrimination, and others will not.

The lesbian and gay civil rights movement has come a long way from the time, not too long ago, when coming out at work was extremely risky and could likely lead to reprisal. Today many millions of Americans are out at work and protected from discrimination by company policy or by local law. Yet this impressive story of successful activism will not be complete until Congress protects all lesbians and gay men with the passage of ENDA.

Bibliography

Kay, Herma Hill, and Martha S. West. *Sex-Based Discrimination.* 5th ed. St. Paul, Minn.: West Group, 2002.

Leonard, Arthur S. "The Gay Rights Workplace Revolution." *Human Rights* 30 (2003): 14-16 and inside back cover.

_____. "New Mexico Legislative/Executive Trifecta: Simultaneous Measures on Discrimination, Hate Crimes, and Partner Benefits; State High Court Recognizes Consortium Claim." *Lesbian and Gay Law Notes* (2003): 64-65.

Kershaw, Sarah. "Wal-Mart Sets a New Policy That Protects Gay Workers." *New York Times* (July 2, 2003): A.1.

MacKinnon, Catharine A. *Sex Equality*. New York: Foundation Press, 2001.

Rubenstein, William B. *Cases and Materials on Sexual Orientation and the Law.* 2nd ed. St. Paul, Minn.: West Publishing, 1997.

www.hrc.org. (For "The State of the Workplace for Lesbian, Gay, Bisexual and Transgender American 2002" and other resources).

www.lambdalegal.org. (For a summary of states and cities with anti-discrimination laws).

About the Author

Gregory A. Johnson is Associate Professor at Vermont Law School, where he teaches courses in Constitutional Law, Apellate Advocacy, and Sexual Orientation and the Law. He served as co-counsel on *Brause v. Bureau of Vital Statistics*, Alaska's groundbreaking same-sex marriage case. Johnson has lectured across the country on same-sex marriage and other issues related to sexual orientation and the law. His publications include *Vermont Civil Unions: The New Language of Marriage,* and *Making History in Vermont*. He is a graduate of Cornell University and Notre Dame Law School. He serves on www.glbtq.com's board of

editorial consultants.