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A KINDER, GENTLER WORKPLACE FOR LESBIANS AND GAY MEN

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ABSTRACT

The 1991 decision by a federal district court in Kansas declaring that the homosexual classification is suspect is supported in this article [1]. The court's decision requires strict scrutiny of the homosexual classification with respect to employment. The treatment of the homosexual classification in other lower courts, and in the Supreme Court, which has declined to address the equal protection rights of homosexuals, is also discussed. Employment protection for lesbians and gay men, which exists in several states, is noted, and the possible impact of the evidence regarding a biological connection to sexual orientation on the individual employment rights is addressed. The article suggests that protection for sexual orientation could be effected with little disruption in the workplace through an amendment of Title VII of the Civil Rights Act, extending the law against sexual harassment, and by applying the narrowly-defined bona fide occupational qualification.

In its quarterly publication, *Issues in Human Resources*, the Society for Human Resources Management (SHRM) reported in January, 1991 that although discrimination laws have historically sought to protect groups with immutable physical characteristics, "The next wave of civil rights protections could be for what may be termed 'lifestyle disabilities.' " [2, p. 8]. The article included sexual preference[1] under this frontier umbrella. The inference was that homosexuality is not based on an immutable physical characteristic [2].

Psychologists, psychiatrists, and psychobiologists have long puzzled over the cause of homosexuality; there has been less agreement on its cause than on its

[1] Some prefer the term sexual *orientation* because "the word *preference* suggests a degree of voluntary choice . . . that has not been demonstrated in psychological research" [3, p. 973].

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immutability. Most agree that, whatever the cause, it is practically immutable. Nevertheless, many court decisions that have dealt with the individual employment rights of lesbians and gay men are based on the belief that persons *choose* homosexual lifestyles, and that the condition is not immutable. Both the courts and the Equal Employment Opportunity Commission (EEOC) have consistently held that Title VII does not prohibit discrimination on the basis of homosexuality.

Dr. Simon LeVay of the Salk Institute for Biological Studies in San Diego, has recently published a study showing a possible biological cause of homosexuality. In examining the cadavers of gay and heterosexual males who had died of AIDS, he found that the front part of the hypothalamus in the brain, which, among other things, determines sexual orientation, was significantly smaller in the homosexuals than in the heterosexuals. Because Dr. LeVay's sample was small, the heterosexual and homosexual classifications were based simply on the assertions of the subjects before they died, and because his finding might be merely an artifact of AIDS, LeVay's findings are not conclusive [4]. However, if his finding can be reliably replicated under varying conditions, there will be reason to believe that homosexuality might be not only an immutable condition, but also an immutable *physical* condition, which presumably would warrant the same civil rights protection as other immutable physical conditions.

The SHRM characterization of homosexuality as a lifestyle *disability* (emphasis is mine) was not meant to suggest that the condition falls under the protection of the Americans with Disabilities Act. The Act specifically does not cover homosexuality: "For purposes of the definition of 'disability' . . . homosexuality and bisexuality are not impairments and as such are not disabilities under this Act" [5]. Although one might disagree with SHRM's characterization and its implication that the condition is not immutable, SHRM is probably correct in identifying sexual orientation as an important issue in the next civil rights frontier.

There is renewed interest in homosexuality in the current popular media. This might be due in part to the AIDS crisis, in which gay men have been at greater risk than the general population. The media are also reinvestigating the historical ban against homosexuals serving in the military. *Time*'s report included some evidence that the ban should be lifted [6, p. 16]:

> Two years ago, the Pentagon commissioned a study that concluded that the antigay policy was irrational. The report, which never got beyond the draft form, was rejected as "technically flawed" and for exceeding its authority.... A second report, which was never submitted, found that gay soldiers were less likely to drink, take drugs, or have disciplinary problems than nongay soldiers.

The *Time article concluded* [6, p. 16]:

> So far, the court has upheld the ban in all the cases it agreed to hear, and despite public support for reversal, few politicians seem ready to take up the cause.

In a move that might have far-reaching effects in benefits administration, the Lotus Development Corporation recently announced plans to provide the same benefits to gay and lesbian couples as it does to married couples. Lotus is the first major publicly-traded company to do this. A corporation spokesman said that the move should be perceived simply as providing equal treatment to both heterosexuals and homosexuals, noting that heterosexual employees have always had the prerogative of extending benefits coverage through marriage. Homosexual employees can now extend benefits to their homosexual partners by attesting that their relationship is based on a long-term commitment. In taking this action, the Lotus Development Corporation is anticipating a predicted shortage of skilled workers, and it is positioning itself to compete successfully for that 10 percent of the workforce that is purported to be homosexual.

Observing that the United States Supreme Court has been slow to grant certiorari to cases where it might have directly addressed the equal protection of the rights of homosexuals, and recognizing, as well, that Congress has not seen fit to extend Title VII protection on the basis of sexual orientation, this article will discuss the employment rights of homosexuals as expressed by the courts and the state legislatures, as well as state legislative initiatives and governors' executive orders. I propose that the homosexual classification, with regard to homosexual employment rights, is suspect and deserving of the strict scrutiny ordered by a federal district court in Kansas (discussed below) [1]. I further propose that if protection for sexual orientation were included in Title VII, the panoply of court and EEOC decisions, and practices and policies in human resource management relating to sexual harassment and the same-sex bona fide occupational qualification (BFOQ), as well as the customer preference BFOQ, would inform the process of such an extension with little resulting turmoil in the workplace. My hope, in this discussion, is to promote a kinder, gentler workplace for lesbians, gay men, their coworkers, and their employers.

