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SEXUAL ORIENTATION AND EMPLOYMENT DISCRIMINATION: The Freedom of Private Employers to Discriminate

by Holly Hecker

Homosexuals in the United States experience discrimination in many areas of their lives, including employment. Unlike other citizens who are members of distinct portions of society, such as people of color, religious groups, women, racial groups and ethnic groups, homosexuals have not been given protected group status under the law. They have, in fact, often suffered under an uneven application of the law as expressed by judges who have, for example, treated the due process rights of homosexuals in a superficial manner. Since homosexuals number about twenty million men and women in the United States, and since homosexuals are found in all economic classes, all types of jobs, all religions, all racial groups and all ethnic groups, their intersection with heterosexual society is extensive. Their economic, psychological and social stakes in the larger society are also extensive, and employment discrimination does a great deal of harm, both to the homosexual discriminated against and to society which loses the services of valuable employees for reasons having nothing to do with an individual's ability to perform a job.4

Because this paper will look at discrimination against homosexual men and lesbians, the definition of a homosexual is important. Funk and Wagnalls defines homosexual as "attracted by or in love with persons of the same sex." This however, raises some problems. Does this mean that someone who had a high school crush on a teacher of the same sex is homosexual? Is someone homosexual who has had a same-sex sexual encounter? How many encounters makes one homosexual? One? Two? Ten? Do teen age same-sex sexual encounters count, or must one be an adult to earn the label? What sort of behaviors are we talking about? Close, deep emotional attachment to another of the same sex? Hugging and kissing? Fantasies? Overt sexual conduct, such as mutual touching to orgasm, fellatio, cunnilingus, sodomy? What is a person who says he or she is homosexual, but who remains celibate?4

According to Kinsey, human sexual behavior can be described by considering a continuum, with exclusively heterosexual people on one end and exclusively homosexual people on the other end. These people fantasize and act sexually only with persons of, for the heterosexual, the opposite sex, and for the homosexual, only with persons of the same sex. People between the endpoints of this continuum have more mixed erotic arousal and overt experience.5 This scheme can be illustrative of a person's entire life span or of a particular period in a person's life.6

Despite these difficulties in labeling anyone homosexual, the courts, like private individuals, have little trouble assigning the label to many different types of individuals. For example:

- a married father who engaged in same-sex sexual behavior in his late teens,8
- a man with a single conviction for a same-sex crime,9
- a woman whose friends were bisexual,10
- a man who said he was a homosexual, but who never admitted to any overt same-sex behavior;11
- women in mannish attire;12
- persons who exhibited characteristics and mannerisms which evidenced homosexual propensities;13
- men who seemed effeminate.14

One consequence of this casual approach to labeling someone as a homosexual person is that those men and women who least fit their appropriate sex stereotype are those most likely to be labeled a gay man or lesbian, regardless of their actual sexual preference. Thus, a man who is soft-spoken, uninterested in sports or wearing an earring may be considered a homosexual, while a woman who is assertive, career-oriented, self-sufficient and single may well be called a lesbian. These stereotypical versions of homosexuality — a feminine man and a masculine woman — mean that those people who fit these images are the first to suffer discrimination.

Since homosexuality is such a difficult concept to define, this paper is limited to two definitions. The first is homosexuality as used in court cases; regardless of whether this view accurately defines an individual, it does demonstrate the prevailing legal thought. The second definition is that which is used by an individual to define himself or herself; this may be taken as an accurate description of that individual's view of him/herself in the world.

Despite the fact that homosexual men and lesbians differ from the rest of the population only with respect to their sexual preferences, homosexuals enjoy little protection from discrimination in hiring, firing, promotion and the
distribution of fringe benefits, especially in private sector employment. This paper will examine sexual preference discrimination in private employment. It will explore some of the attempts to challenge the private employer's freedom to discriminate "at will" on the basis of sexual preference. It will also look at some possible alternatives to address and redress this form of discrimination.

