COMMENT: SEXUAL ORIENTATION AS A PROHIBITED BASIS OF EMPLOYMENT DISCRIMINATION

We are truly honored tonight by our next speaker. This is a tremendous occasion for us. We have at the University of Houston Law Center, because Houston is a progressive town, an endowed writing competition. It's an annual $500 award for the student who writes the best paper in the area of sexual minority law and transgender law. This year it was won by Linda Sanchez, who I'm going to introduce you to in just a few minutes.

It was really exciting to know that when the award ceremony came up at the Law Center, and I read the pamphlet that was printed and handed out, that it said on there -- just with everybody else's -- that this writing competition is awarded to the law student who writes the best paper in the area of sexual minority and transgender law. Not only was it written, but when the speaker came up, they just didn't announce it and go and give Linda her due, instead they read it just like it was written, just like it was just regular stuff, just like the fact that out on the marque of this hotel, it says "Welcome, Transgender Law Conference". And it said what I just said. It was a very routine and matter of fact thing. And the first winner for the first ever writing competition is Linda Sanchez, and she's going to present her paper.

(NOTE: The transcript was omitted because Ms. Sanchez followed her paper so closely and because the paper is complete with citations.

COMMENT

SEXUAL ORIENTATION AS A PROHIBITED BASIS OF EMPLOYMENT DISCRIMINATION

Lesbians and gay men experience unwarranted and extensive discrimination in the workplace.[1] The federal government routinely expels gays from the military or denies them security clearances.[2] State and local governments often refuse to hire gay teachers in public schools.[3] Title VII of the 1964 Civil Rights Act, which prohibits employment discrimination by the federal government and private employers on the basis of race, sex, and other characteristics, notably excludes sexual orientation from its protective umbrella.[4] Gay employees have been consistently unsuccessful in their attempts to extend the coverage of Title VII to discrimination on the basis of sexual

[1] See generally Rhonda R. Rivera, Queer Law: Sexual Orientation Law in the Mid-Eighties, Part I, 10 U. Dayton L. Rev. 459 (1985) (reviewing discrimination based on sexual orientation in private, federal, and state employment).

[2] See Rhonda R. Rivera, Queer Law: Sexual Orientation Law in the Mid-Eighties, Part II, 11 U. Dayton L. Rev. 275, 284, 287 (1986).

[3] See Richard D. Mohr, Gays/Justice: A Study of Ethics, Society and Law 30 (1988).

[4] See Rivera, supra note 1, at 465-71.

orientation.[5] Such discriminatory tactics by employers threaten the quality of life, self-image, and emotional well-being of gay individuals.[6]

This Comment examines the unequal treatment experienced by lesbians and gay men, chronicling their efforts to dispel employment discrimination based on sexual orientation. Section I reviews discrimination in public employment, and the constitutional safeguards that limit the government's ability to arbitrarily discharge employees.[7]

In contrast to the legal restraints imposed on the public sector by constitutional requirements, private employers may hire or fire at will.[8] Section II examines the common-law doctrine of "employment-at-will" in a regional context, emphasizing the interpretation of the doctrine developed by the Texas courts.[9] Because Title VII excludes the sexual orientation classification from its protection, gay employees in the private sector must challenge dismissals through exceptions to the employment-at-will doctrine. The states have fashioned exceptions and limitations to the at-will provisions that vary significantly from state to state. Discussion of all variations is beyond the scope of this Comment; therefore, the focus of the analysis will be on Texas

[5] Id.

[6] See Mohr, supra note 3, at 156-57.

[7] Refer to notes 12-104 infra and accompanying text.

[8] Refer to notes 143-45 infra and accompanying text.

[9] Refer to notes 146-214 infra and accompanying text.

case law.

Because no federal statute prohibits discrimination based on sexual orientation, states and municipalities have passed legislation to protect gays from discrimination in employment, housing, and public accommodations.[10] Section III reviews the four state statutes that afford such protection and the ever increasing number of local ordinances promulgated to fill the gap left by the states and the federal government. This section also adopts a regional focus by including a detailed analysis of the Austin, Texas ordinance as an example of the procedures used by municipalities to combat discrimination based on sexual orientation.

I. Public Employment

The majority of court decisions addressing the question of sexual orientation as a basis for employment discrimination involve challenges to discrimination in the public sector.[11] In particular, the recent challenges invoke the Equal Protection Clause of the Fourteenth Amendment or the equal protection

[10] Refer to notes 217-72 infra and accompanying text.

[11] See Developments in the Law--Sexual Orientation and the Law, 102 Harv. L. Rev. 1508, 1554-75 (1989) (discussing discrimination in military employment, jobs requiring a security clearance, and civil service employment) [hereinafter Developments].

component of the Fifth Amendment's Due Process Clause.[12]

To analyze a case under the Equal Protection Clause, the courts must choose a standard of review, examining governmental action under a rational basis, heightened scrutiny, or strict scrutiny approach.[13] Invoking the strict scrutiny standard in discrimination cases requires a court to find that the complainant belongs to a "suspect class". Characterizing homosexuals as a suspect class allows the courts to apply strict scrutiny and increases the likelihood of finding a regulation discriminatory.[14] The courts have consistently refused, however, to regard homosexuals as a suspect class.[15]

This section reviews the case law dealing with equal protection claims arising in the areas of law enforcement and security clearances, military employment, and public school education. The Supreme Court's opinion in Bowers v. Hardwick,[16]

[12] See Cass R. Sunstein, Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 55 U. Chi. L. Rev. 1161, 1162-64 (1988).

[13] Refer to notes 38-43 infra and accompanying text.

[14] See John C. Hayes, The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny after Bowers v. Hardwick, 31 B.C. L. Rev. 375, 455 (1990).

[15] Id. at 425.

[16] 478 U.S. 186 (1986) (holding that a state statute criminalizing sodomy did not violate the Due Process Clause of the Fourteenth Amendment).

although grounded on the Due Process Clause of the Fourteenth Amendment, rather than the Equal Protection Clause, significantly impacts the employment discrimination question.[17] The following discussion evaluates Hardwick's impact in light of the more recent court decisions.

A. Courts Refuse to Extend Suspect Class Status to Homosexuals

Padula v. Webster[18] was one of the first decisions that relied on Hardwick to deny relief under the Equal Protection Clause. Padula applied for a position as a special agent with the Federal Bureau of Investigation (FBI). The agency denied her application, despite her ranking in the top 25 % of all applicants for the position.[19] Padula alleged that the FBI refused her application solely because she was a practicing homosexual and claimed that this denied her the equal protection of the law.[20] Although Padula urged the court to recognize homosexuals as a suspect or quasi-suspect class, which would subject the FBI's decision to strict or heightened scrutiny, the

[17] See generally Tracey Rich, Note, Sexual Orientation Discrimination in the Wake of Bowers v. Hardwick, 22 Ga. L. Rev. 773 (1988) (discussing the effect of Hardwick on the equal protection rights of homosexuals).

[18] 822 F.2d 97 (D.C. Cir. 1987).

[19] Id. at 99.

[20] Id. at 101.

court refused.[21]

The court concluded that the decisions in Dronenburg v. Zech[22] and Hardwick were "insurmountable barriers" to Padula's claim.[23] In Dronenburg, the Navy discharged a petty officer for engaging in homosexual conduct.[24] The court rejected the officer's equal protection claim and held that there was no consitutional right to engage in homosexual conduct.[25] The Supreme Court mirrored this decision in Hardwick, refusing to recognize a "fundamental right [of] homosexuals to engage in acts of consensual sodomy."[26] Referring to the Hardwick opinion, the Padula court stated it would be anomalous to extend strict scrutiny to homosexual status, since conduct that may be "constitutionally criminalized" defines such status.[27] Thus, the court restricted its review of the FBI's decision to a rational basis test. The court determined that the FBI's

[21] Id. at 102. Refer to notes 38-43 infra and accompanying text for a discussion of the criteria for suspect and quasi-suspect class status.

[22] 741 F.2d 1388, 1398 (D.C. Cir. 1984) (holding that the unique needs of the military justified a naval officer's discharge for engaging in homosexual conduct).

[23] Padula, 822 F.2d at 102.

[24] Dronenburg, 741 F.2d at 1389.

[25] Id. at 1397.

[26] Hardwick, 478 U.S. at 192.

[27] Padula, 822 F.2d at 103.

concerns, that agents who engaged in criminal conduct would undermine the Bureau's credibility, and that a homosexual's susceptibility to blackmail would endanger counterintelligence efforts, rationally justified the Bureau's actions.[28]

In Watkins v. United States Army (Watkins II),[29] a panel for the Ninth Circuit Court of Appeals recognized homosexuals as a suspect class and subjected the Army's policies on discharge and re-enlistment to strict scrutiny analysis.[30] The court subsequently granted an en banc hearing (Watkins III), and withdrew its prior opinions.[31]

When Perry Watkins enlisted in the Army he indicated that he

[28] Id. at 104.

[29] 847 F.2d 1329 (9th Cir. 1988).

[30] Id. at 1349, 1352. The case has a complex history. Initially the district court enjoined the Army from refusing to re-enlist Watkins because of his homosexuality, relying on equitable estoppel. See Watkins v. United States Army, 551 F. Supp. 212, 223 (W.D. Wash. 1982). On appeal, the court reversed the injunction and remanded to determine whether the Army regulations were repugnant to the Constitution, a necessary finding for application of the court's equity power. See Watkins v. United States Army, 721 F.2d 687, 691 (9th Cir. 1983) (Watkins I). On remand, the district court granted summary judgment in favor of the Army and Watkins again appealed (Watkins II).

[31] Watkins v. United States Army, 875 F.2d 699, 711 (9th Cir. 1989) (en banc) (Watkins III), cert. denied, 111 S. Ct. 384 (1990).

had homosexual tendencies.[32] The Army nonetheless inducted Watkins, and he later re-enlisted for another three-year term followed by a six-year term. Throughout Watkins's fourteen years in the service, an Army regulation included homosexuality as a nonwaivable disqualification for re-enlistment.[33] On the strength of these facts, the full court reinstated the district court's order estopping the Army from barring Watkins's re-enlistment.[34]

Because it based its decision on equitable estoppel principles, the Watkins III court concluded that it was "unnecessary to reach the constitutional issues raised in Watkins II."[35] Judge Norris, who penned the majority opinion in Watkins II, agreed with the judgment but used his concurring opinion to essentially restate his findings in Watkins II. He stated that relief was proper because the Army denied Watkins equal protection of the law when it refused his re-enlistment solely on the basis of his homosexuality.[36]

Judge Norris began his equal protection analysis by determining whether the Army's regulations discriminated on the basis of sexual orientation. He concluded that the Army's regulations "target orientation rather than conduct," because

[32] Id. at 703.

