Approved: 3-2-11
Date

MINUTES OF THE SENATE FEDERAL AND STATE AFFAIRS COMMITTEE

The meeting was called to order by Chairman Pete Brungardt at 10:30 a.m. on February 8, 2011, in Room 144-S of the Capitol.

All members were present.

Committee staff present:
Jason Long, Office of the Revisor of Statutes
Doug Taylor, Office of the Revisor of Statutes
Dennis Hodgins, Kansas Legislative Research Department
Connie Burns, Committee Assistant

Conferees appearing before the Committee:
Carrie Nassif, Kansas Equality Coalition
Stephanie Mott, Kansas Equality Coalition
Pedro Irigonegarary, Kansas Equality Coalition
Thomas Witt, Kansas Equality Coalition
Donna Lippoldt, Kansas Family Policy Council
Brent Pinkall, Awaken Manhattan

Others attending:
See attached list.

Introduction of Bills

Senator Owens requested a bill introduction. The bill is in regard to 79-3233(b) tax abatement records and confidentiality.

Senator Owens moved that this request should be introduced as a committee bill. Senator Reitz seconded the motion. The motion carried.

Senator Abrams requested three conceptual bill introductions regarding:

- curriculum and funding of education

Senator Abrams moved that this request should be introduced as a committee bill. Senator Ostmeyer seconded the motion. The motion carried.

- Suitable of education

Senator Abrams moved that this request should be introduced as a committee bill. Senator Owens seconded the motion. The motion carried.

- A bill regarding e-verify

Senator Abrams moved that this request should be introduced as a committee bill. Senator Ostmeyer seconded the motion. The motion carried

Senator Reitz requested a bill introduction. The bill draft 11RS0329 and is in regards to increasing tax on tobacco products.

Senator Reitz moved that this request should be introduced as a committee bill. Senator Owens seconded the motion. The motion carried

SB 53-Inclusion of sexual orientation and gender identity in Kansas act against discrimination

Chairman Brungardt opened the hearing on **SB 53**.

Staff provided an overview of the bill; and stated there was a strike through error in the bill on the first page. The bill is being reprinted.

The minutes of the Federal and State Committee at 10:30 a.m. on February 8, 2011, in Room 144-S of the Capitol.

Carrie Nassif, Northwest Chapter of Kansas Equality Coalition, testified in favor of the bill. (Attachment 1) Ms. Nassif stated adding sexual orientation as a protected class for all Kansans is so important. Voting on this legislation will protect her rights, not special rights just asking for what is decent.

Stephanie Mott, Board Member, Kansas Equality Coalition, appeared in favor of the bill. (Attachment 2) Ms. Mott talked about the life-draining discrimination that is prevalent throughout Kansas against transgender people, and the horrifying effects it has, not just on transgender people, but also on families and communities. Discrimination affects communities because it constructs barriers for transgender people to be productive members of society.

Pedro L. Irigonegaray, Counsel, Kansas Equality Coalition, spoke in favor of the bill. (Attachment 3) Mr. Irigonegaray stated it is time that Kansas is recognized once again as a state that supports justice and equality for all; the right to our religious and moral views, however, as a government, and are not bound by any faith or church. Please vote to amend our laws and provide equal protection to gay, lesbian and transgender families, friends and neighbors. Equality denied to some, denies equality to all. Also provided the court cases of Jantz vs Muci.

Thomas Witt, Chair, Kansas Equality Coalition, testified in favor of the bill. (Attachment 4) The bill would amend the Kansas Acts Against Discrimination to add protection for sexual orientation and gender identity, whether actual or perceived. There are currently 26 states, plus Washington DC, that have some level of protection against discrimination based on sexual orientation; there are 200 towns, cities and counties that ban sexual orientation discrimination, and a Presidential Executive Order banning discrimination in Federal employment. Mr. Witt also provided information on Statewide Employment Laws and Policies; a policy brief, "The Extent of Sexual Orientation Discrimination in Topeka, KS" by Roddrick Colvin; and a General Accounting Office report GAO/OGC-98-7R, Oct. 23, 1997.

Donna Lippoldt, Director, Kansas Family Policy Council, (KFPC) testified in opposition to the bill. (Attachment 5) Kansas Family Policy Council cannot stand by and see an immoral lifestyle that leads to harm for children be presented as law in our state, and KFPC stands for the protection of families and against the bill.

Brent Pinkall, Awaken Manhattan, spoke against the bill. (Attachment 6) Mr. Pinkall stated this issue does not require governmental intervention but is one that requires people to work together to promote and protect the value and dignity of every human being; to better understand the many beliefs and values that we each hold; and to better learn how to allow for such diversity while loving our neighbors as ourselves. Attached to the testimony was a letter, signed by 27 pastors, that was written to the Manhattan City Commission expressing why they as pastors are very concerned about such legislation.

Written testimony in opposition to the bill was received from Michael Schuttloffel, Executive Director, Kansas Catholic Conference (Attachment 7), Judy Smith, Concerned Women for America of Kansas (Attachment 8), and Representative Jan Pauls (Attachment 9).

Kansas Human Rights Commission provided written testimony as neutral on the bill. (Attachment 10)

Chairman Brungardt closed the hearing on **SB 53**

The next meeting is scheduled for February 9, 2011. The meeting was adjourned at 11:53 a.m.

SENATE FEDERAL AND STATE AFFAIRS COMMITTEE
GUEST LIST

DATE 2-8-11

NAME	REPRESENTING
Jeff Zehnder	580 WIBW-AM
Amber Versda	Kansas NOW
Emma Nagy	KEC
Natalie McCall	KEC
Carrie Nassif	KEC
Stephanie Mott	KEC
David Dove	KEC
JON POWELL	KEC
Brent Pinkall	Awaken Manhattan
Bob Eckhardt	CWA of KS
Theresa Gartner	Concerned Women for America
Sylvia Chapman	Concerned Women for America of KS
Donna Lippoldt	Kansas Family Policy Council
TED Hedrick	CAPITOL STRATEGIES
Berend Koops	Hein Law Firm
Ervin Ward	Intern-Senator Brungardt
Edward Larson	KS Catholic Conference
Joseph Mastrosimone	Kansas Human Rights Commission
Ruth Glover	KS. Human Rights Commission
Samantha Foster	Kansas City Star
RL-D Bradley	KLBA
Jenna Troum	KSNT 27 News
Janet Rochel	citizen
PEDRO IRIGONEGARAY	KEC COUNSEL
THOMAS WEIT	KEC CLERK