Despite the limited gains homosexuals have achieved with regard to lessening discrimination in public employment, employers in the private sector are still free to act on their basest prejudices in any way not explicitly prohibited by statute. There are no federal statutes and only one state statute which prohibit a private employer from discriminating against a lesbian or gay man. Recently some county and municipal ordinances have been enacted which forbid discrimination on the basis of sexual orientation, but there is little documentation of their effectiveness as yet. Seventy percent of American workers are "at will" employees, and, as such, the employer may dismiss them "for good cause, for no cause, or even for cause morally wrong, without being thereby guilty of legal wrong." Thus, any employer may refuse to hire, refuse to promote or dismiss any person he suspects of being homosexual.

Title VII of the Civil Rights Act of 1964 is the only federal legislation that prohibits discrimination by private employers based on certain enumerated categories. Sexual preference, sexual orientation and homosexuality are not among the enumerations. However, sex is one of these proscribed categories.

There have been several attempts to broaden "sex" as used in Title VII to include discrimination on the basis of sexual orientation. In the first case to raise this type of argument, Smith v. Liberty Mutual Insurance Co., the court held that Title VII did not forbid employment discrimination based on "affectional or sexual preference" of the job applicant, despite the fact that the plaintiff was characterized only as "effeminate," never as homosexual. The court, in examining the intent of Title VII, found that it guarantees equal job opportunity for males and females, but the question of forbidding discrimination based on "affectional or sexual preference" must be left to Congress, and Congress has not proscribed this form of discrimination. The court further stated that "rights not forbidden are reserved to the individual . . . . If the lawmaking process has yet reserved freedom of action (by not forbidding it) to an employer, it is the duty of the courts to protect it." Thus, the court invoked the broadest principles to protect an employer's right to hire and fire "at will.

Voyles v. Ralph K. Davis Medical Center was decided four months later in another district court. Although this case dealt with the question of whether Title VII protected the rights of transsexuals, the court, in holding that it did not, expanded that lack of protection to homosexuals and bisexuals as well. The plaintiff here, a hemodialysis technician, was discharged shortly before undergoing a sex-reassignment operation. The defendant admitted that the reason for the firing was that both the plaintiffs co-workers and patients receiving dialysis at the center might be adversely affected by the sex-change.

The Voyles court seems to have been unaware of the differences between a homosexual person and a transsexual person. Referring to pending legislation to amend Title VII to include homosexuals as a protected class, the court said that the fact that these amendments had not passed made it "clear that in enacting Title VII, Congress had no intention of proscribing discrimination based on an individual's transsexualism.

Several years later another court used similar reasoning to deny Title VII coverage in a case involving a transsexual. The Ninth Circuit in Holloway v. Arthur Anderson & Co. concluded that Congress had only the "traditional notions of sex in mind" and since bills to amend Title VII to include homosexuality were never enacted, the court refused this chance to extend Title VII coverage.

Hodges v. John Morrell Co. is one case involving Title VII and homosexuality that did withstand a motion to dismiss. The plaintiff alleged that the terms and conditions of his employment were dependent upon his granting sexual favors to the defendant's personnel manager. Although defendant argued that Title VII had never been found to cover homosexual persons and that the complaint should be dismissed, the court said this was not a case of discrimination against a group of unusual sexual orientation. It is simply a case involving the alleged imposition of conditions of employment on a male employee, which would not have been imposed on a female employee similarly situated. In other words, this was actually a case of sexual harassment of a male.

The Equal Employment Opportunity Commission (EEOC), an agency created by Congress to carry out the goals of Title VII, has been as adamant as the courts in refusing to extend Title VII protection to homosexuals. In 1966 the General Counsel issued an Opinion Letter holding that an employer did not commit an unfair employment practice by failing to hire or by discharging a homosexual individual. In 1975, the EEOC rendered two decisions, both finding that sexual orientation was not intended by Congress to be included within the meaning of the word "sex," and further finding, therefore, that EEOC lacked jurisdiction to deal with complaints by homosexual employees.