[33] Id. at 702.

[34] Id. at 711.

[35] Id. at 705.

[36] Id. at 711 (Norris, J., concurring).

persons who engage in homosexual acts may still qualify for Army service if they can prove their orientation is heterosexual.[37] He next addressed the question of whether the class consisting of persons with a homosexual orientation constitutes a suspect class under the equal protection doctrine.[38] Three factors must be present to identify a class as "suspect": a history of purposeful discrimination, discrimination that can be termed "invidious," and lack of political power.[39]

In concluding that purposeful discrimination exists, Norris found that discrimination against homosexuals is pervasive and "no less pernicious or intense than the discrimination faced by other groups already treated as suspect classes...."[40] The second factor, the requirement of invidious discrimination,

[37] Id. at 715.

[38] The Supreme Court has determined that certain government classifications must survive a heightened level of scrutiny to be upheld. Classifications based on race, national origin, and alienage--suspect classes--invoke strict scrutiny, requiring a necessary relation to a compelling government interest. Classifications based on gender and illegitimacy--quasi-suspect classes--are subject to intermediate scrutiny, requiring a substantial relation to an important government interest. See Padula v. Webster, 822 F.2d 97, 102 (D.C. Cir 1987); Hayes, supra note 14, at 405-12.

[39] Watkins III, 875 F.2d at 724-26 (Norris, J., concurring).

[40] Id. at 724.

incorporates a concept of "gross unfairness" which considers, among other things, whether the trait defining the class is immutable.[41] Judge Norris determined that sexual orientation is immutable, as that term is understood under the equal protection doctrine, based on scientific evidence that sexual orientation is "largely impervious to change."[42] He also found that homosexuals lack political power, in part because many of them, responding to immense social pressures, conceal their identities and cannot openly protest anti-homosexual actions.[43] Thus homosexuals meet all the criteria for suspect class status.

Applying a strict scrutiny review standard to the Army's regulations, Norris rejected the Army's various justifications. For example, the Army argued that it would be difficult to maintain morale and discipline in the ranks, because many heterosexual soldiers detest homosexuality.[44] Norris regarded this concern as strikingly similar to previous racial segregation arguments that the Supreme Court rejected years ago.[45] He concluded that the regulations failed to promote a "legitimate compelling governmental interest."[46]

Norris's concurrence also addressed the Army's argument that

[41] Id. at 725.

[42] Id. at 726.

[43] Id. at 727.

[44] Id. at 729.

[45] Id.

[46] Id. at 731.

Hardwick presents controlling authority, negating an equal protection claim. He found the Army's position untenable for two reasons. First, Hardwick involved a class of persons who engage in homosexual conduct; it did not pose the question whether the government may discriminate against persons with a homosexual orientation.[47] Second, and more important, the Court limited the Hardwick holding to a due process question.[48] The Supreme Court has not addressed the issue of discrimination against homosexuals as a violation of the Equal Protection Clause.[49] Because the aims of the Due Process Clause are fundamentally different from equal protection, Norris concluded that no inconsistency exists in a decision that homosexual sodomy does not merit due process protection, and a concomitant recognition that homosexuals form a class warranting heightened scrutiny under the Equal Protection Clause.[50]

Despite the prolific and persuasive Norris opinions in Watkins II and Watkins III, courts continually reject the equal

[47] See id. at 716-17 ("Hardwick was a 'conduct' case; Watkins is an 'orientation' case"); see also Sunstein, supra note 12, at 1162 n.7 (discussing the opinion in Watkins II).

[48] Watkins III, 875 F.2d at 716.

[49] Id. at 718.

[50] Id.; see Sunstein, supra note 12, at 1162-63 (indicating the structural differences between the Due Process and Equal Protection Clauses, and stating that the majority opinion in Watkins II correctly interpreted Hardwick).

protection claims of homosexuals in the military. For example, the courts in Woodward v. United States[51] and Ben-Shalom v. Marsh[52] both refused to submit the military regulations at issue to heightened scrutiny. In Woodward, the court determined that the Navy's release of a reserve officer because of his homosexuality was rationally related to the maintenance of discipline.[53] The court opined that homosexuality as a trait differs from traits that define recognized suspect or quasi-suspect classes.[54] Whereas recognized classifications, such as race, exhibit immutable characteristics, the court stated that homosexuality "is primarily behavioral in nature."[55] Furthermore, the court found that Hardwick, by allowing criminalization of the conduct that defines the class, constitutionally allows discrimination against homosexuals.[56]

In a situation substantially similar to Watkins III, the court in Ben-Shalom reviewed the Army's refusal to re-enlist a reserve sergeant who admitted to being a lesbian.[57] The

[51] 871 F.2d 1068 (Fed. Cir. 1989).

[52] 881 F.2d 454 (7th Cir. 1989), cert. denied, 110 S. Ct. 1296 (1990).

[53] Woodward, 871 F.2d at 1076.

[54] Id.

[55] Id.

[56] Id. (agreeing with the reasoning in Padula v. Webster, 822 F.2d 97, 103 (D.C. Cir 1987)).

[57] Ben-Shalom, 881 F.2d at 457.

appellate court disagreed with the district court's finding that the Army's regulation created a classification based on homosexual status, not conduct.[58] The court found that Ben-Shalom's admitted lesbian status offered evidence of a tendency to engage in homosexual conduct, even though there was no evidence of actual conduct.[59] Because the Army regulation barred persons who either desire to commit or have committed homosexual acts, the regulation applied to Ben-Shalom and did not discriminate on the basis of homosexual status.[60] The Ben-Shalom court also found that Hardwick foreclosed any determination that homosexuals are a suspect class, disputing Judge Norris's interpretation of Hardwick in Watkins III.[61]

The district court in High Tech Gays v. Defense Industrial Security Clearance Office applied heightened scrutiny to a Defense Department policy of subjecting gay applicants seeking security clearances to expanded investigations.[62] Their

[58] See Ben Shalom v. Marsh, 703 F. Supp 1372, 1375 (E.D. Wis.), rev'd, 881 F.2d 454 (7th Cir. 1989).

[59] Ben-Shalom, 881 F.2d at 464

[60] Id. at 460, 464.

[61] Id. at 465.

[62] 668 F. Supp. 1361, 1368 (N.D. Cal. 1987), rev'd, 895 F.2d 563 (9th Cir. 1990). See generally Marion H. Lewis, Comment, Unacceptable Risk or Unacceptable Rhetoric? An Argument for a Quasi-Suspect Classification for Gays Based on Current Government Security Clearance Procedures, VII J.L. & Pol. 133, 138-46

holding, that gay persons are a quasi-suspect class, suffered reversal on appeal,[63] as did the Ben-Shalom district court ruling that homosexuals constitute a suspect class.[64] On appeal, the High Tech Gays court relied on Hardwick, as had other circuits before it.[65] The court voiced the oft-repeated argument that, since homosexual conduct can be criminalized under Hardwick, homosexuals cannot gain recognition as a suspect or quasi-suspect class and are limited to rational basis review on their equal protection claims.[66]

The High Tech Gays court, in its analysis of the equal protection claims, reviewed the criteria which must be met to qualify as a suspect or quasi-suspect class.[67] The court agreed that homosexuals have historically suffered from discrimination,

(describing current security clearance programs).

[63] High Tech Gays, 895 F.2d at 574.

[64] Ben-Shalom v. Marsh, 703 F. Supp. 1372, 1380 (E.D. Wis.), rev'd, 881 F.2d 454 (7th Cir. 1989).

[65] High Tech Gays, 895 F.2d at 571.

[66] Id. The court also disagreed with Judge Norris's evaluation of Hardwick in his Watkins III concurrence and distinguished Norris's differentiation between orientation and conduct because the Defense Department's regulations addressed conduct only. Id. at 573 n. 9.

[67] Refer to text accompanying notes 38-43 supra.

but found they do not meet the other criteria.[68] Homosexuality, according to the court, is behavioral and not an immutable characteristic.[69] Furthermore, the court decided that homosexuals wield political power, citing state and local anti-discrimination legislation as evidence.[70]

Using a rational basis standard, the court then reviewed the Defense Department's justifications for its policy of subjecting gay applicants to expanded investigations . The Defense Department relied on two arguments. First, counterintelligence agencies, like the KGB, target homosexuals, whom they consider vulnerable to manipulation. Second, as a targeted group, homosexuals may be susceptible to blackmail.[71] The court stated that special deference must be accorded executive branch decisions in national security matters.[72] Therefore, the expanded investigation, because it seeks to determine an applicant's vulnerability to counterintelligence efforts, is rationally related to the Department's interest in preserving national security.[73]

The Central Intelligence Agency's (CIA) position on gay

[68] High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990).

[69] Id.

[70] Id. at 574.

[71] Id. at 576.

[72] Id. at 577.

[73] Id. at 578.

employees has also spawned constitutional litigation.[74] In Webster v. Doe the Supreme Court held that employee termination decisions by the CIA, under section 102(c) of the National Security Act, are not subject to the judicial review typically allowed by the Administrative Procedure Act.[75] The Court found, however, that section 102(c) prevents only statutory claims and does not preclude an employee from asserting constitutional claims.[76] The employee in Webster alleged that the CIA's decision to terminate him because his homosexuality posed a threat to security deprived him of the equal protection of the laws, as well as other constitutional rights.[77] The Court determined that these claims were properly reviewable by the

[74] See, e.g., Mark D. Hoerrner, Note, Fire at Will: The CIA Director's Ability to Dismiss Homosexuals as National Security Risks, 31 B.C. L. Rev. 699, 701-05 (1990) (discussing the CIA's potential defenses against challenges to dismissals of homosexual employees). See generally Judith M. Stinson, Note, Who's Been Sleeping in Your Bed? An Analysis of the Government's Approach to the Sexual Orientation of Its Employees, 30 Ariz. L. Rev. 156 (1988) (reviewing the judicial decisions on termination of homosexuals employed in civil service, teaching, military, and other national security positions).

[75] 486 U.S. 592, 601 (1988).

[76] Id. at 603-04.

[77] Id. at 594.

district courts.[78] Despite this partial victory, CIA policies may still survive even a heightened scrutiny analysis, since the courts have historically considered national security a compelling state interest.[79]

B. Classification Based on Sexual Orientation as Inherently Suspect

The discriminatory treatment of gay men and lesbians is fundamentally unfair and compels redress by the judiciary. Several district courts have battled such discriminatory tactics by government employers, shooting down policies that penalize an individual for his or her sexual preference.[80] Unfortunately, appellate courts continue to mistakenly apply the Hardwick decision, as well as insupportable stereotypes of gay persons, to

[78] Id. at 603-04; see also The Supreme Court, 1987 Term--Leading Cases, 102 Harv. L. Rev. 330 (1988) (discussing the majority and dissenting opinions in Webster).