Although the focus of this article is on the action in legal and legislative circles, the medical and scientific communities that deal with the human condition are especially qualified to characterize the abilities and the interactions of homosexuals in the workplace [7]. However, when employment rights are challenged (as the employment rights of gay men and lesbians have been), they are secured (if they are secured) through the courts or legislatures, or, to a lesser extent, through executive orders. Whether or not the courts and legislatures find the medical and scientific evidence to be probative, or whether or not they even consider medical and scientific evidence, homosexual rights are, for better or for worse, dependent on the action of the courts and legislatures.

The Supreme Court and the Congress are aware that, although a majority of the public is in favor of removing the ban against homosexuals in the military (as reported above by *Time*), there has not been ground-swelling support by the general public in the United States for defending homosexual rights in the workplace. It will be shown that even (or perhaps especially) religious groups and other organizations who may view the homosexual condition itself as neither moral nor immoral object to the employment of avowed homosexuals.

Although the stereotypical views that gay men and lesbians exhibit flawed judgment, social development, and vocational capabilities are all demonstrably false, politicians who choose to defend the employment rights of lesbians and gay men are, themselves, liable to be viewed with suspicion. And, although the American Psychological Association, the National Association for Mental Health, the American Psychiatric Association, the American Sociological Association, and the Surgeon General may all agree (and they do) that homosexuality in and of itself is not a mental illness, candidates for national political office are slow either to seek homosexual support, or to support homosexual interests [8]. All these factors set the stage for this discussion.

THE SUPREME COURT ON HOMOSEXUAL EMPLOYMENT RIGHTS

The right to life, liberty, and the pursuit of happiness has been considered a fundamental right since our Declaration of Independence. Because for most people that right is inextricably tied to the freedom of opportunity to work and to earn a living, fairness and understanding require that lesbians and gay men be afforded equitable treatment and equal protection in the workplace.

In 1915, the Supreme Court made this point in declaring an Arizona anti-alien labor law to be in violation of the equal protection clause of the Constitution [9]. It will be shown here that in some instances the civil rights to employment for homosexuals today are even more tenuous than the rights of aliens in Arizona were before *Truax*. At that time, aliens could be excluded when their ranks exceeded 20 percent of a firm's workforce; homosexuals can, in some cases, be totally excluded today. There are similarities, too: aliens could then be denied employment *because* they were aliens; homosexuals can now be denied employment, in some cases, *because* they are homosexuals. There are differences, to be sure: aliens could be penalized for misrepresenting their citizenship, whereas, as a practical matter, homosexuals are encouraged to conceal their identities because a self-acknowledged homosexual is often presumed to engage in conduct that some states criminalize, conduct that some groups find to be immoral, and conduct that is not protected by the right to privacy [10]. At the same time, homosexuals who conceal their identities when hired are, in some cases, subject to dismissal if their sexual orientations are revealed.

The Supreme Court has not, until now, directly addressed the equal protection rights of gay men and lesbians as they relate to the freedom of opportunity to work and to earn a living. Consequently, the Supreme Court has not determined the level of scrutiny that should be applied to the homosexual classification and its effect on employment. It should be noted that suspect classifications require strict scrutiny. As it applies to employment, given suspect status, the Court decides whether the classification is necessary to serve a compelling governmental interest. Quasi-suspect classifications require intermediate scrutiny, through which the courts decide if the classification is substantially related to a governmental interest. If the classification is neither suspect nor quasi-suspect, it is subject to ordinary rationality review, where the Court decides if there is merely a rational basis for, say, not hiring a lesbian or a gay male. Several cases provide a rationale for the Supreme Court's findings in establishing the classifications for other bases of possible discrimination [11-15].

The level of scrutiny that a court applies to classifications for groups who wish to enforce their equal protection rights in matters of employment, then, becomes a threshold issue in employment discrimination cases. For example, the Supreme Court has declared race, alienage, and national origin as suspect classifications [16-18]. Two classifications have been recognized as quasi-suspect: gender and illegitimacy [19, 20].

Although the level of scrutiny becomes a threshold issue, there is no guarantee that any two courts will come to the same conclusion in applying any level of scrutiny to similar cases. What one court might find neither rational substantially related to a governmental interest, nor necessary to serve a compelling governmental interest, another court might find rational, substantially related to a governmental interest, or necessary to serve a compelling governmental interest.

Even though more reliable protection for the job rights of lesbians and gay men could come through federal legislation than through the vagaries of the courts, attempts to add sexual orientation to the list of protected groups in Title VII of the Civil Rights Act of 1964 have not been successful. As noted above, it has not been politically popular at the federal level to defend the civil rights of homosexuals. Initial national protection, if it is to come, is more likely to come through the Supreme Court in an equal protection case than through Congress. The greater independence of the Court would allow it to lead public opinion.