Another Title VII challenge to discrimination on the basis of sexual orientation was attempted in 1979. On appeal, DeSantis v. Pacific Telephone and Telegraph Co. was a consolidation of three separate cases, each of which had been dismissed by district courts for failing to state a claim under Title VII. The plaintiffs argued that discrimination on the basis of sexual orientation had a disparate impact on males and therefore was a Title VII violation within the "sex" category. They based their argument on the interpretation of Title VII in Griggs v. Duke Power Company, in which the U.S. Supreme Court held...
that the Act proscribes "practices that are fair in form, but
discriminatory in operation," as well as overt discriminat-
tion. In Griggs, the Court held that such practices, unless
they could be shown to be related to job performance,
would be prohibited, regardless of the employer's intent.46

There are two premises on which this disparate im-
pact argument rests when analyzing cases involving
homosexuality. The first is that there are reported to be
more male homosexuals than lesbians.47 The second is that
the sexual preference of gay men is more likely to be
discovered than that of lesbians because of their more ex-
tensive intersection with record-keeping authorities, such
as the military and the police.48 The DeSantis court did not
accept this argument, simply stating that disparate impact
should be limited to situations that correspond to Congress' inten-
t when it adopted Title VII.49 Judicially granting Title VII
protection to homosexuals was considered improper,
since it was seen as frustrating the Congressional intent
to deny Title VII coverage to lesbians and homosexual
men.49 In his concurring and dissenting opinion, Justice
Sneed indicated that if the plaintiffs had been able to
demonstrate a disparate impact on males, they would have
shown a Title VII violation.51

Demonstrating disparate impact on males is a difficult
task, however. Discrimination against gay employees or ap-
plicants must be shown to disproportionately impact on
males as a class. More must be shown than that propor-
tionately more gay men than lesbians suffer. The showing
probably will require use of a population in which gay males
are a large proportion of the total applicable male popula-
tion.52

Disparate impact was one of the theories alleged in
Gay Law Students Association v. Pacific Telephone and
Telegraph Co. (GLSA v. PT&T).53 In a class action, gay
organizations and individuals claimed that PT&T had a pat-
tern and practice of employment discrimination against
homosexual persons. They also filed a charge against the
California Fair Employment Practice Commission (FEPC)
on the grounds that it had improperly refused to take any
action to remedy alleged employment discrimination. The
trial court entered judgment for both defendants.54 The
court questioned the applicability of Griggs to males as a
class, but went on to hold that even if Griggs did apply,
no showing of disparate impact had been made. No proof
had been offered showing that PT&T had excluded a signifi-
cant number of males; no statistics were offered to establish
the disparate impact on males of discrimination against gay people.55

As several commentators point out,56 there is another problem with the disparate impact approach. Both homosexual men and lesbians experience discrimination based on their sexual orientation. Advancing a disparate impact argument smacks of "the expediency of sexism and of 'Me First.'"57 To show equal treatment, employers may resort to firing all women even suspected of being lesbian. To argue the rights of gay men in such a way that in effect pits gay men against lesbians does little to acknowledge the fact that this form of discrimination, based as it is on heterosexual antipathy towards and fear of homosexuality, is felt by gay men and lesbians alike. It does not provide a basis for all victims of this discrimination to work together to overcome it and is not a very positive way to establish private employment rights for homosexual individuals.

Another way for plaintiffs to challenge discrimination through Title VII has been mentioned by at least two commentators58 and is based on Justice Marshall's concurring opinion in Phillips v. Martin Marietta Corp.59 The theory is that Congressional intent in enacting Title VII was to prohibit employment discrimination based on irrelevant stereotypes. Discrimination against homosexuals frustrates this intent. Courts should therefore construe the term "sex," as used in Title VII, to include sexual preference as an impermissible classification.60

Phillips recognized this Congressional attempt to prohibit discrimination based on stereotypes.61 This case challenged a corporate policy of not accepting employment applications from women with preschool age children.62 The per curiam opinion held that all parents with preschool age children must be subject to the same hiring policy, unless the corporation could show that having children is "demonstrably more relevant to job performance for a woman."63 The court noted that if this relevancy to job performance were shown, it arguably could be a basis for discriminatory hiring practices. Here, however, insufficient evidence had been tendered to support a decision that the presence of preschool age children was more relevant to job performance for women.64

Justice Marshall disagreed in his concurring opinion:

... Congress intended to prevent employers from refusing to hire an individual based on stereotyped characterizations of the sexes.65 Even characterizations of the proper domestic roles of the sexes were not to serve as predicates for restricting employment opportunity.66