[79] See Hoerrner, supra note 74, at 726-34 (concluding that a homosexual has little chance of challenging the CIA on constitutional grounds under either a heightened or strict scrutiny standard). But see The Supreme Court, 1987 Term--Leading Cases, supra note 72, at 337-38 (stating that the CIA exaggerated its claim of vital national interests in Webster because there are alternatives available to limit disclosure of sensitive information).

[80] Refer to notes 58-64 supra and accompanying text.

overrule these attempts.[81] The district courts continue the fight, however, as exemplified by the recent decision in Jantz v. Muci.[82]

In Jantz, a school principal rejected a high school teacher's employment application because of the applicant's apparent homosexual tendencies.[83] The court examined Jantz's equal protection claim under both a heightened scrutiny and rational basis analysis. The court first disposed of the Hardwick argument, siding with Judge Norris and constitutional scholars who have emphasized that Hardwick addressed due process and not equal protection.[84] The court discussed the important distinction between conduct and sexual orientation, indicating that Hardwick decided solely that homosexual conduct was not a traditional liberty, the proper focus in a due process analysis.[85] Equal protection differs from due process in that it protects disadvantaged groups from "governmental

[81] Refer to notes 58-73 supra and accompanying text.

[82] 769 F. Supp. 1543 (D. Kan. 1991).

[83] Id. at 1545.

[84] Id. at 1546.

[85] Id. The court also noted that prior cases refusing to impose heightened scrutiny analysis emphasized that persons engaging in homosexual "conduct" do not constitute a suspect class. Id. at 1546-47 (citing High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563 (9th Cir. 1990) and Padula v. Webster, 822 F.2d 97 (D.C. Cir. 1987)).

discrimination, even where the discrimination is enshrined in a deep historical tradition."[86] Thus, the same history of discrimination against homosexuals that supports the denial of a due process claim in Hardwick also buttresses the argument that discrimination on the basis of sexual orientation violates equal protection.[87]

Concluding that Hardwick does not preclude application of heightened scrutiny to government discrimination based on sexual orientation, the Jantz court addressed the criteria necessary for a suspect classification.[88] The Supreme Court constructed these criteria as a framework to assist the courts in their analysis of government conduct and motivation.[89] Within this framework, the courts must examine whether a history of purposeful discrimination exists; the likelihood that a class suffers invidious discrimination due to negative stereotypes and characteristics beyond their control; and whether the class lacks

[86] Jantz, 759 F. Supp. at 1546; see also Sunstein, supra note 12, at 1174 ("The [equal protection] clause does not safeguard traditions; it protects against traditions, however long-standing and deeply rooted").

[87] Jantz, 759 F. Supp at 1546.

[88] Id. at 1547.

[89] See Hayes, supra note 14, at 456-64 (describing the criteria established by the Supreme Court to determine the proper level of scrutiny under the equal protection principle).

the political power to combat such discrimination.[90]

The Jantz court described invidious discrimination as "discrimination based upon an obvious, immutable, or distinguishing trait which frequently bears no relation to ability to perform or contribute to society."[91] The court took issue with prior court determinations that homosexuality is not an immutable characteristic. According to the Jantz court, such findings are completely unsupported by scientific or medical authority.[92] The weight of scientific authority indicates that sexual orientation becomes fixed at an early age and is not a matter of conscious choice.[93] Furthermore, gay men and lesbians suffer from negative and unfounded stereotyping. For example, many assume that gay men and lesbians are more likely to molest children, or that they are mentally ill or unstable. Not only are such assumptions patently incorrect, but psychological

[90] See id. at 456.

[91] Jantz, 759 F. Supp. at 1547.

[92] Id. at 1547 n.3 (referring to High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) and Woodward v. United States, 871 F.2d 1068, 1076 (Fed. Cir. 1989)).

[93] Jantz v. Muci, 759 F. Supp. 1543, 1547-48 (D. Kan. 1990); see also Lewis, supra note 62, at 165-66 (stating that, even if homosexuality were changeable, requiring a change in sexual orientation to comply with society's norms seems untenable).

studies dispute these conclusions.[94]

According to the Jantz court, the history of purposeful discrimination against gay men and lesbians is well documented.[95] The court noted Justice Brennan's observation that "homosexuals have historically been the subject of pernicious and sustained hostility."[96] Not only do gay men and lesbians suffer discrimination in employment, housing, and family relationships, but also they are often victims of brutal violence and abuse.[97] Courts agree with little difficulty that gay men and lesbians meet this criterion of the suspect classification

[94] Jantz, 759 F. Supp. at 1548-49; see also Developments, supra note 11, at 1567 (stating that discrimination against gay men and lesbians stems from inaccurate stereotypes).

[95] Jantz, 759 F. Supp. at 1549; see also Mohr, supra note 3, at 27-31 (noting that gays are subject to discrimination affecting central components of meaningful life).

[96] Jantz, 759 F. Supp. at 1549 (citing Rowland v. Mad River Local School Dist., 470 U.S. 1009, 1014 (1985) (Brennan, J., dissenting from denial of cert.)).

[97] See Developments, supra note 11, at 1541-51 (discussing anti-gay crimes and the reluctance of victims to report the crimes because of the legality of certain anti-gay discrimination). See generally Sexual Orientation and the Law, (Roberta Achtenberg & Mary Newcombe eds., 1990) (detailing the discriminatory treatment against gays and providing a litigation guide for lawyers representing gay clients).

analysis.[98]

The final factor in determining whether a classification is suspect recognizes that disadvantaged groups lack the political clout to obtain protection from discriminatory treatment. Although some states and municipalities have passed anti-discrimination legislation to stem the flow of prejudice against gays, these efforts are insufficient to adequately protect gay rights.[99] The Jantz court noted the inadequacy of this legislative action, especially in the absence of a federal statute that prohibits discrimination based on sexual orientation.[100] The court also emphasized that extensive federal legislation exists to protect the interests of blacks, but this does not prevent their categorization as a suspect class.[101] Furthermore, due to the intensity of societal prejudice, many gays conceal their sexual orientation to avoid violence and abuse. This isolation results in limited access to political power and perpetuates the cycle of insensitivity and

[98] See, e.g., High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir. 1990) (agreeing that homosexuals have suffered a history of discrimination even though they fail the other criteria for suspect classification).

[99] Refer to notes 223-70 infra and accompanying text.

[100] Jantz v. Muci, 759 F. Supp. 1543, 1550 (D. Kan. 1991) (noting that scattered successes in local legislation are insufficient evidence of political power).

[101] Id. at 1550.

discrimination.[102]

From the wealth of evidence portraying the "virulent prejudice" against the homosexual community, the Jantz court concluded that all the criteria were satisfied to establish that a government classification based on sexual orientation is inherently suspect.[103] Unfortunately, the eloquent arguments advanced by the Jantz court may not survive attack at the appellate level. The vast number of cases that involve discrimination against gay men and lesbians are resounding evidence that the Supreme Court should address this important issue. The potential infringement of constitutional rights due to an individual's sexual orientation is a vital area of concern, and the absence of guidance from the Supreme Court has left the lower courts in disarray.[104]

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[102] Id. at 1550-51.

[103] Id. at 1551. The court also held that the decision not to hire Jantz because of his alleged homosexual tendencies failed to pass muster under the rational basis standard. See id. at 1552.

[104] See Rowland v. Mad River Local School Dist., 470 U.S. 1009, 1015-16 (1985) (Brennan, J., dissenting from the denial of cert.) ("This case raises important constitutional questions regarding the rights of public employees to maintain and express their private sexual preference."). Government discrimination against gays may also violate a person's First Amendment right to free speech. See, e.g., National Gay Task Force v. Board of Educ., 729 F.2d 1270, 1275 (10th Cir. 1984) (invalidating Oklahoma statute that allowed

C. The Effect of Sodomy Statutes on Gay Rights: The Texas Experience

The Bowers v. Hardwick[105] decision forges a significant barrier to the elimination of discrimination based on sexual orientation.[106] There is, however, a clear cut distinction between sexual orientation, which defines an individual's sexual and affectional preference, and sodomy, which defines sexual acts that persons of any sexual orientation may perform.[107] Nonetheless, society and the judiciary continue to identify sodomy with a homosexual orientation. This exhibition of homophobia produces irrational decisions by legislatures and the courts.[108] Until the Supreme Court recognizes the "fundamental interest [that] all individuals have in controlling the nature of

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public schools to dismiss teachers for advocacy of public or private homosexual activity); Van Ooteghem v. Gray, 628 F.2d 488, 492 (5th Cir. 1980) (holding that firing a county employee for addressing a public body on the subject of civil rights for homosexuals was a violation of the First Amendment). See generally Marsha Jones, Comment, When Private Morality Becomes Public Concern: Homosexuality and Public Employment, 24 Hous. L. Rev. 519 (1987) (examining how courts deal with public employees' freedom of speech where the speech promotes equal treatment of gays).

[105] 478 U.S. 186 (1986).

[106] Refer to notes 17-66 supra and accompanying text.

[107] See Developments, supra note 11, at 1568-69.

[108] See Jones, supra note 104, at 533-37.

their intimate associations with others,"[109] the Hardwick decision will continue to cast a pall over efforts in the public and private sector to secure the equal protection of the law for lesbians and gay men.

Several states, however, operating as "experimental outposts for subsequent national action" have decriminalized homosexual acts between consenting adults in private.[110] If the trend persists and the states recognize an individual's right to privacy in sexual relationships, the obstacles to equal protection for lesbians and gays in other areas, such as employment, should weaken.

The first direct constitutional attack on the Texas statute prohibiting homosexual sodomy occurred in Baker v. Wade.[111]

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[109] Hardwick, 478 U.S. at 206 (Blackmun, J., dissenting).

[110] Rivera, supra note 1, at 540 (noting that in 26 states private, consensual, adult homosexual acts are not criminalized); see Commonwealth of Kentucky v. Wasson (Fayette Cir. Ct. June 8, 1990) (holding state sodomy law unconstitutional based on privacy rights); Michigan Org. for Human Rights v. Kelley (Wayne Cir. Ct. July 9, 1990) (same); People v. Onofre, 415 N.E.2d 936, 938-39 (N.Y. 1980) (sodomy statute unconstitutional on privacy grounds and on equal protection rights of unmarried persons since sodomy by married couples was not illegal), cert. denied, 451 U.S. 987 (1981).