Kansas Equality Coalition

Our mission is to end discrimination based on [illegible]ual orientation and gender identity, and to ensure the dignity, safety, and legal equality of all Kansans.

www.KansasEqualityCoalition.org • 6505 E. Central #219 • Wichita, KS 67206 • (316) 260-4863 • fax (316) 858-7196

Testimony of Carrie Nassif
Senate Committee on Federal and State Affairs
February 8, 2011
Testimony in Support of SB53

Good morning Mr. Chairman and members of the committee. My name is Carrie Nassif, and I want you to know who I am. I live in Hays, I'm a mother of two (6 and 17), and have 3 cats and a dog. I own my own home. I'm a clinical psychologist and had worked at Fort Hays State University for 8 years and I loved it. About a year after getting tenured and promoted, I was offered an administrative position at the Larned Correctional Mental Health facility, which paid about twice what academia did. I was excited, and enjoyed being the Clinical Director for Correct Care Solutions, the company that is contracted with the state to provide healthcare to prisons. In my 8 months there, I oversaw 10 staff and was voted both Employee of the Quarter and Rookie of the Year. I received very good evaluations from my immediate supervisor, and was invited as a speaker at their yearly regional convention.

When one of my staff members became engaged and shared with us her wedding plans, I decided to tell my immediate supervisor about my own plans so that I could gauge from her reaction whether it would be appropriate to share with my staff. She agreed it would be, and encouraged me to let them know. When I told them that I would be travelling to Iowa to marry another woman that spring, they were all very supportive and agreed to keep things quiet at my request out of sensitivity to the work environment.

In the weeks that followed, word had apparently gotten to the corrections side of the prison. When my immediate supervisor attended a regional meeting, a contract monitor who is very close with the Warden at my facility, as well as with Margie Phelps, who works in the Kansas Department of Corrections, pulled her aside asking what was going on with me. The contract monitor pointed out how I was letting my lifestyle choice be a disruptive force in the workplace. My supervisor was just stunned.

Maybe you are thinking that I should have hid this, that I was asking for it. Would you have been able to keep your marriage, a major life decision and most important celebration of your life, from your colleagues? How would that have not taken the joy out of a beautiful and sacred event? Speaking as a clinical psychologist, I can tell you that this sort of double life is unhealthy. There is no sin or mental defect in being something other than heterosexual; my happiness in no way takes away from others' happiness. I took only one vacation day for my wedding, which occurred over a long weekend. I came back, took my on-call hours just like everybody else, and life proceeded as normal. There were never any issues with my sexual orientation at work; I kept good boundaries and was just as professional as always.

When, for a variety of other reasons, I decided to leave my position, I was asked by my immediate supervisor (with her regional manager's support) to consider staying on and work part time, two days a week until they could find a replacement for my position (which, last time, had gone five years unfilled). I agreed to help out and we presented it to the warden whose approval would be needed and who would typically rubber stamp a decision that would benefit us all -

corrections, my company, and the inmates. She refused. Her exact wording was that I would be "too disruptive". Now it was my turn to be stunned.

As an employee of a contractor with the State, I had no job protections, and she knew that. Ironically, as a State of Kansas employee, the Warden herself was protected from discrimination based on sexual orientation because all state workers in Kansas are, thanks to an Executive Order issued by Governor Sebelius. Executive orders come and go, and even when it was there, it couldn't protect me. That's why adding sexual orientation as a protected class for all Kansans is so important. Remember my story when you vote on legislation to protect my rights. They're not special rights – we're just asking for what's decent.

Thank you for your time. I am willing to stand for questions.

Kansas Equality Coalition

Our mission is to end discrimination based on sexual orientation and gender identity, and to ensure the dignity, safety, and legal equality of all Kansans.

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Testimony of Stephanie Mott
Senate Committee on Federal and State Affairs
February 8, 2011
Testimony in Support of SB53

Good morning Mr. Chairman and members of the Committee. Thank you for the opportunity to speak to you. My Name is Stephanie Mott. I am a member of the board for Kansas Equality Coalition, which advocates for fair treatment for gay, lesbian, bisexual, and transgender Kansans, and am also the executive director of the Kansas Statewide Transgender Education Project. I am a transsexual woman. I am here today to talk about the life-draining discrimination that is prevalent throughout Kansas against transgender people, and the horrifying effects it has, not just on transgender people, but also on families and communities.

The very first thing I knew about myself was that I was a girl, and that I had been born into a male body. The second thing I remember knowing about myself was that I would have to pretend to be someone who was not me, and that I could only express my true self in the hidden places where no one would see.

I tried to be this person that I was "supposed" to be. The torment was horrible. Life was something to be endured, not lived. Death offered the end of the pain. When I turned 18, I discovered alcohol. It allowed me to forget about the torment. For the first time in my life, I didn't have to feel the pain. I was still convinced that I had to try to be a man, and I eventually became dependent on the alcohol I was using, just to get through each day.

I tried, for nearly 50 years, to be a man. It was never who I was, and everything, everything was harder. Five years ago, I became homeless due to alcoholism. I finally stopped trying to be a man, and, with the help of a therapist I made the decision to transition.

A friend of mine invited me to a church where she said there were other transgender people. I finally found a place where I could be me. I went to the church, and I was greeted with love and acceptance. I sat down in the pew, looked up at the cross, and felt truth and self in the eyes of the Lord for the first time. The attendance book came around and I signed my name, Stephanie Mott, for the first time. I took communion as Stephanie. My communion prayer started out, "God, bless your daughter for the faith she has shown in you."

When, I began my transition in the face of the horrible discrimination that exists for transgender people - not because I wanted to, but because I had to. I became involved in the church, and now I am a member of the board of directors there. I find my strength in the Lord, not in alcohol. The torment is gone. Last November I celebrated five years of sobriety.

Since my transition, I have become a productive member of society. I volunteer at a number of community organizations including the Shawnee County Jail and the Center for Safety and Empowerment at the YWCA (formerly known as the Battered Women Task Force).

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I am the Drug and Alcohol Resources Quarterback on the Safe Streets Coalition Breaking the Cycle team that is working to provide resources to people who are released from the Shawnee County Jail. I have recently joined the Topeka/Shawnee County Homeless Taskforce.

I know many transgender people throughout Kansas. Most of them never become able to truly embrace society. Statistics show that 41% of us attempt suicide[1]. 19% are denied medical care[1]. 55% of transgender youth report being physically attacked[2]. 74% of transgender youth reported being sexually harassed at school, and 90% of transgender youth reported feeling unsafe at school because of their gender expression[2].