Marshall argued that homosexuals do not fit one of the most basic "stereotyped characterizations of the sexes,"67 which is that a person's sexual preference be for a member of the opposite sex. Some homosexuals, those most likely to feel the severest effects of discrimination, exhibit characteristics inappropriate to his or her gender; an effeminate man or a masculine woman will experience discrimination because of their deviation from these gender stereotypes. In addition, any gay man or lesbian whose sexual preference becomes known, or even suspected or presumed, in the workplace may be discriminated against because of these "stereotyped characterizations of the sexes."68

This equation of deviation from stereotyped characterization to a presumption of homosexuality, leading to discrimination and a resultant lack of protection, is clearly demonstrated in Smith v. Liberty Mutual Insurance Co.69 and in Strailey v. Happy Times Nursery School.70 In neither case was there evidence that the plaintiff was homosexual. Instead, both were found to have acted in a manner inappropriate for a stereotypical male; the plaintiff in Smith was considered effeminate by the defendant71 and the plaintiff in Strailey wore an earring to work one day.72 The District Court in Smith denied a Title VII claim because the term "sex" did not include sexual preference.73 In Strailey, the Ninth Circuit held that discrimination based on effeminacy is not banned by Title VII, since Title VII doesn't ban discrimination based on sexual preference.74 The courts equated effeminate characteristics with homosexuality in both these cases.

Discrimination based on just that sort of stereotyped view of proper gender roles was what Congress intended to prohibit by passing Title VII.75 As one commentator has said:

Justice Marshall ... recognized that "characterization of the proper domestic roles of the sexes" were not legitimate bases for discrimination. Likewise, characterizations of the proper sex roles of the sexes are not legitimate bases for discrimination. Neither domestic nor sexual role is relevant to employment opportunity. Thus to implement Congressional intent, Courts should construe the term "sex," as used in Title VII, to include sexual preference as an impermissible classification.76

Another possible federal route for challenging discrimination on the basis of sexual preference is 42 U.S.C. § 1985(3), which prohibits any conspiracy to deprive a person or class of persons of the equal protection of the law, or of equal privileges and immunities under the law, which results in injury or deprivation.77 Section 1985(3) sets up a high hurdle for a plaintiff, however, and no homosexual individual or group claiming employment discrimination has so far successfully cleared it. A plaintiff must satisfy the conspiracy requirement, must establish homosexuals as a protected class and must prove that a protected right has been harmed by the defendant.78
Conspiracy is usually claimed by alleging that policies
and practices of management are carried out by employees and/or agents of a company. This has been hard to establish and the federal circuit courts disagree on how to consider conspiracy in the corporate world.76

The requirements for showing a protected class were established by the United States Supreme Court in Griffin v. Breckenridge.77 Some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action78 must be established. This class-based animus has been found in discrimination against many groups besides the southern blacks the statute was originally enacted to protect. Among these groups have been:81
- women purchasers of disability insurance,82
- political opponents,83
- supporters of a political candidate,84
- persons holding a particular political view,85
- members of the Jewish faith,86
- members of a single family.87

The plaintiffs in DeSantis v. PT&T,88 in claiming an action under §1985(3), argued that gay people are a group discriminated against by a class-based animus, but the Ninth Circuit found no other evidence of federal protection for homosexuals and refused to recognize the protection of §1985(3).89 This requirement that other federal legislation already protect gays before §1985(3) will protect them is a limitation not found in other §1985(3) cases.

The DeSantis court gave two examples of federal protection that might lead to §1985(3) protection: inclusion within the Title VII enumerated classes, and “suspect” or “quasi-suspect” classification by the courts for purposes of equal protection analysis.90 The first example leads to a dead end for gay employees at present; no court has found them encompassed by the term “sex,” and the Supreme Court, in a 1979 decision,91 held that deprivation of a Title VII right cannot be remedied through a §1985(3) claim.92 Therefore, as one commentator noted, “if Title VII protection is required to establish existence of a §1985(3) protected class, §1985(3) will be rendered virtually useless for employment discrimination purposes.”93