[111] 553 F. Supp 1121 (N.D. Tex. 1982), rev'd, 769 F.2d 289 (5th Cir. 1985) (en banc), cert. denied, 478 U.S. 1022 (1986). See Tex.

Baker's story starkly demonstrates the fear and anguish experienced by a young man coping with his homosexual orientation in a society that labeled him a criminal.[112] The district court reviewed the constitutionality of the Texas statute under both the right of privacy and the equal protection guarantees of the United States Constitution. Expert testimony revealed that homosexuality is fixed at an early age as a result of biological factors and environmental influences.[113] Thus, sexual orientation is largely impervious to change. Furthermore, the scientific community overwhelmingly agrees that homosexuality is neither a disease nor a mental disorder.[114] These facts indicate that criminal sanctions will not reduce the number of homosexuals, but serve only to promote alienation, anxiety and emotional distress.[115]

The court concluded that the right of privacy extends to

Penal Code Ann. §21.06 (Vernon 1989) (providing that "[a] person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex"). The definition of deviate sexual intercourse is: "(a) any contact between any part of the genitals of one person and the mouth or anus of another person; or (b) the penetration of the genitals or the anus of another person with an object." Tex. Penal Code Ann. §21.01(1) (Vernon 1989).

[112] Baker, 553 F. Supp. at 1127.

[113] Id. at 1129.

[114] Id. at 1129-30.

[115] Id. at 1130.

private sexual conduct between consenting adults, requiring a compelling state interest for any governmental regulation of that right.[116] Relying heavily on the expert testimony, the court found that the statute was not justified by a compelling state interest, nor was it even rationally related to a legitimate state interest.[117] The court also held that the statute violated the Equal Protection Clause of the Fourteenth Amendment since it proscribed homosexual sodomy but not heterosexual sodomy. The state had failed to show a rational relationship to a legitimate state interest for such unequal treatment.[118]

The appellate court, sitting en banc, reversed the district court's decision in Baker v. Wade.[119] Refusing to hold that homosexuals constitute a suspect or quasi-suspect class, the appellate court applied the rational relation standard of equal protection review. Because of the historically strong objection to homosexual conduct in Western culture, the court found that

[116] Id. at 1140.

[117] Id. at 1143.

[118] Id. at 1143-45. The court did not need to reach the issue of whether homosexuals constitute members of a "suspect class" since the statute failed to meet even the lowest level of scrutiny. However, the court indicated they would not find homosexuals to be a suspect class since the Supreme Court had not yet held that sex constituted a suspect class. Id. at 1144-45 & n.58.

[119] 769 F.2d 289, 293 (5th Cir. 1985) (en banc), cert. denied, 478 U.S. 1022 (1986).

the sodomy statute was rationally related to the "permissible" state goal of implementing morality.[120] The court also declined to declare the statute unconstitutional under the right of privacy argument.[121]

Recently, a state district court decision declared the Texas sodomy statute unconstitutional as violative of the right to privacy and equal rights guarantee of the Texas Constitution.[122] In Morales v. State the court stated that the sodomy law is the basis for discrimination against lesbians and gay men, and that the "stigma of criminality" encourages discrimination in employment, family issues, housing, and criminal justice.[123] In an enlightened decision, the court reviewed the wealth of psychological and factual data indicating the severe impact of the sodomy law on the emotional well-being of lesbians and gay men. The court found that intimate, private sexual conduct and same-sex relationships are fundamental to a gay individual's

[120] Id. at 292.

[121] Id. (finding that the Supreme Court's summary affirmance in Doe v. Commonwealth's Attorney, 425 U.S. 901 (1976), which upheld the constitutionality of a Virginia sodomy statute, was controlling authority on the right of privacy issue).

[122] Morales v. State, No. 461,898 (Dist. Ct. of Travis County, 200th Judicial Dist. of Texas, March 15, 1991) (declaring §21.06 of the Texas Penal Code unconstitutional). For the text of Tex. Penal Code Ann. §21.06, refer to note 111, supra.

[123] Id. at 4-5.

self-identification and sense of purpose in life.[124] A combination of factors establish sexual orientation at an early age, and no scientific evidence exists to support the effectiveness of "conversion therapies" that attempt to change sexual orientation.[125]

The court recognized the impact of societal discrimination on gay youth suicide as being among the severe negative consequences engendered by sodomy laws.[126] Moreover, the court emphasized that sexual orientation is no impediment to an individual's ability to contribute meaningfully to society.[127] The mental health and medical professions emphatically dispute the idea that homosexuality is a mental disease or disorder and urge the repeal of discriminatory legislation singling out private, consensual, homosexual acts by adults.[128] The Texas

[124] Id. at 3.

[125] Id. at 12 ("efforts to 'repair' homosexuals are nothing more than social prejudice garbed in psychological accouterments," quoting the Executive Director for Professional Practice of the American Psychological Association).

[126] Id. at 5.

[127] Id. at 5-6 (indicating that based on national figures approximately 260,000 adult Texans identify themselves as lesbian, gay, or bisexual).

[128] Id. at 6-8 (noting also that the American Psychological Association passed resolutions urging that lesbians and gay men not be discriminated against in employment, housing, licensing, public

sodomy law also discourages lesbians and gay men from acknowledging their orientation because of the threat of prosecution and social stigmatization.[129] This impairs the efforts of public health officials to gather information and promote educational efforts designed to reduce the incidence of AIDS.[130]

The Morales court concluded that "[a] mature adult's choice of an adult sexual partner, and sexual relations, in the privacy of his or her own home is an intensely personal matter and is protected by the Texas Constitutional right to privacy."[131] For the government to intrude upon a privacy right, it must demonstrate a compelling objective not otherwise attainable by

accommodations, and child custody). For a discussion of the developing law of AIDS and employment, see generally Arthur S. Leonard, Aids, Employment and Unemployment, 49 Ohio St. L.J. 929 (1989).

[129] Morales v. State, No. 461,898 at 11 (the sodomy law interferes with efforts to deter violent, anti-gay hate crimes because victims are afraid to report attacks).

[130] Id. at 9-10 (stating that Texas lawmakers have cited section 21.06 of the Penal Code as the basis for opposing AIDS-related funding measures).

[131] Id. at 17. The court stated that the Texas constitutional provisions contain affirmative and broader language, confer greater rights, and give rise to greater zones of privacy than the federal Constitution. See id. at 14.

less intrusive and more reasonable means.[132] The court found that the Texas sodomy statute failed this standard of review, because it could not be defended as a public health measure or as a deterrent to homosexual conduct.[133] The court also disputed the state's argument that a restrictive law may be based solely upon perceived public moral views. The statute does not regulate public life and the court found no evidence of a moral consensus.[134]

The court further held that the Texas sodomy law violates the equal rights guarantee of the state constitution by discriminating on the basis of sexual orientation and gender.[135] Because the statute only prohibits "deviate sexual intercourse" with a person of the same sex, it treats gay and non-gay people differently.[136] Furthermore, evidence indicates that gay people

[132] Texas State Employees Union v. Texas Dept. of Mental Health and Mental Retardation, 746 S.W.2d 203, 205 (Tex. 1987) (articulating a stringent standard of review to be applied in reviewing governmental intrusion upon personal privacy).

[133] Morales v. State, No. 461,898 at 17-19. The court found that section 21.06, rather than reducing the incidence of homosexual behavior, only drives it underground, harming individual mental health and public health. See id. at 28.

[134] Id. at 18.

[135] Id. at 21 (the statute does not prohibit "deviate sexual intercourse" by heterosexuals).

[136] Id.

share the characteristics of other recognized suspect classes. For example, the court found discrimination against gay people to be invidious because it is based on a characteristic over which individuals have little or no control.[137] Lesbians and gay men have also indisputably suffered a history of adverse treatment untempered by access to the political process.[138] Therefore, the court concluded that sexual orientation is a suspect classification under Texas equal rights analysis.[139]

Based on its review under the right to privacy issue, the court held that the sodomy statute's discrimination on the basis of sexual orientation fails not only the compelling governmental objective test, but also the rational basis test. According to the court, the imposition of a moral standard "concerning sexual expression between consenting adults in the privacy of their home is not a legitimate governmental purpose."[140]

The Texas Attorney General will appeal the Morales decision.[141] A victory at the appellate level would increase the impact of the decision and add impetus to the fight for equal protection for gay individuals in Texas. The appellate court

[137] Id. at 22.

[138] Id. at 23.

[139] Id. at 21.

[140] Id. at 25.

[141] Telephone interview with Margaret Tucker, Legal Coordinator of the Texas Human Rights Foundation, Austin, Texas (June 17, 1991) (the district court of appeals will hear arguments in March, 1992).

should resist the course taken by the Fifth Circuit in Baker v. Wade[142] and put to rest the government's insupportable reliance on perceived public morality to justify intrusion upon a strictly private concern.

II. Private Employment: The Texas At-Will Doctrine

Challenges to employment discrimination against gay men and lesbians in the private sector are difficult to maintain due to the private employer's ability to fire employees "at will."[143] The employment-at-will doctrine provides that an employer has an unfettered right to dismiss an employee for any reason, where the employment term is indefinite and no express agreement to the contrary exists.[144] The doctrine has lost vitality in recent years, and several states now recognize exceptions to the rule based on various contract and tort theories.[145] This section

[142] 769 F.2d 289, 292 (5th Cir. 1985) (en banc) (implementing morality is a permissible state goal).

[143] Developments, supra note 11, at 1575-76.

[144] Claudia E. Decker, Comment, The At-Will Doctrine: A Proposal to Modify the Texas Employment Relationship, 36 Baylor L. Rev. 667, 667-68 (1984) (discussing the origins of the at-will rule in the American courts).

[145] See David A. Cathcart & Pamela J. Thomason, State by State Survey of Wrongful Discharge Case Law, 1990 A.L.I.-A.B.A. Resource Materials: Labor and Employment Law, at 435 [hereinafter State

examines the limitations to the at-will doctrine in Texas, and how employees may use these exceptions to combat discrimination based on sexual orientation.