Significantly, a federal district court in Kansas recently declared the homosexual classification to be suspect, requiring strict scrutiny of the classification with respect to hiring [1]. However, the court ruled in this case that there was not even a rational basis to deny employment to a prospective teacher who was perceived to have homosexual tendencies. Because the *Jantz* case was decided on the basis of a rationality review, it is not likely that this case will lead to an appeal of the suspect status. However, if and when an appellate court concurs in a finding of suspect status, such a case would likely reach the Supreme Court. And, given the new thinking on the homosexual condition, and a direct application of the

equal protection clause, protection for the equal employment rights of homosexuals could flow from a Supreme Court decision. Nevertheless, it would be helpful to review a traditional test that the Supreme Court used in determining suspect status.

In *Plyler*, the Supreme Court shed light on its thinking [12, p. 216 n.14].

> Several formulations might explain our treatment of certain classifications as "suspect." Some classifications are more likely than others to reflect deep-seated prejudice . . . certain groups, indeed largely the same groups, have historically been relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process. . . . The experience of our nation has shown that prejudice may manifest itself in the treatment of some groups. Our response to that experience is reflected in the Equal Protection Clause of the Fourteenth Amendment. Legislation imposing special disabilities upon groups disfavored by virtue of circumstances beyond their control suggests the kind of "class or caste" treatment that the Fourteenth Amendment was designed to abolish.

Having said all this, the Supreme Court has not to date been eager to afford itself the opportunity to apply these principles to the homosexual classification. In February, 1985, it denied a petition for certiorari, declining to hear an appeal from the Sixth Circuit that dealt with the homosexual classification [21]. In *Rowland*, the appellate court had held that it was not impermissible to discipline the plaintiff for making statements about her sexual preference (homosexual/bisexual). Justice Brennan, with whom Justice Marshall joined in dissenting to the denial of certiorari, articulated reasons why the case might have been heard [21, 470 U.S. 1009].

> This case raises important constitutional questions regarding the rights of public employees to maintain and express their private sexual preferences. Petitioner, a public high school employee, was fired because she was a homosexual who revealed her sexual preference—and, as the jury found, for no other reason . . . Because determination of the appropriate constitutional analysis to apply in such a case continues to puzzle lower courts and because this Court has never addressed the issues presented, I would grant certiorari and set the case for oral argument . . . Whether constitutional rights are infringed in sexual preference cases, and whether some compelling state interest can be advanced to permit their infringement are important questions that this Court has never addressed, and which have left the lower courts in some disarray.

HOMOSEXUALITY CASES IN THE LOWER COURTS

The lower courts have used several tests in determining suspect status: whether the group has suffered a history of invidious discrimination; whether the group is defined by a trait that bears no relation to ability to perform or to contribute to

society; whether the group has been saddled with unique disabilities because of prejudices or inaccurate stereotypes; whether the trait defining the class is immutable or exhibits distinguishing characteristics that define it as a discrete group; and whether the group lacks the political power to address its grievances through the legislative process. Although there have been strong dissenting opinions, most lower courts that considered the question of suspect status for the homosexual classification before *Jantz* have decided against the need for higher scrutiny. Before turning to a discussion of recent lower court cases that dealt with these issues, and before reviewing how the *Jantz* court considered and rejected the conclusions of other lower courts, it would serve us well to capture the flavor of how selected lower courts have dealt with the homosexual issue in general over the last couple of decades.

In a 1972 case, a federal district court for the District of Minnesota had enjoined the University of Minnesota Board of Regents from denying employment to James Michael McConnell, who had openly and publicly flaunted his homosexual lifestyle by applying for a marriage license to marry another male. On appeal, the Board of Regents' action was found to be justified because McConnell's actions were public and unconventional, and designed to foist tacit approval of his behavior upon his potential employer [22]. However in 1973, a California federal district court granted reinstatement with back pay for a worker whose homosexuality had no connection with the duties of his federal job [23, p. 5994]:

> "The mere claim that the government would be subject to public contempt if it were to employ homosexuals could not justify discharge because the federal bureaucracy's function is not to enforce the majoritarian moral code."

The courts have historically concurred in governmental agencies' denials of national security clearance because the possible, unwanted disclosure of homosexuality would make homosexuals targets of blackmail, and thereby make them security risks [24].

In *Baker v. Hampton*, the federal district court of the District of Columbia decided that a federal employee who was discharged for refusing to provide information concerning his homosexuality was deprived of "due process" under the Fifth Amendment where there was no showing that his homosexuality had a detrimental effect on his job performance [25].

In *Acanfora v. Board of Education*, an appellate court decided that it was proper to transfer a homosexual from teaching to administrative work. The court held that, except for the fact that the plaintiff had misrepresented his sexual orientation on a job application, he would not have been hired in the first place [26].