The concept of “suspect” or “quasi-suspect” classification of homosexuals for purposes of equal protection analysis has evoked much legal commentary lately.94 Presently the only suspect classes are grouped by race, alienage and national origin.95 The criteria for a suspect class include political powerlessness, subjection to purposeful unequal treatment based on traits over which the individual has no control, immutability of characteristics, a status which frequently bears no relationship to an individual’s ability to perform or contribute to society, and a classification more the reflection of historic prejudices than legislative rationality.96 Homosexuals share most, if not all, of these criteria. Their political powerlessness is demonstrated by the fact that, despite numbering twenty million, gay men and lesbians lack the basic employment protections enjoyed by all other citizens. Discrimination against them is intentional and based on their homosexual
ty or the presumption of it, an orientation that many psychiatrists and psychologists are now saying is not capable of change.97 Most homosexuals are responsible, job-holding members of society with problems which, if they stem from homosexuality at all, are caused by the op
probrium in which society holds them, rather than being an outgrowth of their sexual preference, thus illustrating the irrationality of this prejudice. Since homosexuality fulfills the criteria for suspect classification, there seems little reason to deny §1985(3) protection.

Furthermore, there is already some minimal federal protection for homosexual men and lesbians which might satisfy the DeSantis court’s requirement for §1985(3) protection.98 The Guidelines of the Civil Service Regulations establish special protection from arbitrary discrimination against gay people in federal employment.99 In addition, 42 U.S.C. §1983 provides protection against deprivation of a gay person’s civil rights under color of state law.100 Both §§1983 and 1985 were enacted at the same time and were joined in one act.101 Although the DeSantis court does not address the §1983 protections,102 some courts have noted that “acceptance of §1983 claims lends weight to an argument that §1985(3) protection should be recognized.”103

Strict scrutiny of classifications based on homosexuality could also be required by a demonstration that a fundamental right, such as the right to privacy or freedom of association, is directly affected by the unequal treatment. Courts are reluctant to find such fundamental rights in cases affecting homosexuals, however. Despite a powerful dissenting opinion in a recent case denying a petition of certiorari, the firing of a bisexual high school guidance counselor was found to violate no constitutional principles or any federal law, despite trial court and jury findings for the plaintiff.104

The National Labor Relations Act (NLRA) may protect gay union members105 under interpretations that require unions to fairly represent all members, the prohibition against employer interference with union activities and the usual just-cause dismissal clause in union contracts. Unions have an affirmative duty to represent each employee on an equal basis.106 According to the National Labor Relations Board (NLRB)107 this duty also prohibits a union from “taking action against any employee upon considerations or classifications which are irrelevant, invidious or unfair.”108 If an employee has a cause of action against the union, the employee also has an action against the employer who participates in the discrimination.109 This means that if a union takes action against a gay employee because of his/her sexual orientation, the action would be based on an irrelevant, invidious or unfair classification. If an employer acquiesced or participated in the union’s action, a gay employee would have a cause of action against the employer, as well.

The struggle for gay rights is gaining increased recognition as a political movement for civil rights. It is likely that eventually a union, particularly one with a large number of gay members, will act to obtain fair treatment of its gay members. The NLRA holds an employer liable for any in-
ference with those union activities which are legitimate forums for employee action. Arguably, protection of the employment rights of the homosexual employee — alleviation of the fear of being arbitrarily dismissed because of sexual orientation — is a valid aim of employee action, and any interference with actions toward this goal would lead to a cause of action against the employer.

The common provision in labor contracts, that dismissal must be based on just cause, may provide the best protection to homosexual employees. The usual resolution of just cause disputes is through arbitration, and arbitrators are reluctant to encourage employer censorship of an employee's off-duty conduct. A requirement that a direct relationship between the off-duty conduct and employment be shown is commonly found in arbitration decisions. This relationship may be difficult for an employer to show, especially if the conduct has not been accorded widespread publicity and the employee does not have contact with the general public.

In general, federal protection of homosexual men and women in private employment is weak. In spite of the fact that homosexuals share many characteristics with the enumerated groups of Title VII and the categories which have been deemed deserving of § 1985(3) protection, homosexuals still face the brunt of historic, irrational prejudices. Federal judges, often imbued with these same prejudices, have been extremely slow in recognizing the value of according employment protection to this insular and oppressed minority.