I know a woman. She is the mother of a transgender person. She talks about the fear that overwhelmed her when her adult daughter told her she was transgender. Not the fear of who her daughter is, but the fear of the discrimination she is certain to face.

This discrimination affects families. This discrimination also affects the community. It affects communities because transgender people are dramatically more likely to turn to drugs and alcohol, suffer from depression, attempt suicide, become homeless, and live on the edges of society. It affects communities because transgender people are more at risk for violence. Transgender people are twice as likely to be unemployed[1]. We are four times as likely to live in poverty. One in five of us become homeless[2]. Discrimination affects communities because it constructs barriers for transgender people to be productive members of society.

I urge you to vote in favor of moving this bill forward. Thank you again for the opportunity to speak to you. I am willing to stand for questions.

[1]National Center for Transgender Equality/National Gay and Lesbian Taskforce
[2]Gay Lesbian Straight Education Network.

(3)

MEMORANDUM

To: Kansas Senate Committee on Federal and State Affairs
The Honorable Pete Brungardt
From: Pedro L. Irigonegaray
Counsel, Kansas Equality Coalition
Date: February 8, 2011
Re: Senate Bill No. 53

Honorable Chairman, members of the committee, good morning. As counsel for the Kansas Equality Coalition (KEC), I have the privilege of representing many lesbians, gay men, bisexuals and transgender people. These folks are our mothers, fathers, brothers, sisters, aunts, uncles, friends and neighbors. We at KEC also represent many heterosexuals, people like myself that have resolved not to remain silent and indifferent on matters of discrimination against fellow citizens for no other reason than their sexual orientation or gender identity.

KEC urges you to vote favorably for the amendments proposed in Senate Bill No. 53. It is time that Kansas is recognized once again as a state that supports justice and equality for all. Kansas for years has been recognized as the home of one of the most hateful groups in America. The Phelps legacy is one that stains our reputation as a place of equal justice. You have the power, the duty, and the responsibility to send a signal to our nation, indeed the world, that Kansas protects the equal rights of all of its citizens, not just some. In *Lawrence v Texas*, 539 U.S. 558, the United States Supreme Court concluded that gay people can no longer be considered criminals because they love others of the same sex - this is the law of the land. There is no reason to continue to deny our gay and transgender population equal protection of the law.

Legally, protected bigotry can no longer be tolerated in Kansas, no matter the source of the bigotry, even if on religious grounds. Bigotry wrapped in prayer is still bigotry. As clearly stated in the Lawrence decision, gay conduct is not a crime between consenting adults. To deny equal protection in housing or employment to an individual simply because of their sexual orientation has no place in our secular democracy. Yet, people like Vernon R. Jantz can be denied employment simply because they are suspected of having "homosexual tendencies."

Mr. Jantz applied for a position as a teacher/coach in Wichita. Mr. Jantz was well qualified, married and the father of two children. When denied employment for allegedly possessing "homosexual tendencies," Mr. Jantz filed a lawsuit in the United States District Court in Wichita, Kansas. District Court Judge, the Honorable Patrick F. Kelly's in his MEMORANDUM AND ORDER, wrote the following words:

> Assuming, however, that the plaintiff's factual contentions are correct and that the true reason for the refusal to accept Jantz for the teaching position was Mucci's perception of Jantz's "homosexual tendencies," the defendant offers not one word to support the action. He makes no attempt to defend the consideration of perceived sexual orientation in determining whether to employ an applicant for a public school teaching position. Nor, the court believes, is there any possible rational basis for such discrimination in this day and age... The court accordingly concludes that the refusal to hire the plaintiff on the

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basis of his perceived sexual orientation was the result of an action by the defendant which was arbitrary and capricious in nature... [T]he action of the defendant was not in good faith, was arbitrary and without any rational motivation, and motivated instead by a visceral, unreasoning prejudice against homosexuals.

Mr. Jantz case was lost in the United States Court of Appeals, Tenth Circuit, not because he was not the victim of outrageous bigotry, but because in 1991 Kansas did not provide its gay population with a protected class status. As hard as it is to imagine the same is true today. Why? Simply because we have turned a blind eye to bigotry, ignorance and its progeny hate. We live at the epicenter of hate here in Topeka, our city is known worldwide as the home of America's ugliest hater, Rev. Fred Phelps. Why do we allow his type of hate to be represented in our laws? Why do we not do the right thing and send a signal to the world that we have determined once and for all that our gay and transgendered population, are as matter of Kansas law, to be treated equally; no longer the subject of discrimination, abuse and mistreatment simply because of their sexual orientation or gender identity.

There is simply no legitimate reason to continue the legally permissible bigotry which our laws allow today. Employment and housing, basic concerns of all our citizens should not be denied and withheld as a result of discriminatory practices based on outdated, unreasonable, and ignorant beliefs. While it is true that each of us possesses under the constitution a right to religious freedom, such religious freedom cannot be used to deny others' equal protection. The same religious authority that was previously quoted to deny our African American population the equal protection of law enjoyed by our White population is often times used as a basis to deny our gay population their rights in our democracy. This can no longer be permitted.

Individually we have a right to our religious and moral views, however as a government, we are not bound by any faith or church. We are bound by the United States Constitution, by our laws, not as a Theocracy, but as a pluralistic democracy, with respect for all in our nation and our state. Kansas must once again be recognized as a leader for freedom, justice and equality. Please vote to amend our laws and provide equal protection to gay, lesbian and transgender families, friends and neighbors. Equality denied to some, denies equality to all.

759 F. Supp 1543

Vernon R. JANTZ,
Plaintiff,

v.

Cleofas F. MUCI,
Defendant.

No. 89-1628-K.

United States District Court,
D. Kansas.

March 29, 1991.

Motion for Reconsideration Denied
May 28, 1991.

James S. Phillips, Jr., Phillips & Phillips, Wichita, Kan., for plaintiff.

William H. Dye, Susan L. Smith, Foulston & Siefkin, Wichita, Kan., for defendant.

MEMORANDUM AND ORDER

PATRICK F. KELLY, District Judge.

Plaintiff Vernon Jantz has brought the present action under 42 U.S.C. § 1983, alleging a violation of his right to equal protection. The plaintiff alleges that he was denied by the defendant, then-school principal Cleofas Muci, employment as a public school teacher on the basis of Muci's perception that Jantz had "homosexual tendencies." The defendant has now moved for summary judgment.