In 1977, another appellate court found that, in passing Title VII of the Civil Rights Act of 1964, Congress did not intend to protect sexual orientation and has

since refused to extend such protection [27]. The same court also refused to apply *Griggs v. Duke Power* under a disparate impact theory,[2] wherein the plaintiff asserted there was a greater incidence of homosexual discovery among males [28]. In 1979 an appellate court ruled that the discharge of a worker because he was a homosexual was not prohibited by Title VII [29]. Also in 1979, the Ninth Circuit addressed three federal district court cases simultaneously, and sustained three decisions that had rejected claims of conspiracy by employers in denying employment to homosexuals [30]. The circuit court did not allow the plaintiffs standing under an old civil rights act proscribing a conspiracy of two or more persons to deprive any person of the equal protection of laws (42 United States Code § 1985), and refused to expand Title VII's application without a congressional mandate. However, in the same year, a California state court ruled that a discriminatory employment policy against homosexuals was actionable under the equal protection provisions of the state constitution [31].

In 1984, a New York state court reviewed a resolution by the New York City Board of Estimate that required agencies seeking renewal of social service contracts not to discriminate on the basis of sexual orientation. The Roman Catholic Archdiocese of New York and the Salvation Army had asked the court for a preliminary injunction against the enforcement of the resolution. The court denied the injunction, saying " . . . that discrimination in employment based on sexual orientation or affectional preference is a violation of equal protection under the Fourteenth Amendment to the United States Constitution and Section 11 of Article I of the New York State Constitution" [32, p. 38, 407]. In 1985, the New York Supreme Court declared Executive Order 50, issued by Mayor Edward I. Koch on April 25, 1980 and upon which the resolution by the Board of Estimate was based, to be a valid affirmation of constitutional rights [32].

In 1985, the federal district court in the District of Columbia held that an employee of the CIA was deprived of his constitutional right to due process when he was summarily discharged following disclosure of his homosexuality [33]. In 1987, the District of Columbia Court of Appeals ruled that a National Security Agency employee was entitled to challenge the basis for the revocation of his security clearance, which had cost him his job [34].

On June 15, 1988 the Supreme Court reviewed the effect of the National Security Act, which granted the CIA director the discretionary authority to fire employees "in the interest of the United States." The Court said that although the Administrative Procedures Act banned judicial review of any agency action that is made discretionary by law, the ban does not bar subsequent constitutional claims by affected employees [35].

[2] The disparate impact theory of discrimination was established by the Supreme Court in 1971. Employment practices that have a disparate effect on protected groups, regardless of intent, are considered discriminatory.

Military cases have been mixed in their outcomes, but, in general, the courts defer to the military ban against homosexuals. The courts are reluctant to interfere in military decisions that are alleged to affect morale and discipline. When the military has knowingly granted exceptions and allowed homosexuals to serve for extended periods of time, the courts in some cases have not upheld subsequent decisions to separate homosexuals involuntarily [36, 37].

There are several cases that focus very clearly on the opposing views of homosexual rights or restrictions in employment [36, 38-40]. Because the arguments of Judge Norris of the Ninth Circuit (who participated in *High Tech Gays* and *Watkins*) were persuasive in the *Jantz* court's opposing the decisions in *Padula, Woodward*, and *High Tech Gays*, his views are included here [1, 36, 38-40]. But first, a review of the *Bowers* case will be helpful because, even though it is not an employment case, its findings entered into the above decisions [10].

THE IMPACT OF THE *BOWERS* DECISION

In *Bowers*, Michael Hardwick had been charged with violating a Georgia statute criminalizing consensual sodomy. The charge was that Hardwick had committed the act of sodomy with another male in the bedroom of his home. After the district attorney decided not to present the matter to a grand jury for possible indictment, Hardwick nevertheless challenged the constitutionality of the statute in federal district court. The district court granted defendant's motion to dismiss for failure to state a claim. The Court of Appeals for the Eleventh Circuit reversed, holding that [41, p. 1212]:

> [t]he Georgia sodomy statute implicates a fundamental right of Michael Hardwick. The activity he hopes to engage in is quintessentially private and lies at the heart of an intimate association beyond the proper reach of state regulation. Such a right is protected by the Ninth Amendment . . . and the notion of fundamental fairness embodied in the due process clause of the Fourteenth Amendment.

The attorney general for the State of Georgia appealed the Eleventh Circuit's holding to the Supreme Court, which reversed in a 5-4 decision. The high court ruled that the due process clause of the fourteenth amendment does not provide a fundamental right for homosexuals to engage in consensual sodomy, even when such acts occur in the privacy of the home. The Court refused to invalidate sodomy laws under the due process clause of the fourteenth amendment, noting that [10, pp. 192-194]:

> In 1868, when the Fourteenth Amendment was ratified, all but 5 of the 37 States in the Union had criminal sodomy laws. In fact, until 1961, all 50 States outlawed sodomy, and today, 25 States and the District of Columbia continue to provide criminal penalties for sodomy performed in private and between

> consenting adults . . . Against this background, to claim that a right to engage in such conduct is "deeply rooted in this Nation's history and tradition" or "implicit in the concept of ordered liberty" is, at best, facetious.