State law may provide some remedy to employment discrimination on the basis of sexual orientation. GLSA v. PT&I, discussed earlier as a Title VII action, led to some unique and intriguing results under state law. Because the court found state action in the extensive government regulations of a public utility, PT&I was seen as "more akin to a governmental entity than to a purely private employer." PT&I was accordingly restrained by the state's equal protection clause from arbitrarily discriminating against any class of persons. The court then held that California's Public Utilities Code precluded PT&I and other utilities from arbitrary discrimination in employment. Finally, and perhaps most significantly, the court found that "the struggle of the homosexual community for equal rights, particularly in the field of employment, must be recognized as a political activity." Interference with an employee's right to engage in political action is a violation of the state's Labor Code. Because the court construed plaintiffs' allegations as charging that "PT&I discriminates in particular against persons who identify themselves as homosexuals, who defend homosexuality, or who are identified with activist homosexual organizations," the court therefore found a violation of California's Labor Code. According to one commentator, this reasoning, if other states adopt it, "would have far-reaching beneficial effects on the rights of gay employees. However, it is wise at this time to regard the decision as idiosyncratic to California. Little protection still exists under state law for most gay employees in private employment.

Local ordinances that prohibit sexual orientation discrimination have been enacted in some counties and cities, including Buffalo. These vary widely in scope, and many have been in place such a short time that it is difficult to gauge their effectiveness. There are difficulties with these ordinances, ranging from a lack of money and the will to enforce them to questions concerning their constitutionality.

Another possible approach is through common law tort doctrine. A plaintiff has several possible allegations:

- Violation of constitutional, statutory and common law rights,
- assault, battery and harassment,
- infliction of emotional distress,
- wrongful discharge,
- interference with contractual relations and prospective economic advantage.

Contract law may provide another avenue to challenge discrimination. Standard contract and commercial clauses such as breach of contract and UCC violations may be applicable. Breach of an implied covenant of good faith and fair dealing might also be argued.

However, many of these approaches promise little to an individual who has been discriminated against because of sexual orientation. Even the remedies available to the enumerated categories are difficult to obtain and provide relatively little redress to members of those protected groups. Proof problems can be overwhelming, especially for plaintiffs with little money. Back pay awards must be mitigated, and years may be spent in litigation. Gay plaintiffs face even greater challenges in the courtroom. They do not belong to a protected class; since judges share the fears and prejudices of the general population, they are reluctant to expand protection to someone of "unusual sexual orientation." While labor law offers some hope, few employees work under a collective bargaining agreement. Both tort and contract doctrines may provide avenues of redress, but they require an expansion of present law to a class that is not viewed favorably by most courts.

There may still be an opening in Title VII if the argument on stereotyping can be made in the right context before a receptive court. Sections 1983 and 1985 provide difficult proof problems for a plaintiff, but may provide some protection for a gay employee under certain circumstances. Of somewhat more assistance may be labor codes and local antidiscrimination ordinances.

Discrimination against an individual because of actual or assumed homosexuality is harmful to society as well as to the individual victims of such discrimination. One's sexual preference for persons of the same sex has as little bearing on an individual's capacity to be a responsible and competent employee as does an individual's preference for someone of the opposite sex. People are far more than their erotic desires, and society stands to lose the services of
one tenth of the population as a result of prejudice and fear. Congressional approval of the addition of "sexual orientation" to the enumerated categories of Title VII, for example, would indicate to the American people, and the American employer in particular, that lesbians and gay men have a right to be free from arbitrary discrimination.

FOOTNOTES


2. Id. at 811, note 66. Paul Gebhard, Director, Institute for Sex Research, Indiana University, estimates that a combined average of 9.13% of the total population, 13.95% of males and 4.25% of females, had either extensive or more than incidental homosexual experience.


4. The American Psychiatric Association stated in 1973 that homosexuality is not a personality disorder. The Association recommended that all discrimination, including employment discrimination, against homosexual individuals should cease. N.Y. Times, April 9, 1974, p. 12.