Arguments relating to the defendant's motion were presented to the court in a hearing conducted March 21, 1991. Consistent with the views of the court expressed during the course of the hearing, and for the reasons addressed herein, the court hereby grants in part, and denies in part, the defendant's motion for summary judgment.

Summary judgment is proper where the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. Fed.R.Civ.P. 56(c). In considering a motion for summary judgment, the court must examine all evidence in a light most favorable to the opposing party. McKenzie v. Mercy Hospital, 854 F.2d 365, 367 (10th Cir.1988). The party moving for summary judgment must demonstrate its entitlement to summary judgment beyond a reasonable doubt. Ellis v. El Paso Natural Gas Co., 754 F.2d 884, 885 (10th Cir.1985). The moving party need not disprove plaintiff's claim; it need only establish that the factual allegations have no legal significance. Dayton Hudson Corp. v. Macerich Real Estate Co., 812 F.2d 1319, 1323 (10th Cir.1987).

In resisting a motion for summary judgment, the opposing party may not rely upon mere allegations or denials contained in its pleadings or briefs. Rather, the nonmoving party must come forward with specific facts showing the presence of a genuine issue of material fact for trial and significant probative evidence supporting the allegation. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 2514, 91 L.Ed.2d 202 (1986). Once the moving party has carried its burden under Rule 56(c), the party opposing summary judgment must do more than simply show there is some metaphysical doubt as to the material facts. "In the language of the Rule, the nonmoving party must

come forward with 'specific facts showing that there is a genuine issue for trial.' " Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986) (quoting Fed.R.Civ.P. 56(e)) (emphasis in Matsushita). One of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses, and the rule should be interpreted in a way that allows it to accomplish this purpose. Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Vernon Jantz graduated from high school in Newton, Kansas in 1963. He graduated cum laude from Wichita State University, receiving a bachelor's degree from Wichita State University in 1972 and a master's degree in 1978. After serving in the United States Air Force, Jantz completed course work in secondary education at Western New Mexico State University, and obtained a New Mexico secondary school teaching permit in 1985.

During the 1985-86 school year, Jantz taught social studies in the New Mexico schools. Jantz and his wife moved to Wichita, Kansas in the summer of 1986. Obtaining Kansas certification in September, 1986, Jantz took employment with Unified School District No. 259 and began substitute teaching for the district in early 1987. Jantz substituted at several middle and elementary schools in the district, including Wichita North High School.

During this time, Jantz did no coaching. In his interviews with school administrators, including an interview conducted by a Wichita North administrative officer on behalf of Muci, Jantz did not volunteer to perform coaching activities. By the same token, Jantz was not asked whether he was able and willing to assume coaching responsibilities. Jantz, who had experience in basketball, baseball, soccer, and tennis, was able to coach, and would have done so had he been asked.

In May, 1987, Jantz contacted the district's Director of Secondary Personnel, Frank Crawford, and inquired about the possibility of obtaining a teacher's position for the 1987-88 school year. Despite his talk with Crawford, it remained uncertain whether there were any openings for the upcoming school year. Jantz interviewed at Wichita South and at Wichita North (with associate principal Milford Johnson). However, as it turned out, no positions were open for the 1987-88 school year at the schools where Jantz interviewed. As with the previous year, Jantz provided substitute teaching services during the 1987- 88 school year.

Jantz met with Crawford's successor, Jane Ware, in February, 1988. Due to the upcoming merger of ninth grade students into the Wichita high schools, a combined social studies teacher and coach position was created at Wichita North for the 1988-89 school year. Jantz applied for the position.

The contentions of fact presented by the parties establish that the principals of the individual schools in the district exercise de facto the predominant role in hiring decisions, with some input by the district personnel office. The principal usually conducts the job interview with any applicant and his determination is normally decisive.

Jantz's application was turned down and Matthew Silverthorne was selected to fill the new position. The parties dispute the reason for this decision by Wichita North's principal, Cleofas Muci. Muci was principal of Wichita North for the 1986-87 and 1987-88 school years. Muci retired in November, 1988.

According to Muci, he hired Silverthorne because he was the best candidate. Silverthorne had student taught and coached at Wichita North. In Muci's opinion, Silverthorne had done a good job while coaching.[1] Silverthorne was certified to teach social studies (with the exception of world geography, in

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[1] The defendant alleges, at p. 9 of his reply brief, that Silverthorne was an "avid" coach who volunteered for coaching assignments. The cited portion of Muci's deposition testimony establishes

which he had only a provisional certification).

Jantz disputes this version of the decision to hire Silverthorne. Jantz cites the testimony of Sharon Fredin (Muci's secretary) and William Jenkins (the coordinator of social studies at Wichita North). Fredin has acknowledged in her deposition that during the 1987-88 school year she "made the offhand comment" to Muci that Jantz reminded her of her husband, whom she believed to be a homosexual. Jenkins has testified that when he asked why Jantz was not hired for the new position, Muci told him it was because of Jantz's "homosexual tendencies."

After being denied the social sciences position at Wichita North, Jantz worked during the 1989-90 school year as a (half-time) social studies teacher and a (half-time) facilitator for gifted students at Jardine Middle School. Jantz currently is employed full-time as a facilitator for gifted students at Hadley Intermediate School. Jantz is a 45-year-old white male. He is married with two children.

The positions of the parties are diametrically opposed, and under the rules of summary judgment the court must accept the plaintiff's version as correct. Defendant Muci makes several arguments seeking to contradict the plaintiff's version: he stresses Jenkins' misspelling of Muci's name in his affidavit, suggests that his ex-secretary Fredin's "recollection is questionable," and generally denies any discriminatory intent against homosexuals. Muci also spills a great deal of ink in his briefs arguing from the premise that Muci simply made a professional, good faith selection of the candidate he believed to be the better qualified.

The problem, of course, is that the rules of summary judgment do not allow such a premise. Under those rules, Jantz's version of the events leading to the selection of Silverthorne must be taken as true. Muci is entitled to argue his version to the jury at the trial of the present matter, but for purposes of resolving the present motion for summary judgment, the court must accept as true that the real reason for the failure to hire Jantz was Muci's belief that Jantz had "homosexual tendencies."