A. Exceptions Based on Contract Theories

The Texas Supreme Court adopted the at-will rule in East Line & R.R.R. Co. v. Scott.[146] The court held that "when the term of service is left to the discretion of either party, or the term left indefinite, or determinable by either party, ... either may put an end to it at will, and so without cause."[147] In carving out exceptions to the rule, some courts rely on an implied contract theory or impose a duty of good faith and fair

Survey]. See generally Joseph Grodin, Toward a Wrongful Termination Statute for California, 42 Hastings L.J. 135 (1990) (advocating statutory change of the at-will rule since common law exceptions to the rule do not effectively protect a majority of workers); Gary Minda & Katie R. Rabb, Time for an Unjust Dismissal Statute in New York, 54 Brooklyn L. Rev. 1137 (1989) (reviewing the current state of employment at-will in New York and outlining features of a model unjust dismissal statute); Richard J. Pratt, Comment, Unilateral Modification of Employment Handbooks: Further Encroachments on the Employment-At-Will Doctrine, 139 U. Pa. L. Rev. 197 (1990) (discussing the employment handbook as an implied contract and as an exception to at-will employment).

[146] 72 Tex. 70, 10 S.W. 99 (1888).

[147] Id. at 75, 10 S.W. at 102.

dealing on the employer-employee relationship.[148] The Texas courts have not recognized the good faith and fair dealing standard,[149] but the issue remains controversial.[150]

(1) Implied Contracts

As part of the erosion of the employment-at-will doctrine, courts have increasingly allowed modifications to employment contracts based on statements in personnel manuals, handbooks, or employee regulations.[151] When manuals state that employees may

[148] Decker, supra note 144, at 670. Several jurisdictions recognize exceptions based on contract rights. See State Survey, supra note 145, at 435.

[149] Decker, supra note 144, at 672.

[150] See Philip J. Pfeiffer & W. Wendell Hall, Employment and Labor Law, 44 Sw. L.J. 81, 98-99 (1990) (noting that a majority of the justices on the Texas Supreme Court have not expressly refused to impose an implied covenant of good faith and fair dealing).

[151] See State Survey, supra note 145, at 655 (a majority of states recognize implied contracts arising from statements in employer's manuals or handbooks). The Texas courts have, of course, recognized that a specific contract term may alter an employee's at-will status. See, e.g., W. Pat Crow Forgings, Inc. v. Casarez, 749 S.W.2d 192, 194 (Tex. App.--Fort Worth 1988, writ denied) (employer's letter offering promotion and right to return to former position limited employer's ability to terminate union employee).

only be dismissed for just cause, this generates an enforceable contract right in some jurisdictions.[152] Texas courts, however, generally refuse to allow provisions in personnel manuals to modify an at-will employment arrangement.[153]

In Reynolds Manufacturing Co. v. Mendoza,[154] an employee maintained that policies in the employee's handbook limited the employer's ability to dismiss at will.[155] The court found that the employee handbooks provided no express agreement dealing with discharge procedures, but merely constituted general guidelines that did not limit the employer's dismissal power.[156] Subsequent cases dealing with personnel manuals have consistently followed this holding.[157] Additionally, the court in Berry v.

[152] See Toussaint v. Blue Cross & Blue Shield, 292 N.W.2d 880, 890 (Mich. 1980) (holding that statements in personnel manual become part of the employment contract); Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441, 445 (N.Y. 1982) (concluding that an employee could establish an implied-in-fact contract not to be discharged without just cause).

[153] See Pfeiffer & Hall, supra note 150, at 92 (indicating that, absent express agreement, employee handbooks do not constitute written employee contracts).

[154] 644 S.W.2d 536 (Tex. App.--Corpus Christi 1982, no writ).

[155] Id. at 537.

[156] Id. at 539.

[157] See, e.g., Bowser v. McDonald's Corp., 714 F. Supp. 839 (S.D. Tex. 1989) (discussing requirement of written contract and

Doctor's Health Facilities[158] upheld a disclaimer in an employment handbook stating that the handbook was not intended as a contract or limitation on the at-will relationship.[159]

Employer statements and corporate policies prohibiting discrimination on the basis of sexual orientation are becoming more common.[160] A survey of Fortune 500 companies indicates that approximately 50 percent of the top 100 do not consider sexual orientation as a criterion in their employment decisions.[161] In Joachim v. AT&T Information Systems,[162] the

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the insufficiency of employee manuals in satisfying statute of frauds requirement); Glagola v. North Tex. Mun. Water Dist., 705 F. Supp. 1220 (E.D. Tex. 1989) (asserting that employee manuals, standing alone, may not expressly or impliedly limit ability to terminate at will); Stiver v. Texas Instruments, 750 S.W.2d 843 (Tex. App.--Houston [14th Dist.] 1988, no writ) (stating that employee handbooks are insufficient memoranda of contractual agreements).

[158] 715 S.W.2d 60 (Tex. App.--Dallas, 1986, no writ).

[159] Id. at 62 (employee handbook contained statement establishing status as revocable general guideline); see also Stiver v. Texas Instruments, 750 S.W.2d 843, 844, 846 (Tex. App.--Houston [14th Dist.] 1988, no writ) (written agreement contained statement that employment was terminable at will).

[160] Corporate Attention Focusing on Rights of Gay Employees, Chicago Tribune, May 5, 1991, at 10, col. 1.

[161] Developments, supra note 11, at 1578.

company's personnel handbook provided that sexual preference would not be used as a basis for job discrimination or discharge.[163] Joachim maintained that he suffered discrimination and termination because of his homosexuality and claimed violation of an implied contract arising from the employee handbook statements.[164] The Fifth Circuit Court of Appeals, relying on Reynolds, found that the handbook statements did not create a contractual agreement that protected the employee from the at-will provisions.[165]

In a marked departure from their holding in Joachim, the Fifth Circuit in Aiello v. United Air Lines[166] established that a company's regulations, which prohibited termination without good cause, constituted a contract and obviated the application of the Texas at-will doctrine.[167] United discharged Aiello after 18 years of service for submitting an expense report claiming expenses not yet incurred.[168] The company's manuals did not specifically forbid anticipatory expense claims and also provided that the employer could discharge an employee only for

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[162] 793 F.2d 113 (5th Cir. 1986).

[163] Id. at 114.

[164] Id.

[165] Id.

[166] 818 F.2d 1196 (5th Cir. 1987).

[167] Id. at 1201.

[168] Id. at 1197.

good cause.[169] The court placed great emphasis on the detailed nature of the company's regulations, which contained specific grievance and disciplinary procedures, and on testimony that company supervisors viewed these procedures and the good cause requirement as a contractual agreement.[170] The court distinguished Reynolds and other contrary holdings because they did not involve handbooks containing specific and detailed discharge procedures.[171]

The holding in Aiello is remarkable given the number of Texas cases to the contrary, and it remains to be seen whether its liberal interpretation will survive.[172] The district court in Abston v. Levi Strauss & Co.[173] followed the Aiello holding, indicating that "where company policies or manuals do contain procedures for termination ... and expressly recognize an obligation to discharge only for good cause, a contract modifying

[169] Id. at 1198.

[170] Id. at 1200.

[171] Id. at 1200-01.

[172] Id. at 1204 (Jones, J. dissenting) (finding a complete lack of Texas authority supporting an implied contract exception to the at-will doctrine); see also Pfeiffer & Hall, supra note 150, at 92 n.82 (stating that Aiello is not a correct interpretation of Texas law).

[173] 684 F. Supp. 152 (E.D. Tex. 1987).

the at-will rule may be found."[174] Thus, it appears that an employee claiming discrimination based on sexual orientation may be able to successfully challenge a dismissal where the employer's handbooks contain the specificity and good cause requirement present in the Aiello fact pattern.

Employees have also been successful in claiming modifications to their at-will status through oral agreements.[175] In Johnson v. Ford Motor Co.,[176] the court recognized that an oral agreement between an employee and a supervisor with authority to modify the employment agreement was an enforceable contract right.[177] A substantiated oral promise to dismiss only for good cause modifies the employee's at-will status and prohibits arbitrary termination.[178] An employee who

[174] Id. at 157 (denying a motion for summary judgment where a written agreement, incorporating by reference company manuals, was in dispute); see also Hicks v. Baylor Univ. Medical Center, 789 S.W.2d 299 (Tex. App.--Dallas 1990, writ denied). In Hicks, the court refused to decide whether Aiello correctly applied Texas law, but found the case distinguishable because Hicks had acknowledged that the employee manual did not create a contract. See id. at 303.

[175] Pfeiffer & Hall, supra note 150, at 93.

[176] 690 S.W.2d 90 (Tex. App.--Eastland 1985, writ ref'd n.r.e.).

[177] Id. at 93.

[178] Id.

can prove an oral agreement may recover for wrongful discharge even if he has not agreed to continued employment for a definite time period.[179] Employers can defeat an oral modification argument, however, by using a statute of frauds defense where the contract term is greater than one year.[180]

(2) Good Faith and Fair Dealing

A majority of courts have rejected the adoption of a duty of good faith and fair dealing in employment contracts.[181] The Texas Supreme Court refused to address the issue in McClendon v.

[179] See Ramos v. Henry C. Beck Co., 711 S.W.2d 331, 336 (Tex. App.--Dallas 1986, no writ) (holding that an oral agreement between a union and its employees requiring good cause for termination would modify the employee's at-will status).

[180] See, e.g., Stiver v. Texas Instruments, 750 S.W.2d 843, 846 (Tex. App.--Houston [14th Dist.] 1988, no writ) (applying the statute of frauds to oral representations that employment would continue until normal retirement age); Schroeder v. Texas Iron Works, 769 S.W.2d 625, 628 (Tex. App.--Corpus Christi 1989) (observing that alleged oral employment contract was within statute of frauds because retirement would not occur for eight years), aff'd, 813 S.W.2d 483 (Tex. 1991).

[181] See Pfeiffer & Hall, supra note 150, at 99 (indicating that the judicial trend is against the imposition of a duty of good faith which would effectively abolish the employment-at-will doctrine).

Ingersoll-Rand Co.,[182] even though McClendon alleged a breach of good faith and fair dealing in the employment relationship. The court instead based its decision on a public policy exception to the employment-at-will doctrine.[183] Four justices, in dissenting opinions, chided the majority for side-stepping the good faith issue.[184] The justices spurned the application of the duty of good faith and fair dealing to the employment-at-will relationship.[185]

Because the court in McClendon failed to examine the applicability of the good faith duty in an employment context, the issue remains unsettled. The decision whether to impose an obligation of good faith and fair dealing on employers may more appropriately reside with the legislature, given its potentially tremendous impact on Texas businesses.[186] Attempts to limit the

[182] 779 S.W.2d 69, 70 (Tex. 1989), rev'd, 111 S. Ct. 478 (1990) (holding on appeal that ERISA pre-empts a state common law claim of wrongful discharge to prevent an employee's attainment of benefits under an ERISA-covered plan).

[183] Id. at 71. Refer to notes 189-96 infra and accompanying text for a discussion of the public policy exception.

[184] McClendon, 779 S.W.2d at 74-75 (Cook, J., dissenting, joined by Phillips, C.J., Hecht, J., and Gonzalez, J.).