6. Id. at 639.

7. Examples from Rivera, supra note 1, at 801.


15. For example, Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969), established that due process considerations limit the Civil Service Commission's discretion to fire an employee who allegedly engaged in homosexual conduct and held that the employing agency must demonstrate some rational basis for a conclusion that discharge will promote the efficiency of such agency.

16. See, e.g., Kramarsky v. Stahl Management, 46 U.S.L.W. 2241 (N.Y. Super. Ct., Nov. 9, 1977)(upholding right of landlord to refuse to rent to a black, divorced female lawyer on the grounds he didn't want to rent to lawyers). See also Smith v. Liberty Mutual Insurance Co., supra note 14, (upholding an employer's right to refuse employment to an individual because the employer found him effeminate).


23. Id. at 1099. The plaintiff had applied for a mailroom job and was refused employment because the department supervisor found him effeminate.

24. Id. at 1101.

25. Id. at 1100-01.


27. Id.

28. Id. at 456. Title VII requires that customer (and coworker) preferences can only be taken into account insofar as they make the performance of the company's primary function impossible. See Diaz v. Pan American World Airways, 442 F.2d 385 (5th Cir. 1971), cert denied, 404 U.S. 950 (1971). Therefore, if Title VII did cover transsexuals, the plaintiff would have a cause of action.

29. A transsexual is a person who is anatomically of one sex, with that sex's genitalia, who deeply believes that she or he is the opposite sex. This belief is so strongly held that a transsexual is obsessed with the desire to be surgically and hormonally altered to conform to the body, appearance and social status of his or her "rightful" gender. Almost all transsexuals are heterosexually oriented, as viewed from this "rightful" gender. Homosexuals, on the other hand, are congruent in their psychosocial identity and physiological appearance; their erotic preference is for a member of their own sex, but they want to remain their own gender at all times. (Incidentally, transvestites, individuals who have a fetish for dressing in clothing of the opposite sex, are almost always heterosexual.) See generally, Gagnon, Human Sexualities (1977).

30. This legislation has never passed. One commentator said that political expediency may keep members of Congress from voting to protect homosexuals. It may not be indicative of a general Congressional intent to deny protection to homosexuals. Wise, supra note 18, at 513. The difference seems irrelevant, since the effect is that gay men and women are denied protections available to most other citizens. And if it means that Congressmen would like to afford protections to homosexuals, but fear not being reelected, then it is a case of their pandering to their constituents' baser prejudices.

31. Supra note 26, at 457.

32. 566 F.2d 659 (9th Cir. 1977). Plaintiff, upon promotion, informed her supervisor that she had undergone a sex-change operation. A few months later a company official suggested that she might be happier at a new job where her transsexuality was unknown. She was fired a short time later, just after requesting that her records be changed to reflect her present name.

33. Id. at 662.

34. Id.


36. No. 78-2258, slip op. at 2 (W.D. Tenn. 1978) (order denying motion to dismiss).

37. Id.


40. 608 F.2d 327 (9th Cir. 1979).

41. In Strailey v. Happy Times Nursery School, Inc., (an unreported opinion), the plaintiff was fired because he wore a small gold earring to work prior to the commencement of the school year. In Lundin v. American Telephone and Telegraph Co., (also unreported), plaintiffs claimed they had been subjected to numerous insults from co-workers and were fired because of their lesbian relationship. DeSantis v. Pacific Telephone and Telegraph Co. (also unreported), is discussed in the text of the opinion as the principal case, and concerns three males, one of whom was allegedly not hired because of his homosexuality, and two of whom were allegedly harassed and fired because of their homosexuality.

42. The plaintiffs also filed a claim under 42 U.S.C. §§ 1983(3). 42 U.S.C. §§ 1982(3) states that * * * if two or more persons * * * con-
spire . . . for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the law, or of equal privileges and immunities under the laws, . . . the party so injured or deprived may have an action for the recovery of damages . . . . The court equally dismissed this claim.