The court concludes that Jantz has articulated a claim which, if proven at trial, sets forth a violation of his constitutional rights under 42 U.S.C. § 1983. "[T]he time has come today for private, consenting, adult homosexuality to enter the sphere of constitutionally protectable interests." Acanfora v. Board of Educ., 359 F.Supp. 843, 851 (D.Md.1973), aff'd on other grounds, 491 F.2d 498 (4th Cir.); cert. denied, 419 U.S. 836, 95 S. Ct. 64, 42 L.Ed.2d 63 (1974). The court will address Jantz's equal protection claim under two potentially relevant standards. The court will discuss the claim in the context of both a heightened scrutiny analysis, and in the additional context of the potential arbitrary and capricious nature of the classification. The court will then address the defendant's claim to qualified immunity as it relates to both the heightened scrutiny and rational basis analyses.

Heightened Scrutiny

In Bowers v. Hardwick, 478 U.S. 186, 106 S.Ct. 2841, 92 L.Ed.2d 140 (1986), the Supreme Court held that the due process clause of the Fourteenth Amendment does not prohibit the states from criminalizing homosexual sodomy. That case, cited by defendant Muci, is not directly relevant here. The Bowers Court only addressed the respondent's claim that the Georgia statute was a violation of due process; equal protection was not in issue. The case presented the limited issue of whether homosexual conduct could be regulated by the states. Whether a state or its agents may discriminate among citizens on the basis of their sexual orientation was not at issue.

The distinction between conduct and orientation is both proper and useful in analyzing the constitutional rights of homosexuals. See Sunstein, Sexual Orientation and the Constitution: A Note on the Relationship Between Due Process and Equal Protection, 55 U.Chi.L.Rev. 1161, 1162 (1988). Due process, which was at issue in Bowers, serves as a limitation of majoritarian restrictions of traditionally

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neither point, only that he performed his coaching responsibilities well.

favored and sanctioned activities and rights; it necessarily focuses on historical practice and tradition. Equal protection, on the other hand, protects disadvantaged groups of individuals from governmental discrimination, even where the discrimination is enshrined in a deep historical tradition. Id. at 1163, 1170-74. 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. See John Charles Hayes, The Tradition of Prejudice Versus the Principle of Equality: Homosexuals and Heightened Equal Protection Scrutiny After Bowers v. Hardwick, 31 B.C.L.Rev. 375 (1990). Indeed, as Judge Norris recognized in his concurring opinion in Watkins v. United States Army, 875 F.2d 699, 711 (9th Cir.1989) (Norris, J., concurring in the judgment), cert. denied, --- U.S. ----, 111 S.Ct. 384, 112 L.Ed.2d 395 (1990), the strength of the historical tradition of discrimination against homosexuals documented by the Supreme Court in Bowers, while supporting the denial of the due process claim in that case, in fact supports the view that governmental discrimination on the basis of sexual orientation may represent a violation of equal protection considerations.

> It is perfectly consistent to say that homosexual sodomy is not a practice so deeply rooted in our traditions as to merit due process protection, and at the same time to say, for example, that because homosexuals have historically been subject to invidious discrimination, laws which burden homosexuals as a class should be subjected to heightened scrutiny under the equal protection clause. Indeed, the two propositions may be considered complementary: In all probability, homosexuality is not considered a deeply-rooted part of our traditions precisely because homosexuals have historically been subjected to invidious discrimination.

Id. at 719 (emphasis in original).

The distinction between conduct and orientation may be seen in the cases decided by lower federal courts which have discussed the appropriate standard for review of governmental discrimination against homosexual activity. Decisions which have refused to impose a heightened scrutiny analysis have done so with an emphasis that persons engaging in homosexual conduct do not constitute a suspect class. See High Tech Gays v. Defense Industr. Sec. Clearance Office, 895 F.2d 563 (9th Cir.1990) (challenged regulations "all relate to conduct" rather than orientation); Padula v. Webster, 822 F.2d 97 (D.C.Cir.1987) (homosexual orientation not resulting in homosexual conduct not in issue); National Gay Task Force v. Board of Education, 729 F.2d 1270 (10th Cir.1984), aff'd by an equally divided court, 470 U.S. 903, 105 S.Ct. 1858, 84 L.Ed.2d 776 (1985) (teachers could be fired for "engaging in an indiscreet public act of oral or anal intercourse"); Singer v. United States Civil Service Com'n, 530 F.2d 247 (9th Cir. 1976).[2]

Bowers, however, provides no bar to the use of heightened scrutiny when analyzing governmental discrimination based upon sexual orientation. However, in identifying which governmental classifications require heightened scrutiny analysis, the Supreme Court, in a series of cases, has identified several considerations which are relevant. The discrimination must be invidious and unjustifiable, that is, discrimination based upon an obvious, immutable, or distinguishing trait which frequently bears no relation to ability to perform or contribute to society. A second factor is whether the class historically has suffered from purposeful discrimination. Third and finally, the class must lack the political power necessary to obtain protection from the political branches of government. See City of

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[2] One Circuit has abandoned explicitly the distinction between orientation and conduct which has been stressed in other cases. In Ben- Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir.1989), cert. denied, 494 U.S. 1004, 110 S.Ct. 1296, 108 L.Ed.2d 473 (1990), the Seventh Circuit held, without any evidence in the case before it, and without citation to any authority of any kind, that the plaintiff's admitted lesbian orientation compelled the "reasonable inference" that she "has in the past and is likely to again engage in such conduct."

Cleburne v. Cleburne Living Center, 473 U.S. 432, 440-41, 105 S.Ct. 3249, 3254-55, 87 L.Ed.2d 313 (1985); Plyler v. Doe, 457 U.S. 202, 216 n. 14, 219-23, 102 S.Ct. 2382, 2394 n. 14, 2395-97, 72 L.Ed.2d 786 (1982) Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976); San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 28, 93 S.Ct. 1278, 1293, 36 L.Ed.2d 16 (1973); Frontiero v. Richardson, 411 U.S. 677, 684-87, 93 S.Ct. 1764, 1769-70, 36 L.Ed.2d 583 (1973).

In denying heightened scrutiny to discrimination against homosexuals, two circuit courts have found that homosexuality was not an immutable characteristic.[3] In both cases, the findings were made without the benefit of any supporting authority, and were barren of any cited scientific or medical authority which would lend support to such conclusions. Nor did the courts cite in evidence in the records before them, instead simply intoning that homosexual orientation was not immutable.