It is instructive to observe that the Supreme Court's majority opinion in *Bowers* did not address the equal protection clause of the Constitution, dealing only with the homosexual issue before it. The majority was silent on the issue of whether or not heterosexual sodomy in the privacy of the home is protected by the fourteenth amendment. In his dissent, Justice Stevens, joined by Justices Brennan and Marshall, observed [10, p. 216]:

> Because the Georgia statute expresses the traditional view that sodomy is an immoral kind of conduct regardless of the identity of the persons who engage in it, I believe that a proper analysis of its constitutionality required consideration of two questions: First, may a State totally prohibit the described conduct by means of a neutral law applying without exception to all persons subject to its jurisdiction? If not, may the State save the statute by announcing that it will only enforce the law against homosexuals? The two questions merit separate discussion.

With this background review of *Bowers*, I now return to the cases that have dealt with homosexual employment rights. In 1987, the *Padula* court refused to extend suspect status to the homosexual classification, citing the *Bowers* decision as an insurmountable barrier to the appellant's claim: "It would be quite anomalous, on its face, to declare status *defined by conduct* (emphasis is mine) that states may constitutionally criminalize as deserving of strict scrutiny under the equal protection clause" [38, p. 103]. The *Padula* court concluded (38, p. 103]:

> If the [*Bowers*] Court was unwilling to object to state laws that criminalize the behavior that defines the class, it is hardly open to a lower court to conclude that state-sponsored discrimination against the class is invidious. After all, there can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal.

Some might find several things wrong with this construction. The act of sodomy (technically defined as anal or oral sex) does not define a homosexual. Heterosexuals might engage in sodomy, and homosexuals, for that matter, might not. But beyond that, neither homosexuals nor heterosexuals would likely consider themselves to be *defined* by their private sexual conduct. Rather, insofar as employment is concerned—and employment is the issue here—they would prefer to be defined in terms that relate to a job. In any event, the question here is whether or not the homosexual classification is job-related, whether or not this classification inhibits equal employment opportunity and, if it does, whether or not there is a rational, substantially related, or compelling governmental interest that it should inhibit employment opportunity. Nevertheless, the suggestion in *Padula* that

homosexuality is defined by conduct introduces the impact of failing to make the distinction between sexual orientation and sexual conduct.

Courts that do not make this distinction tend to focus on *conduct*, and at the same time usually conclude that homosexuality is not immutable (i.e., the *conduct* can be changed). Courts that focus on sexual orientation are more likely to see the condition as immutable. Beyond the question of immutability, courts that define homosexuality in terms of conduct assume that the homosexual conduct is sodomy. They then reason that because sodomy is criminalized in some states, and because the Supreme Court chose not to challenge the Georgia sodomy law as violating the due process clause of the fourteenth amendment, homosexuality cannot be classified as suspect.

THE *JANTZ* DECISION

In rebutting the *Padula* construction [38], the *Jantz* court found that in *Bowers* [10], the Supreme Court had merely decided that homosexual conduct could be regulated by the states without violating the due process clause of the Constitution [1]. The *Jantz* court added [1, p. 1546]:

> Whether a state or its agents may discriminate among citizens on the basis of their sexual orientation was not an issue. . . . *Bowers* merely established that homosexual conduct was not a recognized historical liberty. The case does not deal with the issue of whether societal bigotry against private homosexual orientation or tendencies legitimizes governmental discrimination against homosexuals under equal protection. . . . In all probability, homosexuality is not considered a deeply rooted part of our tradition *precisely because* homosexuals have historically been subjected to invidious discrimination.

In *Watkins*, a case in which the Ninth Circuit sitting *en blanc* decided that the Army was equitably estopped from denying reenlistment of a homosexual sergeant because it had knowingly reenlisted and promoted him previously during his 14-year career, Judge Norris argued that in *Bowers* the parties did not dispute and the Court explicitly did not decide the question of whether the Georgia sodomy statute might violate the equal protection clause [36]. Norris added [36, p. 723]:

> *Padula's* reasoning rests on the false premise that *Hardwick* [*Bowers*] issues a blanket approval for discrimination against homosexuals. . . *Hardwick* held only that the constitutionally protected rights to privacy does not extend to homosexual sodomy. The case had nothing to do with equal protection. I see no principled way to transmogrify the Court's holding that the due process clause permits states to criminalize specific sexual conduct commonly engaged in by homosexuals into a holding that the equal protection clause gives states a license to pass "homosexual laws"—laws imposing special restrictions on gays because they are gay.

In *Woodward*, the court ruled [39, p. 1076]:

> Homosexuality, as a definitive trait, differs fundamentally from those defining any of the recognized suspect or quasi-suspect classes. Members of recognized suspect or quasi-suspect classes, e.g., blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in nature . . .
>
> Accordingly, we conclude that Woodward is not a member of a class to which heightened scrutiny must be afforded nor that the Navy must have a compelling interest to justify discrimination against Woodward because of his admitted homosexuality.

In *High Tech Gays v. Defense Industry Security Clearance Office* [40], the Ninth Circuit addressed the homosexual issue as follows:

> While we do agree that homosexuals have suffered a history of discrimination, we do not believe that they meet the other criteria. Homosexuality is not an immutable characteristic; it is behavioral and hence is fundamentally different from traits such as race, gender, or alienage, which define already existing suspect and quasi-suspect classes [p. 573].