43. 608 F.2d at 329.
44. 401 U.S. 424 (1971).
45. Id. at 431.
46. Id. at 431-32.
47. See note 2, supra.
48. Wise, supra note 18, at 505.
49. 608 F.2d at 330-31.
50. Id. at 330.
51. Id. at 333-34.
52. Id.
54. Id. at 618.
55. Id.
56. Dunlap, Friend & Liberty, Sexual Orientation and The Law, 5-72 (1985); Wise, supra note 18, at 506.
57. Dunlap, id.
58. Rivera, supra note 1, at 807; Wise, supra note 18, at 507.
60. Wise, supra note 18, at 597.
61. 400 U.S. at 542-44. EEOC Guidelines on Discrimination Because of Sex provide in part: "(1) The Commission will find that the following situations do not warrant the application of the bona fide occupational qualification exception: . . . (ii) the refusal to hire an individual based on stereotyped characteristics of the sexes." 29 C.F.R. § 1601.1(a) (1979).
62. 400 U.S. at 542-43.
63. Id. at 544.
64. Id.
65. Id. at 544-47 (Marshall, J. concurring).
66. Id. at 545 (Marshall, J. concurring).
67. Id.
69. 608 F.2d 327 (9th Cir. 1979).
70. 395 F. Supp. at 1099.
71. 608 F.2d at 328.
72. 395 F. Supp. at 1101.
73. 608 F.2d at 331-32.
74. See note 61, supra and text accompanying note 65, supra.
75. Wise, supra note 18, at 509.
76. See note 42, supra.
77. For a detailed discussion of these proof problems, see Wise, supra note 18, at 509-18.
78. Id. at 510.
80. Id. at 102.
81. Examples from Wise, supra note 18, at 511.
82. Life Insurance Co. of North Am. v. Reichardt, 591 F.2d 499 (9th Cir. 1979).
85. Richardson v. Miller, 446 F.2d 1247 (3rd Cir. 1971).
88. Supra note 40.
89. Id. at 333.
90. Id. at 333.
92. Id.
93. Wise, supra note 18, at 513.
97. "The Kinsey Research made a concerted effort over a period of years to find and evaluate the histories of people whose (sexual preference) had changed during or following therapy of any kind. None was ever found." C. Tipp, The Homosexual Matrix, 236-38 (1975) (as cited in Wise, supra note 18, at 514).
98. supra note 40, at 333.
99. Wise, supra note 18, at 514.
100. 42 U.S.C. § 1983 (1976) provides that "every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected any . . . person . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured. . . ."
101. Their predecessors were included in the Ku Klux Klan Act, Ch. 33, 12 Stat. 284 (1861).
103. Wise, supra note 18, at 515.
105. Only 30% of American workers are unionized. (See note 19, supra, and accompanying text). Therefore it is reasonable to assume that approximately 30% of homosexual employees work under labor contracts.
108. Id. at 185.
111. See, e.g., Babcock & Wilcox Co., 43 Lab. Arb. & Disp. Settl. 242, 244 (1964) (Duff, Arb.).
112. See note 53, supra and accompanying text.
113. Id. at 470.
114. Id. at 473.
115. Id. at 474.
116. Id. at 489.
117. Id. at 488.
118. Id. at 489.
119. Id. at 490.
120. Rivera, supra note 35 at 316.
121. The Buffalo Common Council amended § 10 Chap. 1 of the Ordinances of the City of Buffalo to prohibit any city agency or department from discriminating against an employee on the basis of sexual orientation. This amendment was passed 9-4 over the veto of the mayor on April 3, 1984. No complaints have been filed under it yet.
122. Rivera, supra note 1, at 810.
123. See discussion in Dunlap, supra note 56, at 5-27, in text and n. 43.
124. Id. at 5-30, 31.
125. Id. at 5-32, 33.
126. In Burton v. Cascade School Dist. Union High School No. 5, 512 F.2d 850 (9th Cir. 1975), aff't 353 F. Supp. 254 (D. Or. 1975), cert denied, 423 U.S. 839 (1975), plaintiff lesbian school teacher was denied reinstatement because of the disruption that reinstatement was found to be likely to cause, in spite of the fact that her termination on grounds of "immorality" (as cited in Dunlap, id., at 5-21, n. 21).
127. supra note 36 and accompanying text.
128. See note 2, supra.