[185] Id.

[186] See Pfeiffer & Hall, supra note 150, at 99-102 (noting that the adoption of a good faith duty has the potential for adverse economic consequences due to increased litigation and a negative

application of the at-will employment doctrine by asserting a good faith duty, however, stand little chance of success.[187]

B. Tort Causes of Action for Wrongful Discharge

Employees who file wrongful discharge claims, in addition to seeking recovery for employment contract breaches, increasingly append tort causes of action.[188] Courts allow recovery in some cases under intentional tort or public policy principles.[189] Lesbians or gay men who have suffered emotional distress from employer conduct may be able to maintain an intentional tort action which allows for recovery of punitive damages.[190] Except in extreme circumstances, however, Texas courts are hesitant to embrace the cause of action for intentional or negligent infliction of emotional distress in employee wrongful discharge claims.[191]

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impact on a favorable business climate).

[187] Id. at 100.

[188] Refer to notes 192-98 infra and accompanying text.

[189] See Decker, supra note 144, at 675 (stating that, although some states recognize intentional tort actions, the public policy exception is more widely accepted).

[190] See Sexual Orientation and the Law, supra note 97, at 5-31.

[191] Pfeiffer & Hall, supra note 150, at 102.

(1) Intentional Torts and Negligent Infliction of Emotional Distress

Despite the reluctance of Texas courts to recognize the intentional infliction of emotional distress claim in the employment context, the Fifth Circuit stated in Dean v. Ford Motor Credit Co.[192] that the tort action does exist in Texas.[193] In Dean, a female administrative clerk applied for a promotion to the company's credit department, but since women typically did not work in that department, the company instead hired a man for the position.[194] Subsequently, Dean's supervisor subjected her to harassment and threatened to discharge her.[195] Additionally, company checks appeared in her purse, apparently put there to promote an accusation of theft.[196] During this time Dean suffered from insomnia, headaches, and nervousness, which continued after her discharge from employment.[197] The court upheld the jury award for an emotional distress claim, concluding that the supervisor's

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[192] 885 F.2d 300 (5th Cir. 1989).

[193] Id. at 301 (applying Texas law); see also Bushell v. Dean, 781 S.W.2d 652 (Tex. App.--Austin 1989, writ requested) (upholding jury verdict for intentional infliction of emotional distress where a male supervisor made sexual advances to a female employee).

[194] Dean, 885 F.2d at 303.

[195] Id. at 304-05.

[196] Id. at 304.

[197] Id. at 304-05.

actions "pass[ed] the bounds of conduct that will be tolerated by a civilized society and is, therefore, outrageous conduct."[198]

An employee alleging dismissal or other severe mistreatment because of his or her sexual preference must prove certain elements in order to successfully maintain an action for intentional infliction of emotional distress in Texas. An employee must establish that the employer acted intentionally or recklessly; that the conduct was extreme or outrageous; and that the conduct caused severe emotional distress.[199] This burden of proof can be onerous, and mere anxiety at the loss of employment is insufficient to justify recovery.[200]

Although Texas' highest court allows a cause of action for negligent infliction of emotional distress, the case establishing

[198] Id. at 307.

[199] Id. at 306 (citing Tidelands Auto Club v. Walters, 699 S.W.2d 939, 942 (Tex. App.--Beaumont 1985, writ ref'd n.r.e.)).

[200] See, e.g., Benavidez v. Woodforest Nat'l Bank, No. H-87-3094 (S.D. Tex. Oct. 12, 1989) (stating that, while distress at job loss is unavoidable, it is not the type of severe emotional distress necessary to support a tort claim); Laird v. Texas Commerce Bank, 707 F. Supp. 938, 941 (W.D. Tex. 1988) (stating that when an employer legally terminates an employee, he will not be liable for intentional infliction of emotional distress, absent facts showing sufficient injury).

that claim did not involve an employment situation.[201] More specifically, the court in Fiorenza v. First City Bank Central[202] held that Texas courts do not recognize a negligent infliction claim in the employment context.[203] It appears, therefore, that wrongful discharge suits grounded on claims of negligent infliction of emotional distress will afford little, if any, relief.

A more promising avenue for relief from wrongful discharge is a cause of action based on tortious interference with a contract. In Sterner v. Marathon Oil Company,[204] the Texas Supreme Court examined a situation of third party interference in an employment-at-will contract. At Marathon's request, a subsequent employer fired Sterner, who had previously recovered personal injury damages from Marathon.[205] The court held that a third party cannot tortiously interfere with an at-will

[201] See St. Elizabeth Hospital v. Garrard, 730 S.W.2d 649 (Tex. 1987) (allowing damages where a hospital placed a stillborn child in an unmarked grave without the knowledge or consent of the parents).

[202] 710 F. Supp. 1104 (E.D. Tex. 1988).

[203] Id. at 1105 (cause of action based solely on discharge from employment).

[204] 767 S.W.2d 686 (Tex. 1989).

[205] Id. at 689.

employment contract.[206]

(2) Public Policy Exception

Judicial erosion of the employment-at-will doctrine is most evident in the limitations imposed by the application of public policy exceptions.[207] It is unclear how much support springs from public policy arguments, however, where employees seek to assert wrongful dismissal because of their sexual orientation. No court has expressly held that employment discrimination based on sexual orientation runs afoul of public policy.[208]

Texas courts have fashioned very narrow public policy exceptions to the employment-at-will doctrine, beginning with the

[206] Id. at 688-89. On remand, the court determined that Marathon's retaliatory action was malicious and not based on any legal justification or privilege. See Marathon Oil Co. v. Sterner, 777 S.W.2d 128, 130-32 (Tex. App.--Houston [14th Dist.] 1989, no writ).

[207] See Decker, supra note 144, at 677 (indicating that 25 jurisdictions allow a public policy exception to the at-will rule or have indicated a willingness to do so).

[208] Developments, supra note 11, at 1577 (stating that, absent statutory prohibitions against sexual orientation discrimination, gay or lesbian plaintiffs are unlikely to prevail on public policy grounds).

Sabine Pilot Service, Inc. v. Hauk decision.[209] In Sabine, the court emphasized "[t]hat [the] narrow exception covers only the discharge of an employee for the sole reason that the employee refused to perform an illegal act."[210] The court propounded a somewhat broadened public policy exception in Johnston v. Del Mar Distributing Co.[211] The Johnston court extended the Sabine exception to protect employees who investigate the illegality of an act requested by an employer.[212] Although the court stated that it was not creating a "whistle blower" exception to the employment-at-will doctrine,[213] an employee who reports potential illegal activities to authorities should be able to rely on Johnston. The Texas Supreme Court also recognized a public policy exception to the employment-at-will doctrine when an employer dismissed his employee to avoid pension benefit

[209] 687 S.W.2d 733 (Tex. 1985) (employee was discharged for refusing to illegally pump boat bilges into the water); see also, June E. Higgins, Comment, An Employee Dismissed for Refusing to Commit an Illegal Act States a Cause of Action Under a Narrow Exception to the Employment-At-Will Doctrine, 17 Tex. Tech L. Rev. 273, 285-88 (1986) (reviewing the at-will doctrine and the public policy exception).

[210] Sabine, 687 S.W.2d at 735.

[211] 776 S.W.2d 768 (Tex. App.--Corpus Christi 1989, writ denied).

[212] Id. at 771.

[213] Id. at 772.

liability, but the United States Supreme Court reversed this decision.[214]

Gay and lesbian employees should encourage courts to extend the public policy exception to dismissals on the basis of sexual orientation. In at least one case, an employee argued that such a termination violated both a state statute prohibiting an invasion of privacy and the state's public policy.[215] An invasion of privacy argument relying on a state constitution may be effective, since the Texas constitution confers greater privacy rights than the corresponding federal provisions.[216]

[214] McClendon v. Ingersoll-Rand Co., 779 S.W.2d 69, 71 (Tex. 1989), rev'd, 111 S. Ct. 478 (1990) (finding that ERISA pre-empts the state common-law claim); see also Carol Jendrzey, Note, An Employer Cannot Avoid Its Obligation to Contribute to an Employee-At-Will's Pension Plan by Terminating the Employee, 22 St. Mary's L.J. 161, 169-79 (1990) (discussing the McClendon decision and its potential encroachment on ERISA pre-emptive powers).

[215] See Madsen v. Erwin, 481 N.E.2d 1160, 1166-67 (Mass. 1985) (lesbian journalist was an employee-at-will and could not rely on state statutes or constitution to recover for wrongful discharge). The statute at the time of the Madsen case did not prohibit employment discrimination based on sexual orientation. The legislature has since amended the statute to prohibit sexual orientation as a consideration in employment decisions. Refer to notes 225-34 infra and accompanying text.

[216] Refer to notes 122-40 supra and accompanying text.

Given the inclination of the Texas courts to keep the public policy exceptions narrow, however, litigants should not attempt to rely solely on public policy arguments.

III. State and Local Laws Prohibiting Discrimination Based on Sexual Orientation

Responding to the paucity of protection for lesbians and gay men at the federal level, several municipalities and some states have enacted laws against discrimination based on sexual orientation.[217] Four states have adopted statutes providing state-wide protection against discrimination in employment, housing, and public accommodations.[218] Additionally seventy-eight cities or counties in twenty-five states and the District of Columbia have ordinances prohibiting discrimination against lesbians and gay men in employment, housing, and public

[217] See generally Case, Repealable Rights: Municipal Civil Rights Protection for Lesbians and Gays, 7 Law & Inequality 441 (examining the impact of city ordinances that provide varying degrees of protection from discrimination based on sexual orientation).