> Moreover, legislatures have addressed and continue to address the discrimination suffered by homosexuals on account of their sexual orientation through the passage of anti-discrimination legislation. Thus homosexuals are not without political power; they have the ability to and do "attract the attention of lawmakers" as evidenced by such legislation [p. 574].

The *Jantz* court argued that in both cases (*Woodward* and *High Tech Gays*), the findings that homosexuality is not immutable [1, p. 1547]

> . . . were made without the benefit of any supporting authority, and were barren of any scientific or medical authority which would lend support to such conclusions. Nor did the Courts cite in evidence the records before them that homosexual orientation was not immutable.

The *Jantz* court argued further that homosexuals had been successful in securing their rights through the political process in only a few jurisdictions—citing Wisconsin as the only state with a comprehensive statute barring discrimination against homosexuals.

In dissenting to the denial of a petition to rehear the decision by the three-member panel in *High Tech Gays en banc*, Judge Canby (who was joined by Judge Norris) argued that homosexuals have little political power relative to other minorities and women, who have not only been granted suspect or quasi-suspect classifications, but who also have numerous legislated protections [42, p. 378]:

> Blacks are protected by three federal Constitutional amendments, major federal Civil Rights Acts . . . as well as by antidiscrimination laws in 48 of the

> states. By that comparison, and by absolute standards as well, homosexuals are politically powerless. They are so because of their numbers, which most estimates put at around 10 percent of the population, and by the fact that many of them keep their status secret to avoid discrimination. That secrecy inhibits organization of homosexuals as a pressure group. Certainly homosexuals as a class wield less political power than blacks, a suspect classification, or women, a quasi-suspect one. One can easily find examples of major political parties' openly tailoring their positions to appeal to black voters, and to female voters. One cannot find comparable examples of appeals to homosexual voters; homosexuals are regarded by the national parties as political pariahs.

The *Jantz* court added that currently available scientific studies demonstrate that [1, p. 1548]:

> Sexual orientation is a trait which is not subject to voluntary control or change. More importantly, to discriminate against individuals who accept their given sexual orientation and refuse to alter that orientation to conform to societal norms does significant violence to a central and defining character of those individuals.

Finally, the *Jantz* court concluded [1, p. 1551]:

> Sexual orientation is not a matter of choice; it is a central and defining aspect of the personality of every individual. Homosexuals have been and remain the subject of invidious discrimination. . . . Accordingly, the Court finds that a governmental classification based on an individual's sexual orientation is inherently suspect.

STATE ACTIONS GOVERNING HOMOSEXUAL RIGHTS

After reviewing selected court decisions indicating that sexual orientation is not protected in the federal civil rights laws, I turn now to a discussion of state legislative measures and governors' executive orders dealing with sexual orientation or sexual preference.

In California, Governor Edmund G. Brown, Jr. issued Executive Order B-54-79 on April 4, 1979. It directs that "No individual is to be discriminated against in state employment on the basis of his/her sexual preference. Any alleged acts of discrimination in violation of this directive shall be reported to the State Personnel Board for resolution" [43, ¶ 20,965]. California's current governor, Pete Wilson, vetoed an act passed by the state legislature in 1991 that would have prohibited discrimination in employment on the basis of sexual orientation.

Connecticut Public Act 91-58, which is separate from Connecticut's Fair Employment Practices Art, prohibits discrimination by employers, employment agencies, and labor organizations on the basis of sexual orientation. The law was approved on May 1, 1991, and took effect on October 1, 1991 [43, ¶ 21,205].

The District of Columbia has a comprehensive law protecting sexual orientation. Its employment guidelines, which were adopted by the District of Columbia Commission of Human Rights on June 25, 1986, direct that "[n]o employer shall discharge, suspend, refuse to hire or promote an individual, or subject an individual to different terms, conditions, and privileges of employment or discharge of an individual because of his or her sexual orientation" [43, ¶ 21,690.17].

Hawaii's Fair Employment Practices Act prohibits employers from discriminating against a person in compensation or in the terms, conditions or privileges of employment on the basis of sexual orientation [43, ¶ 22,000.02].

The Massachusetts Fair Employment Practices Law makes it unlawful for an employer to discriminate on the basis of an individual's race, color, religious creed, national origin, sex, or sexual orientation. This protection was added under Chapter 516, *Laws of 1989*, effective February 13, 1990 [43, par. 24,001]. Regarding sexual orientation under Section 18 (Construction of Sexual Orientation Protection), the law states [43, ¶ 24,002.18]:

> "It is hereby found and declared that the sexual orientation of a person is an invalid basis for discrimination in areas of housing, employment and the granting of credit" [43, ¶ 24,002.18].

Then, in what might appear to be a politically inspired *non sequitur*, it adds [43, ¶ 24, 002.18]:

> Therefore, the legislature explicitly states that nothing contained in this chapter shall be construed as an approval or endorsement of homosexuality or bisexuality.

The Massachusetts law also adds Section 19, which deals with homosexual marriages [43, ¶ 24,002.19]:

> Nothing in this act shall be construed so as to legitimize or validate a 'homosexual marriage,' so-called, or to provide health insurance or related employee benefits to a 'homosexual spouse,' so-called.