This, of course, is hardly surprising, in view of the overwhelming weight of currently available scientific information. According to that information, sexual orientation (whether homosexual or heterosexual) is generally not subject to conscious change.[4] Sexual orientation becomes fixed during early childhood, "it is not a matter of conscious or controllable choice." High Tech Gays v. Defense Ind. Clearance Off., 909 F.2d 375 (9th Cir.1990) (en banc) (Canby, J., dissenting). Judge Norris has put the issue in terms the ordinary person (whether heterosexual or homosexual) can appreciate. If the government began to discriminate against heterosexuals, how many heterosexuals "would find it easy not only to abstain from heterosexual activity but also shift the object of their desires to persons of the same sex?" Watkins v. United States Army, 875 F.2d 699, 726 (9th Cir.1989) (en banc) (Norris, J., concurring).

Aside from the available scientific evidence, which strongly supports the view that sexual orientation is not easily mutable, complete and absolute immutability simply is not a prerequisite for suspect classification.[5] Race, gender, alienage, and illegitimacy can all be changed, yet discrimination on

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[3] In High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F.2d 563, 573 (9th Cir.1990), the Ninth Circuit, without citation to any evidence in the record or to a single medical authority, announced that: "[h]omosexuality 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." In Woodward v. United States, 871 F.2d 1068, 1076 (Fed.Cir.1989), the Federal Circuit also opined that "[m]embers of recognized suspect or quasi-suspect classes, e.g., blacks or women, exhibit immutable characteristics, whereas homosexuality is primarily behavioral in character." As with the Ninth Circuit in High Tech Gays, the court offered not the slightest support or authority for the position that homosexuality is a mutable characteristic.

[4] See Coleman, "Changing Approaches to the Treatment of Homosexuality," in Homosexuality: Social, Psychological, and Biological Issues, 81-88 (W. Paul, J. Weinrich, J. Bonsiorek & M. Hotvedt eds. 1982); A. Bell, M. Weinberg, & F. Hammersmith, Sexual Preference--Its Development in Men and Women, 166-67, 211, 222 (1981); McConaghy, Is a Homosexual Orientation Irreversible?, 129 Brit. J. Psychiatry, 556, 563 (1976); Acosta, Etiology and Treatment of Homosexuality, 4 Arch. Sexual Behavior, 9, 23-24 (1975); C. Tripp, The Homosexual Matrix, (1975); Ross & Stalstrom, Exorcism as Psychiatric Treatment: A Homosexual Case Study, 8 Arch. Sexual Behavior, 379 (1979). Additional authorities are cited in Note, An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality, 57 S.Cal.L.Rev. 797, 819-21.

[5] In listing the factors relevant to the determination that a governmental classification is suspect, the Supreme Court has omitted citing immutability as a requirement on several occasions. City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 440-41, 105 S.Ct. 3249, 3254-55, 87 L.Ed.2d 313 (1985); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313, 96 S.Ct. 2562, 2566, 49 L.Ed.2d 520 (1976); San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 28, 93 S.Ct. 1278, 1293, 36 L.Ed.2d 16

the basis of any of these categories compels heightened scrutiny by the courts. Aliens may obtain citizenship, gender may be altered by surgery, lighter-skinned blacks may pass as white. Discrimination on the basis of race would not become permissible merely because a future scientific advance permits the change in skin pigmentation.

The consideration of the mutability of a personal trait which is the subject of governmental discrimination serves a more general purpose, indicating the existence of particularly heinous and reprehensible forms of discrimination. While traits such as race, gender, or sexual orientation may be altered or concealed, that change can only occur at a prohibitive cost to the average individual. Immutability therefore defines traits which are central, defining traits of personhood, which may be altered only at the expense of significant damage to the individual's sense of self. See L. Tribe, American Constitutional Law § 16-33 at 1616 (1988) (sexual orientation, whether homosexual or heterosexual, is central to the personality of the individual); Note, The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification, 98 Harv.L.Rev. 1285, 1303 (1985); Watkins v. United States Army, 875 F.2d at 726 (sexual orientation serves as "a central aspect of individual and group identity").

In this context, classification on the basis of sexual orientation fulfills the concern that the identifying trait of the class be immutable. 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.

Discrimination on the basis of sexual orientation is invidious. In addition to the immutable nature of the trait, homosexual individuals have been and are the subject of incorrect stereotyping. See Mississippi Univ. for Women v. Hogan, 458 U.S. 718, 729-30, 102 S.Ct. 3331, 3338-39, 73 L.Ed.2d 1090 (1982) (invalidating discrimination based on stereotype of what constitutes acceptable female work). Homosexual orientation "implies no impairment in judgment, stability, reliability or general social or vocational capabilities." Resolution of the American Psychological Association (Jan. 1985). Nor does homosexual orientation alone impair job performance, including the job of teaching in public schools. Acanfora v. Board of Educ., 359 F.Supp. at 851. See also Norton v. Macy, 417 F.2d 1161 (D.C.Cir.1969). As a class-defining trait, sexual orientation "bears no relation to ability to perform or contribute to society." Frontiero v. Richardson, 411 U.S. at 686, 93 S.Ct. at 1770.

Yet homosexuals remain the subject of significant and virulent stereotyping in modern society. Homosexuals are believed to be effeminate (if gay) or masculine (if lesbian), they are believed to proselytize children to homosexuality or indeed seek out children to molest, they are believed to be mentally ill; stereotypes which are all demonstrably false. See Note, An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications based on Homosexuality, 57 S.Cal.L.Rev. 797, 821-24 (1984). In truth, the sexual orientation of the vast majority of homosexuals is not identifiable on the basis of mannerism alone. Marmor, "Clinical Aspects of Male Homosexuality," in Homosexual Behavior: A Modern Reappraisal, 267 (Marmor ed. 1980). Homosexuals are no more likely to molest children than are heterosexuals. Id., at 271; State of Oregon Dept. of Human Resources, Final Report of the Task Force on Sexual Preference, 21 (1978). Homosexuals are not mentally ill. "[T]he National Association for Mental Health, the American Psychiatric Association, and the Surgeon General now agree that homosexuality, in and of itself, is not a mental illness." 57 S.Cal.L.Rev. at 824.