[218] See 1991 Conn. Acts 91-58 (Reg. Sess.); Haw. Rev. Stat. §§368-1, 378-2 (1991); Mass. Ann. Laws ch. 151B, §3 (Law. Co-op. 1990); Wis. Stat. Ann. §111.31-.395 (West 1988).

accommodations.[219] Furthermore, the governors of eight states

[219] See D.C. Code Ann. [[1-2512 (1990). The following cities or counties have adopted anti-discrimination ordinances that include discrimination based on sexual orientation: Tucson (Arizona); Berkeley, Cupertino, Davis, Laguna Beach, Los Angeles, Mountain View, Oakland, Sacramento, San Francisco, San Jose, Santa Barbara, Santa Cruz, and West Hollywood (California); Aspen and Boulder (Colorado); Hartford (Connecticut); Hillsborough County and Tampa (Florida); Atlanta (Georgia); Honolulu (Hawaii); Champaign, Chicago, Evanston, and Urbana (Illinois); Iowa City (Iowa); Baltimore, Montgomery County, Prince George's County, and Rockville (Maryland); Amherst, Boston, Cambridge, and Malden (Massachusetts); Ann Arbor, Detroit, East Lansing, Ingham County, Lansing, and Saginaw (Michigan); Hennepin County, Minneapolis, Mankato, and St. Paul (Minnesota); Alfred, Buffalo, Brighton, Ithaca, New York City, Rochester, Syracuse, and Troy (New York); Carrborro, Chapel Hill, Durham, Orange County (Hillsborough), and Raleigh (North Carolina); Columbus, Cuyahoga County, and Yellow Springs (Ohio); Portland (Oregon); Harrisburg, North Hampton, Philadelphia, and Pittsburgh (Pennsylvania); Minnehaha County (South Dakota); Austin (Texas); Clallam County, King County, Olympia, Pullman, Seattle, and Tacoma (Washington); Dane County, Madison, and Milwaukee (Wisconsin). See A National Summary of Anti-Discrimination Laws: A Listing of Legal Protections for Lesbians and Gay Men Re: Employment, Housing, and Public Accommodations, Lambda Legal Defense and Education Fund, Inc. (June 1991) [hereinafter National Summary].

have signed executive orders outlawing discrimination based on sexual orientation in state employment.[220]

A. State Laws

Wisconsin was the first state to pass a comprehensive bill protecting lesbians and gay men from discrimination in many areas, including private and public employment.[221] Proponents of the legislation emphasized the law's symbolic effect, and its message to the community that gays will receive equal treatment.[222] A recurring problem with state and local legislative efforts is lack of knowledge by the gay community that these statutes exist or the extent of their coverage.[223] The Wisconsin law, however, has produced some litigation and has resulted in a good number of complaints being filed with the

[220] See National Summary, supra note 219, at 1-11 (California, Minnesota, New Mexico, New York, Ohio, Pennsylvania, Rhode Island, and Washington).

[221] See Wis. Stat. Ann. §111.31-.395 (West 1988) (passed in 1982).

[222] See Case, supra note 217, at 449 (indicating that the law increases the morale of lesbians and gay men).

[223] Id; see also Rivera, supra note 1, at 480 n. 30 (gays filed only four complaints during the first year of the anti-discrimination ordinance in Ann Arbor, Michigan).

Wisconsin Equal Rights Commission.[224] The trend should continue as gay citizens become aware of the protection afforded by the law and encouraged by successful challenges to discriminatory treatment.

Massachusetts passed its anti-discrimination statute in 1989, amending existing civil rights statutes by adding the phrase "sexual orientation, which shall not include persons whose sexual orientation involves minor children as the sex object."[225] This particular language was apparently the result of a compromise to ensure the bill's passage and demonstrates the "homophobia" that threatens anti-discrimination efforts.[226]

In a case predating the recent amendments to the Massachusetts civil rights statutes, Madsen, a lesbian employee of the Christian Science Monitor (Monitor), challenged her employment termination.[227] In her complaint, Madsen alleged wrongful discharge, violation of the Massachusetts statute prohibiting invasion of privacy, and sexual preference

[224] See Rivera, supra note 1, at 480 (noting that, as of April 1984, 23 cases included charges based on sexual orientation).

[225] See Mass. Ann. Laws ch. 151B, §3 (Law. Co-op. 1990) (employment and housing); id. ch. 272, §§92A, 98 (public accommodations).

[226] See Sexual Orientation and the Law, supra note 97, at 5-26 n.37.

[227] Madsen v. Erwin, 481 N.E.2d 1160 (Mass. 1985).

discrimination.[228] The court concluded that Madsen was a "church" employee, the Monitor being an arm of the Christian Science Church.[229] According to the court, the decision to discharge Madsen because of her sexual preference was a religious one and therefore protected by the First Amendment; thus Madsen's claims failed.[230]

The court also stated that nothing in the state's statutes prohibited the Monitor's termination action, noting that the Massachusetts employment discrimination statute did not include discrimination based on sexual preference.[231] The Massachusetts legislature has since amended the statute to include discrimination on the basis of sexual orientation.[232] Despite the change in the statute, it appears that the Madsen court would be unwilling to allow wrongful discharge claims against church employers based on state legislation.[233] The court's position

[228] Id. at 1161.

[229] Id. at 1163.

[230] Id. at 1165-66.

[231] Id. at 1166 & n.4.

[232] Refer to notes 225-26 supra and accompanying text.

[233] Madsen v. Erwin, 481 N.E.2d 1160, 1165 (Mass. 1985) (stating that whereas modern legislation may restrict secular employers, to deprive churches of the fiduciary duty owed to them by their employees interferes with an interest protected by the Free Exercise Clause). The court cited Lewis ex rel. Murphy v. Buchanan, 21 Fair Empl. Prac. Cas. (BNA) 696 (Minn. Dist. Ct. 1979)

on this issue demonstrates the inadequate protection provided by such state and local legislative efforts against discrimination based on sexual orientation.[234]

State and local laws are also vulnerable to attack from referendum measures.[235] The Massachusetts anti-discrimination statute weathered such a referendum attempt in Collins v. Secretary of the Commonwealth.[236] The Massachusetts legislation prohibiting discrimination based on sexual orientation passed, despite strong opposition.[237] The day after its passage, however, voters filed a petition for a referendum seeking its repeal.[238] The amendments that added discrimination based on sexual orientation to the civil rights statutes also substantially expanded the exemption from the anti-discrimination law granted to religious institutions.[239]

The state constitutional provisions authorizing the referendum process exclude from its scope any law relating to religion, religious practices, or religious institutions.[240] The Collins court concluded that the broadened exemption for religious institutions in the anti-discrimination bill was not merely incidental to the provisions barring discrimination on the basis of sexual orientation.[241] Therefore, the referendum provisions excluded the law because on its face it related to religion, religious practices, or religious institutions.[242] The court's holding, however, may not protect the law from

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(refusing to endorse ordinance forbidding employment discrimination on the basis of sexual preference against parochial school pastor who refused to employ a homosexual teacher). Madsen, 481 N.E.2d at 1165.

[234] See Developments, supra note 11, at 1668 (stating that local anti-discrimination measures become ineffective when their enforcement would conflict with constitutional limitations); see also Gay Rights Coalition v. Georgetown Univ., 536 A.2d 1, 21-26 (D.C. 1987) (University's refusal to grant official recognition to gay student groups did not violate District of Columbia's nondiscrimination provision but students were entitled to equal access to tangible facilities); Shelley K. Wessels, Note, The Collision of Religious Exercise and Governmental Nondiscrimination Policies, 41 Stan. L. Rev. 1201, 1228 (1989) (reviewing Gay Rights Coalition v. Georgetown Univ. and arguing that the school should not have been able to maintain freedom-of-religion defense since the educational mission was secular).

[235] See Case, supra note 217, at 451-53 (noting that five communities have had public referendums repealing gay rights ordinances).

[236] 556 N.E.2d 348 (Mass. 1990).

[237] See Sexual Orientation and the Law, supra note 97, at 5-26 n.37.

[238] Collins, 556 N.E.2d at 348.

[239] Id. at 350-51.

[240] Id. at 351.

[241] Id. at 355.

[242] Id. at 354-55.

subsequent attack. The court stated that their decision does not place other provisions of the law that prohibit discrimination based on sexual orientation beyond the reach of the referendum process.[243]

In 1991 two states, Hawaii and Connecticut, enacted legislation barring discrimination on the basis of sexual orientation. The Hawaii provisions extend protection to lesbians and gay men from discrimination in employment, housing, and public accommodations.[244] The Connecticut law prohibits professional associations, whose profession requires a state license, from refusing membership because of a person's sexual orientation.[245] Connecticut also bars discrimination by employers, employment agencies, and labor organizations in hiring, firing, or compensation.[246] Additionally, the new law prohibits discrimination based on sexual orientation in public accommodations,[247] housing,[248] and financial credit transactions.[249]

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[243] Id. at 356.

[244] Haw. Rev. Stat. §§368-1, 378-2 (1991).

[245] 1991 Conn. Acts 91-58, §2 (Reg. Sess.) (subject to a fine of not less than $100 nor more than $500).

[246] Id. at §3.

[247] Id. at §4 (providing for a fine of $25 to $100 and/or 30 days imprisonment).

[248] Id. at §5 (providing for same fines as §4).

[249] Id. at §6.

B. Municipal Ordinances

The most notable development in the struggle for equal treatment of lesbians and gay men is the increasing number of municipal ordinances barring discrimination based on sexual orientation in the public and private sectors. The proliferation of such legislation reflects a response to the dearth of gay rights protection at the federal and state levels.[250] Political efforts to promote passage of local ordinances provide a forum for educating the community on the needs and problems of lesbians and gay men.

(1) The California Ordinances

California has the greatest number of local ordinances, with the Berkeley, Laguna Beach, Los Angeles, and San Francisco codes providing the most widespread protection.[251] These ordinances prohibit discrimination in public and private employment, business establishments and practices, and housing and real estate.[252] Generally, the scope and coverage of various ordinances both in California and other states differ greatly, as

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[250] See James W. Meeker et al., State Law and Local Ordinances in California Barring Discrimination on the Basis of Sexual Orientation, 10 U. Dayton L. Rev. 745, 746-47 (1985).

[251] See Berkeley, Cal., Code ch. 13.28 (1982); Laguna Beach, Cal., Code ch. 1.07 (1984); Los Angeles, Cal., Code ch. IV, art. 12 (1979); San Francisco, Cal., Administrative Code art. 33 (1987).

[252] See Meeker et al., supra note 250, at 758.

do the enforcement provisions and remedies available under the ordinances.[253] It is difficult to gauge the effectiveness of these provisions; however, complaints filed appear to be on the increase. For example, the number of complaints alleging sexual orientation discrimination filed with the San Francisco Human Rights Commission rose to 85, as compared to 71 complaints filed in the previous year.[254]

The remedies available to individuals subjected to sexual orientation discrimination vary from injunctive relief to punitive damages. The Berkeley, Laguna Beach, Los Angeles, and San Francisco ordinances allow petitions for injunctive relief and awards of actual damages, costs, as well as reasonable attorney fees.[255] With the exception of the San Francisco ordinance, these ordinances also provide for punitive damages.[256] Other California ordinances lack such rigorous enforcement measures, providing only a complaint procedure for

[253] Id. at 758-60.

[254] SF Rights Panel Reports on Bias Cases, S. F. Chron., June 20, 1991, at A19, col. 1. But see Case, supra note 217, at 455 & n.98 (indicating that ordinances receive surprisingly little use and noting that the sexual orientation cases represent only between 1% and 7.5% of the number of total cases under the Minneapolis ordinance).