This is especially interesting in view of the Cambridge, Massachusetts-based Lotus Development Corporation's decision regarding employee benefits noted above.

Minnesota Governor Rudy Perpich signed Executive Order No. 86-14 on November 19, 1986. It became effective on December 23, 1986, and prohibits public employers from discriminating against any employee or job applicant because of that person's sexual orientation or HIV status [43, ¶ 24,593].

A New Jersey law prohibiting law discrimination on the basis of sexual orientation went into effect on January 19, 1992. [43, ¶ 25,598].

Governor Mario M. Cuomo of New York signed Executive Order No. 28 on November 18, 1983. The order prohibits discrimination in state employment on

the basis of sexual orientation. In a policy statement, Governor Cuomo announced his intention to appoint a task force to review the nature and extent of discrimination in the public sector and to assist in assuring individual rights to government services and equal opportunity for state employment regardless of sexual orientation [43, ¶ 26,123].

Oklahoma, in what might be viewed as a veiled threat to lesbians and gay men, has a law that provides: "School teachers may be refused employment or reemployment, or may be discharged if they have engaged in a criminal sexual activity or sexual conduct that has interfered with their job performance" [43, p. 9430]. The Oklahoma Statutes, Title 70, Section 6-130.15, amended by House Bill No. 1569, Laws of 1985, approved July 24, 1985, operative July 1, 1985, define criminal sexual activity as the commission of an act defined in Section 886 of Title 21 of the Oklahoma Statutes, or sodomy [43, ¶ 26,930]. The veiled threat, noted above, would be operative if the law were selectively applied against homosexuals.

Through an initiative petition, the Oregon electorate passed a law on November 8, 1988 which revoked Executive Order 87-20. The executive order had banned discrimination in the executive branch based on sexual orientation [43, ¶ 27,172]. This public reaction demonstrates that protection against discrimination on the basis of sexual orientation is tenuous at best in the state of Oregon. Section 2 of the Oregon initiative provides, "No state official shall *forbid* (emphasis is mine) the taking of any personnel action against any state employee based on the sexual orientation of such employee." Arguably, Section 3 contradicts Section 2: "This measure shall not be deemed to limit the authority of any state official to forbid generally the taking of personnel action against state employes based on *non-job-related factors* (emphasis is mine)" [43, ¶ 26,930].

On May 2, 1975, Governor Milton Shapp of Pennsylvania filed Executive Order 1975-5, which provides that no state agency or department is to discriminate in employment against any individual because of his sexual or affectional orientation. The order was amended on September 19, 1978. It established the Pennsylvania Council for Sexual Minorities to work toward ending discrimination against persons because of their sexual or affectional orientation. The council was to issue an annual report of its activities to the governor and the general public [43, ¶ 27,298].

Wisconsin's Fair Employment Act provides comprehensive protection for homosexuals. It prohibits discrimination on the basis of sexual orientation in both the public and the private sectors of the state [43, ¶ 28,898].

AN INTERIM SUMMARY AND REVIEW

The *Jantz* decision, the legislative actions in four states and the District of Columbia, the public sentiment opposing the military ban on the employment of gay males and lesbians, a corporate employer's benefit decision favorable to homosexual partners, and tentative findings relating to a possible biological basis

for homosexuality all point to the possibility of a kinder, gentler workplace for lesbians and gay men. The much-publicized study suggesting the possible difference in hypothalamic structure between heterosexual and homosexual men [4] deserves further comment, because if there is a difference and if that difference is shown to cause, or even to correlate with, sexual orientation, a strong argument could be made to amend Title VII to provide protection against discrimination on the basis of sexual orientation.

It is interesting to read some of the reactions to Dr. LeVay's tentative findings within the scientific community. Marcia Barinaga said that Dr. LeVay's study is not the first to report differences in the brain structures of homosexuals and heterosexuals [44]. She refers to another study by Swaab and Hofman, which reported that the suprachiasmatic nucleus, a part of the brain that governs daily rhythms, is twice as large in homosexual men as it is in typical heterosexual men [45]. This part of the brain, however, is not associated with sexual orientation. Thomas A. Schoenfeld asserted that ". . . evidence for a biological basis for homosexuality is hardly news, because this proposition was never seriously in doubt, at least as an issue in natural science. This is because the biological basis of behavior is a *premise* for psychobiology." He added: "Several decades of empirical work have shown that the brain is a product of early experience, social environment, and genetic instructions. So it manifests the workings of both nurture and nature [46]." Joseph M. Carrier and George Gellert are concerned because LeVay did not recognize the behavioral continuum of males involved in homosexual, bisexual, or heterosexual activity in his experimental design, but simply created bipolar categories: homosexual men and heterosexual men [47].

The above reactions are important in the biological and the psychobiological sciences. However, in applying the reactions to employment discrimination law and fair employment practice, it is instructive to observe, for example, that when providing protection for the handicapped, it does not matter whether the handicap is rooted in nurture or nature. What matters is that the employee is handicapped. Similarly, employers do not ask employees: "Where do you fit on the continuum with respect to homosexual, bisexual, or heterosexual activity?" Rather, the bipolar categories operate in employment practice. If one is categorized as homosexual, discrimination in employment is not prohibited in forty-five states,[3] nor is it prohibited by federal legislation. Furthermore, no Federal appellate court has designated the homosexual classification as suspect or even quasi-suspect with regard to employment. Still, one might hope that the federal district court in Kansas will prevail as a single point of light in the *Jantz* decision.