In addition to the invidiousness of discrimination presently faced by members of a classification--the presence of inaccurate stereotyping, the lack of any connection between the classification and the ability of the individual to perform in society--the Supreme Court has also focused on the historical background of that discrimination, to determine whether the class has suffered a history of purposeful discrimination. Homosexuals in the United States have historically been subjected to

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(1973).

discrimination both pervasive in its scope and intense in its impact. Rowland v. Mad River Local School Dist., 470 U.S. 1009, 1014, 105 S.Ct. 1373, 1376, 84 L.Ed.2d 392 (1985) (Brennan, J., dissenting from denial of cert.) (homosexuals have been the historical object of "pernicious and sustained hostility"). See also 98 Harv.L.Rev. at 1302 (stigmatization of homosexuals has "persisted throughout history, across cultures, and in the United States"); 57 S.Cal.L.Rev. at 824-25 (homosexuals "have historically faced pervasive discrimination" in America). Widespread discrimination against homosexuals exists in both public and private employment. Developments in the Law--Sexual Orientation and the Law, 102 Harv.L.Rev. 1508, 1554, 1575 (1989). Homosexuals must also face discrimination in many other facets of modern life. Id., at 1671. In finding jobs, securing housing, in nearly every aspect of social existence, discrimination on the basis of sexual orientation has been a persistent facet of life in America. The prejudice against homosexuals is "so severe and pervasive that homosexuals are often forced to hide their identities as homosexuals." 31 B.C.L.Rev. at 377.

Unfortunately, the deep-seated societal prejudice against homosexuals also evidences itself in widespread violence against homosexuals. One study has found that homosexuals probably face victimization more frequently than any other minority group. P. Flinn & T. McNeil, The Response of the Criminal Justice System to Bias Crime: An Exploratory Review, at 2 (1987). Law enforcement officials report that violence against homosexuals is both significant, and, perhaps due to the AIDS epidemic, increasing. See Swisher & Masters, Police, Gay Activists See Rise in Assaults on Homosexuals, Washington Post, Sept. 17, 1989 at A1; Mannery, Anti-Gay Acts in U.S. Widespread, Chicago Tribune, June 8, 1990 at 20; Schoolman, Bias Crimes Against Gays Increasing in Major U.S. Cities, Reuters, Mar. 6, 1991.

A final consideration used by the Supreme Court in identifying governmental classifications which require heightened scrutiny is whether the class has traditionally been unable to protect the rights of its members through the political process. Heightened scrutiny serves to protect politically powerless minorities or groups against majoritarian abuses. Special protection is accorded the class under heightened scrutiny analysis because it is unable to secure similar protection through representative government. See Cleburne, 473 U.S. at 441, 105 S.Ct. at 3255; Plyler, 457 U.S. at 216 n. 14, 102 S.Ct. at 2394 n. 14; Murgia, 427 U.S. at 313, 96 S.Ct. at 2566; Rodriguez, 411 U.S. at 28, 93 S.Ct. at 1293.

One circuit court, in refusing to extend heightened scrutiny to homosexuals, argued that recent legislation in several states indicates that homosexuals are not politically powerless. Citing anti-discrimination provisions in three states, an executive order in New York, and a series of local ordinances, the Ninth Circuit in High Tech Gays, 895 F.2d at 574, announced: "Thus, homosexuals are not without political power; they have the ability to and do 'attract the attention of the lawmakers,' as evidenced by such legislation."

As an initial matter, it must be observed that this view is premised on an inaccurate, and exaggerated, view of recent state anti-discrimination legislation. The Ninth Circuit's catalogue of legislative action is taken directly from two footnotes to a recent Harvard University analysis of homosexual rights in America in Developments in the Law--Sexual Orientation and the Law, 102 Harv.L.Rev. 1508, 1667 n. 49, & 1668 n. 51 (1989). The court ignored the text which accompanies this section of the Harvard study: "Unfortunately, very little legislation protects gay men and lesbians from discrimination in the private sector. No federal statute bars discrimination by private citizens or organizations on the basis of sexual orientation. Nor do the states provide such protection: only Wisconsin has a comprehensive statute barring such discrimination in employment." Id., at 1667. The Harvard study concludes that discrimination against homosexuals is pervasive, and recent changes in the law too inadequate to provide adequate protection. Unless more is done, the study found, "gay men and lesbians will remain unable to conduct their lives free from discrimination." Id., at 1671.

The Ninth Circuit's position in High Tech Gays not only exaggerates the significance of recent anti-discrimination efforts, it suffers from a more fundamental error. It mistakenly assumes that scattered, piecemeal successes in local legislation are proof of political power, and hence an invalidation

of the use of heightened scrutiny in governmental classifications based on sexual orientation. The standard implicitly adopted by the Ninth Circuit would disqualify every group from suspect or quasi-suspect status. Blacks, women, aliens, or any group which has obtained some form of legislative protection would forfeit the benefits of heightened scrutiny. As Judge Canby has properly observed, the Ninth Circuit's argument in High Tech Gays is not consistent with the Supreme Court's treatment of other minorities. The existence of isolated, local anti-discrimination successes

> is clearly insufficient to deprive homosexuals of the status of a suspect classification. Compare the situation with that of blacks, who clearly constitute a suspect category for equal protection purposes. Blacks are protected by three federal constitutional amendments, major federal Civil Rights Acts of 1866, 1870, 1871, 1875 (ill-fated though it was), 1957, 1960, 1964, 1965, and 1968, as well as by antidiscrimination laws in 48 of the states. By that comparison, and by absolute standards as well, homosexuals are politically powerless.

High Tech Gays v. Defense Ind. Clearance Off., 909 F.2d at 378 (Canby, J., dissenting from denial of rehearing en banc).

In reality, homosexuals face severe limitations on their ability to protect their interest by means of the political process. As Justice Brennan has observed, "[b]ecause of the immediate and severe opprobrium often manifested against homosexuals once so identified publicly, members of this group are particularly powerless to pursue their rights openly in the political arena." Rowland v. Mad River Local School Dist., 470 U.S. at 1014, 105 S.Ct. at 1376. See also High Tech Gays, 909 F.2d at 378 (homosexuals are regarded as "political pariahs" by the major political parties); and Watkins, 875 F.2d at 727 (Norris, J., concurring in the judgment) (homosexuals face structural barriers rendering "effective political participation unlikely if not impossible").

There are several factors which limit effective political action by homosexuals. Due to the harsh penalties imposed by society on persons identified as homosexual, many homosexual persons conceal their sexual orientation. Silence, however, has its cost. It may allow a given individual to escape from the discrimination, abuse, and even violence which is often directed at homosexuals, but it ensures that homosexuals as a group are unheard politically. Moreover, the prejudice that compels many homosexuals to refrain from open political activity also limits access to political power in other ways. By diminishing contact between the heterosexual majority and avowed homosexuals, the majority loses any perspective on concerns in the homosexual community and is deprived of the resulting sensitivity to those concerns. Politicians seeking to limit the impact of anti-homosexual prejudices through legislation are themselves the target of prejudice. 57 S.Cal.L.Rev. at 825- 27.