[255] See Meeker et al., supra note 250, at 760.

[256] Id.

the investigation of violations.[257]

(2) The Austin, Texas Ordinance

Texas bestows no state-wide protection against discrimination based on sexual orientation. The City of Austin ordinance is the only provision in the state that recognizes sexual orientation as a prohibited basis for discrimination.[258] The ordinance outlaws discrimination in housing, public accommodations, and employment because of an individual's race, color, religion, sex, sexual orientation, national origin, age, or physical handicap.[259] The code exempts certain individuals, groups, or practices from the reach of the provisions. For example, it is not an unlawful employment practice to classify employees on the basis of sexual orientation where such basis is a "bona fide qualification reasonably necessary for the normal operation of that particular business or enterprise."[260] Furthermore, religious institutions, including schools owned or controlled by a religious association, may discriminate by hiring employees of a particular religion.[261]

[257] Id.

[258] See National Summary, supra note 219, at 11.

[259] Austin, Tex., Code ch. 7-4, arts. II, III, IV (1975). Some provisions extend protection to other categories, such as student status or marital status. Id. art. II.

[260] Id. art. IV, §7-4-80(a).

[261] Id. art. IV, §7-4-80(b), (c).

The Austin Human Relations Commission enforces the ordinance, with legal assistance from the city attorney.[262] Enforcement is difficult, however, since the commission has limited power to attack code violations.[263] The Austin ordinance delineates a complaint procedure for handling charges filed by aggrieved parties. The provisions are substantially similar for alleged violations of discriminatory practices in housing, public accommodations, or employment.[264]

Using the employment provisions as an example, the first step taken is a review of the allegations included in the charge, to ensure they fall within the ordinance.[265] The employer must then receive notice of the complaint within ten days.[266] If an investigation determines that a charge does not come within the provisions, or that there is not reasonable cause to believe the charge is true, the investigator will dismiss the complaint, subject to a right of review and hearing before the

[262] Austin, Tex., Code chs. 7-2, 7-4 (1975).

[263] Telephone interview with Marco Salinas, Administrator/Program Manager with the Austin Human Rights Commission (June 17, 1991) (indicating that enforcement is difficult since the Commission has no subpoena authority).

[264] Austin, Tex., Code ch. 7-4, art. II §7-4-38, art. III §7-4-55, art. IV §7-4-75 (1975).

[265] Id. art. IV, §7-4-75.

[266] Id.

Commission.[267] Where reasonable cause is found, the director must attempt "to eliminate any such alleged unlawful employment practice by informal methods of conference, conciliation, and persuasion."[268] If these efforts fail, the Commission refers the case to the city attorney for prosecution.[269]

Although local ordinances prohibiting discrimination on the basis of sexual orientation may be symbolic, their effectiveness is often limited by weak enforcement provisions, lack of public awareness, and the negative consequences that may follow an individual's revelation of his or her sexual orientation.[270] The Austin ordinance, for example, does not allow the commission to assess penalties or other damages, restricting its power to investigation, conciliation, and prosecution recommendations.[271] Despite these limitations, local ordinances serve a significant function in states, such as Texas, where no state-wide statute

[267] Id. art. IV, §7-4-75(d).

[268] Id. art. IV, §7-4-75(e).

[269] Id. art. IV, §7-4-75(f) (the statute requires a majority vote, and the Commission may also refer the case to the United States Equal Employment Opportunity Commission).

[270] See Case, supra note 217, at 456 (calling for city action to inform the community that sexual orientation discrimination is illegal).

[271] Refer to notes 262-69 supra and accompanying text.

outlaws discrimination based on sexual orientation.[272]

CONCLUSION

In the public sector, lesbians and gay men who challenge employment discrimination based on sexual orientation typically rely on the Equal Protection Clause of the Fourteenth Amendment. However, courts consistently refuse to grant relief, even though lesbians and gay men arguably suffer invidious discrimination. A handful of federal district courts have upheld equal protection claims against government employers, only to have the appellate courts overturn their decisions. The decisions by the lower courts offer enlightened, cogent arguments for recognizing homosexuals as a suspect class and applying heightened scrutiny to the discriminatory practices of government employers. The appeals courts should re-examine their position and extend suspect class status to lesbians and gay men.

In the private sector, lesbians and gay men have likewise had little success combatting employment discrimination. The employment at-will doctrine operates to protect employers' arbitrary discharge practices. More and more jurisdictions, however, recognize the out-dated nature of the doctrine and the

[272] See State v. Driskill Bar & Grill, Inc., Nos. 739,130 & 739,131 (Austin, Tex. Mun. Ct. April 16, 1980) (upholding the constitutionality of city's sexual preference ordinance in its application against establishment prohibiting same-sex dancing).

exceptions to the doctrine threaten to envelope the rule. Lesbians and gay men should be able to use these exceptions to successfully attack wrongful terminations.

The greatest progress in the recognition of the rights of homosexuals to equal treatment in the workplace has occurred at the state level. Recently state courts have found state sodomy statutes unconstitutional. This is an important first step in establishing the rights of lesbians and gay men. These statutes stigmatize homosexuals and encourage discrimination in employment, housing, and other vital areas. Additionally, some states have enacted legislation outlawing discrimination based on sexual orientation. A large number of cities also have ordinances that prohibit discrimination against lesbians and gay men in employment, housing, and public accommodations. These efforts are important indications that lesbians and gay men are slowly gaining in their efforts to achieve equal protection under the law.

Linda Sanchez

COPY

PHYLLIS RANDOLPH FRYE WRITING COMPETITION (AWARD)

ENDOWMENT GIFT AGREEMENT

In order to encourage legal research as it relates to the issues of sexual identity, (which includes the transgender community of transsexuals, transgenderists and transvestites; and which also includes the lesbian and gay community), this writing competition will be awarded annually to the student writing the best paper on topics relating to any area of the law (i.e, family, employment, custody, criminal) dealing with sexual identity, with preference given to transgender issues in the final judging of the papers.

The $500 award is to commence spring of 1992, via a current gift of $ 1,000.00, $ 500 of which will fund the award and the remaining $ 500 will initiate the fund. Included in this agreement is a commitment on the part of Donor, Phyllis Randolph Frye, UHLC Class of 1981, to endow same award at a principal no less than $7,000.00 necessary to generate a comparable level of interest income for the annual award. Until the time that the fund is fully endowed at such level, donor agrees to commit an annual gift to fund the writing competition award and to fully fund the award at no less than $ 7,000.00, with the remaining $ 6,000.00 fully paid over the next four (4) years. The fund will be housed within the University of Houston Law Foundation, a section 501 (c)(3) not-for-profit corporation which exists solely for the benefit of the University of Houston Law Center.

Monies within this endowed fund are established for said purpose and only interest income generated (in compliance with current interest rates quoted by the Board of Directors of the UH Law Foundation) may be paid to the awardee each year. The remaining corpus represents an endowed, restricted fund within the UH Law Foundation for said purposes.

The law to be analyzed may be in such areas (illustrative but not inclusive) as

-- employment (hiring discrimination, on the job transition, and wrongful discharge)
-- family (change of name, pre-operative change of gender, amendment of birth certificate, passports, validity of marriage before and after surgery, child custody and child visitation)
-- housing (refusal to rent and wrongful eviction)
-- insurance (naming beneficiaries, electrolysis and hormones, psychological analysis, surgery and hospitalization, refusal to insure life)
-- military (security risks, forced discharge, and benefits)
-- criminal (mistreatment during arrest, segregation while in jail or in prison, and withholdings of hormones)

--- probate (validity of being a named heir after transition begins and validity of bequest to legal spouse before surgery if death after surgery) and

--- health (ethics of greed in overtreatment or bias in undertreatment by medical community; malpractice from the primary and ancillary procedures; definitions of sex, gender, role and appearance by legal, medical, historical and social).

The competition will be open to all law students at the University of Houston Law Center. Judging will be by a committee appointed by the Dean and approved by the Donor. The winner and other selected submissions may be published and distributed under the auspices of the Bar Association of Human Rights of Greater Houston, Inc. or the Gulf Coast Transgender Community--An Outreach Organization as arranged by the Donor.

The preference given to transgender law is because in donor's real life experience as a transgendered person, she knows that comparatively less is written on this issue.

Robert L. Knauss, Dean
UH Law Center

Phyllis Randolph Frye
Donor

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Note to lawyer and non-lawyer — Endow one at your area law school. Phyllis

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"Sexual Orientation as a Prohibited Basis of Employment Discrimination"

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"Punitive Damages Under 42 U.S.C. § 1983: The Effect of Qualified Immunity on the Plaintiff's Ability to Obtain Punitive Damages"

Honorable Mention: Michele E. Marquit
"Actual Innocence: The History and Development of an Enigmatic Exception to Procedural Default and Abuses of the Writ in Capital Habeas Corpus Cases"

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Recipients: Jeff[illegible]

a page from the 2nd Annual Dean's Award Ceremony.

University of Houston Law Alumni Association
Briefcase
Summer 1992
Volume 11, No. 3

PILO's Outstanding Year Acknowledged at Dean's Awards Ceremony

Linda Bueker, Martin Mayne and Ellen Larkin are all smiles because their group, Public Interest Law Organization, was named the S.B.A. Organization of the Year

Linda Sanchez wins the Phyllis Randolph Frye Writing Competition Award and is congratulated by the named donor

On April 22, 1992, the Law Center hosted the Second Annual Dean's Awards Ceremony in Krost Auditorium. Students, family, alumni and faculty were gathered and welcomed by Dean Robert L. Knauss to recognize outstanding scholarly achievements, academic excellence, and service to the Law Center. Donors of the more than 80 scholarships and awards were invited to meet personally with the recipients of the honors.

The Student Bar Association acknowledged the Public Interest Law Organization as the Outstanding Student Organization for 1991-92. Among many of its accomplishments, the group produced a video during the spring semester entitled "Justice, Not Just Us" which they [illegible] from students and faculty to the PIG (Public Interest Grant) program. More than $7,000 was raised with 100 donors and it will be used to fund grants for Bryan Walker and Patricia Miller. They will be able to work this summer with Public Citizen (a Ralph Nader organization) and the Center for Battered Women respectively.

The S.B.A. also honored Gilbert Finnell with the A.A. White Outstanding Professor Award. A newly established scholarship in memory of Murray Nusynowitz, assistant dean of admissions, was awarded to Petula Palmer, president of the S.B.A. and member of Murray's admissions team. It was presented by Murray's wife Sheri and his sister, Leah Gross '87.

a page from the subsequent issue of law school alumni magazine