In summary, protection for sexual orientation by the states is generally light; most states offer no protection against employment discrimination on the basis of

[3] Some municipalities and some public and private organizations (e.g., colleges and universities) prohibit employment discrimination on the basis of sexual orientation.

sexual orientation. Connecticut, Hawaii, Massachusetts, New Jersey, Wisconsin and the District of Columbia, however, do prohibit discrimination in employment on the basis of sexual orientation. Protection in California was provided by the legislature in 1991, but the bill was vetoed by Governor Pete Wilson. Executive orders have been issued in California, Minnesota, New York and Pennsylvania that offer protection against employment discrimination in the states' public sectors.

GAY MEN, LESBIANS, SEXUAL HARASSMENT, AND THE BFOQ

If federal statutory protection were provided for homosexuals, the current law against sexual harassment would take on additional meaning in practice. A federal district court has already found sexual harassment betweeen persons of the same gender to be unlawful [48]. Given federal protection, both homosexuals and heterosexuals would need to develop greater sensitivity, especially with regard to conduct that might be defined as interfering with an individual's work performance or creating an offensive working environment.

Offensive working environments are subjectively determined. Sexual harassment is defined by individual perceptions, yet there are recognized common elements that employers and coworkers can identify and control in avoiding such harassment. For example, homosexual activism in the workplace could be defined by some heterosexuals as creating an offensive working environment. If such were the case, offending homosexuals would need to be made aware of such heterosexual sensitivities. Perhaps more significantly, all illegal conduct, which has up until now been identified as creating either a hostile working environment or *quid quo pro* harassment (where personnel decisions are conditioned on submission to or rejection of sexual advances) would have to be eliminated *between* homosexual and heterosexual groups as well as *within* homosexual and heterosexual groups. For the Supreme Court's treatment of sexual harassment, see *Meritor Savings Bank v. Vinson* [49].

If the employment of homosexuals was legitimately problematic, employers could still fall back on the well-defined bona fide occupational qualification (BFOQ) exception, which is characteristically and appropriately defined narrowly by the courts. Case law in this regard would likely evolve as did the same-sex BFOQ and the customer-preference BFOQ cases. Courts have allowed same-sex BFOQ when the essence of the job requires infringing upon another's physical privacy [50].

In another case, a woman was excluded from working as a correctional counselor in an Alabama prison where the board of corrections believed that she would be at risk because of her sex, reasoning that male prisoners who might have been sex offenders or other prisoners who were being denied normal heterosexual contact might sexually assault her. The Supreme Court agreed with this rationale and sustained the same-sex BFOQ [51].

However, in *Gunther v. Iowa State Men's Reformatory*, the Eighth Circuit denied a BFOQ exception on a privacy basis, calling for a reasonable accommodation between equal employment opportunity and inmate privacy in a medium-security prison and the Supreme Court denied certiorari [52]. Similarly, female sports reporters have been allowed into men's locker rooms after football and baseball games. Men are expected to provide their own privacy in order to accommodate such women. But, in *Fesel v. Masonic Home* the court upheld a refusal to hire a male nurse to attend female patients [54] and the decision was affirmed on appeal [55]. There appears to be greater accommodation required by the courts in behalf of women than of men.

In summary, the same-sex BFOQ has been narrowly defined, requiring accommodation where reasonable but allowing the exception in a maximum-security prison and in those cases where the invasion of privacy goes to the essence of the job and accommodation cannot be reasonably provided. How these comparable issues would be developed in same-gender homosexual/heterosexual cases is speculative; however, there could be a greater call for accommodation between homosexuals and heterosexuals who are the same gender than there is in same-sex cases. Nevertheless, homosexual/heterosexual sensitivities regarding physical privacy could be respected through the narrowly-defined BFOQ.

Customer-preference BFOQ's have not been accepted by the courts as justification for discrimination on the basis of sex [56]. Customer-preference BFOQ's would not likely prevail in allowing employers to deny employment to lesbians and gay males if sexual orientation were protected under Title VII.

It should be emphasized that if sexual orientation were protected, privacy rights would probably allow homosexuals to conceal their identities if they chose to do so. Although protection is provided for, it does not have to be claimed. Just as a person who might technically qualify as being black and thereby qualify for minority protection might choose to cross over as white, a homosexual might conceal his/her sexual orientation and forego the minority protection.

Finally, most heterosexuals have preconceived notions of who and what homosexuals are, based on stereotypical constructions. If, indeed 10 percent of the workforce is homosexual, avowed homosexuals are a small percentage of the homosexual population. How avowed homosexuals behave in attempting to secure their civil rights is not for us, the majority who are heterosexuals, to judge. But, for all of us who pursue fairness, understanding, and cooperation in the workplace, it would be well to hold our fire "until we walk a mile in their moccasins." Again, my hope in opening this discussion is simply to promote a kinder, gentler workplace for lesbians, gay men, their co-workers, and their employers.

* * *

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