There is, the court believes, no way to analyze the present issue under the guidelines set down by the Supreme Court and reach any conclusion other than that discrimination based on sexual orientation is inherently suspect. 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. No other identifiable minority group faces the dilemma dealt with every day by the homosexual community--the combination of active and virulent prejudice with the lack of an effective political voice. Only by abandoning the established tests of suspectness, and retreating to some other formulation is it possible to achieve some other result. This court cannot join in such a retreat. Accordingly, the court finds that a governmental classification based on an individual's sexual orientation is inherently suspect.

Rational Basis

For reasons discussed below, the court finds that it is also necessary to discuss the present case in the context of the most permissive standard applicable in equal protection analysis, the rational basis standard. That is, even assuming there is no suspect class here, the question remains whether there is

any rational basis for the consideration of sexual orientation in public employment decision making.

There are special circumstances in which a rational basis for such discrimination has been found. In cases which have refused to apply heightened scrutiny to the defendant's conduct in discriminating against homosexual conduct, a rational basis for the conduct has been found in the need to maintain morale and discipline in the armed forces, Ben-Shalom v. Marsh, 881 F.2d 454 (7th Cir.1989); Woodward v. United States, 871 F.2d 1068, 1076 (Fed.Cir.1989); Beller v. Middendorf, 632 F.2d 788 (9th Cir.1980); the requirement for avoiding illegality among law enforcement personnel, Padula v. Webster, 822 F.2d 97 (D.C.Cir.1987); and the need to limit the exposure of persons in positions with access to sensitive information to blackmail, High Tech Gays v. Defense Industr. Security Clearance Off., 895 F.2d at 575-78 (Department of Defense personnel with secret and top secret security clearances); Padula, 822 F.2d at 97 (FBI agent).

Of course, none of those considerations are present here. There is no threat to discipline, no threat of blackmail. Nor, it must be noted, does the defendant even attempt to offer a rational basis for his alleged discrimination on the basis of sexual orientation.

The defendant's brief, to the extent that it makes any attempt to identify a rational basis for his actions, merely reasserts his denial of any consideration of Jantz's alleged "homosexual tendencies," and contends that the only considerations which affected his decision were legitimate employment factors, such as coaching experience. The problem with this is that it wholly ignores the standards of summary judgment which require the court to assume the truth of Jantz's version of the facts: that Muci refused to hire Jantz because of his perceived homosexual orientation.

This approach was maintained by the defendant during the hearing on the present motion. Despite repeated invitations by the court, the defendant modestly declined to identify any rational basis for a decision not to hire predicated on Jantz's alleged "homosexual tendencies." The defendant instead used each opportunity extended by the court to retreat into his factual argument, averring that the decision not to hire Jantz had nothing to do with his perceived sexual orientation, and was solely based upon Silverthorne's superior coaching experience.

Assuming, however, that the plaintiff's factual contentions are correct and that the true reason for the refusal to accept Jantz for the teaching position was Muci's perception of Jantz's "homosexual tendencies," the defendant offers not one word to support the action. He makes no attempt to defend the consideration of perceived sexual orientation in determining whether to employ an applicant for a public school teaching position. Nor, the court believes, is there any possible rational basis for such discrimination in this day and age.

Homosexual orientation alone does not impair job performance, including the job of teaching public schools. Acanfora v. Board of Educ., 359 F.Supp. at 851. See also Norton v. Macy, 417 F.2d 1161. In Swift v. United States, 649 F.Supp. 596 (D.D.C.1986), the plaintiff was a stenographer whose job transcribing presidential speeches and press conferences was terminated when the government revoked his White House security clearance. The government asserted the plaintiff was a "national security risk" and barred him from access to the White House. The district court denied the government's motion to dismiss, finding that the arbitrary discrimination on the basis of sexual orientation would violate the plaintiff's right to equal protection, even without the use of heightened scrutiny:

> Homosexual conduct may not be protected under the right of privacy, and homosexuals may not qualify as a suspect class. Nonetheless, the government may not discriminate against homosexuals for the sake of discrimination, or for no reason at all.

649 F.Supp. at 602.

The court accordingly concludes that the refusal to hire the plaintiff on the basis of his perceived

sexual orientation was the result of an action by the defendant which was arbitrary and capricious in nature.

Qualified Immunity

A key point in the defendant's motion for summary judgment, and almost the exclusive point made in the defendant's reply, is that even if there was some wrongful discrimination, the defendant is nonetheless qualifiedly immune. Under the doctrine of qualified immunity, governmental officials performing discretionary functions are shielded from civil damage actions insofar as their conduct does not violate clearly established statutory or constitutional rights. Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982). Qualified immunity exists unless the plaintiff can demonstrate that the contours of the right allegedly violated by the defendant were "sufficiently clear that a reasonable official would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640, 107 S.Ct. 3034, 3039, 97 L.Ed.2d 523 (1987). In response to a claim of qualified immunity, the plaintiff must demonstrate by facts or by allegation both that the defendant violated the law and that the law was clearly established at the time of the violation. Snell v. Tunnell, 920 F.2d 673, 696 (10th Cir.1990); Pueblo Neighborhood Health Ctrs. v. Losavio, 847 F.2d 642, 646 (10th Cir.1988).

The defense is not available, however, for discrimination which is purely arbitrary and without any rational basis. As the Tenth Circuit has observed, "when a plaintiff can point to specific facts of defendant's improper motivation, qualified immunity may be inappropriate due to a 'conflict sufficiently material to defendant['s] claim of immunity to require [him] to stand trial.' " Snell, 920 F.2d at 696-97 (quoting DeVargas v. Mason & Hanger-Silas Mason Co., 844 F.2d 714, 719 (10th Cir.1988) (other citations omitted).

The defendant's argument with regard to qualified immunity is similar to his discussion (or rather lack thereof) relating to rational basis: he simply argues that he made a good faith professional decision which was not affected by even the slightest consideration of Jantz's alleged homosexuality. But again, the question for the court is whether, assuming Muci's real reason for not hiring Jantz was because of his "homosexual tendencies," Muci is entitled to any qualified immunity defense.

The court finds the answer is no. Certainly when the decision not to hire Jantz was made, homosexual orientation was not established as a suspect class. Muci's actions cannot therefore be tested against whether they were necessary to achieve a compelling governmental objective. Despite the court's conclusion above that discrimination on the basis of sexual orientation is inherently suspect, that determination cannot support the plaintiff's claim in the present case. At the time of the determination not to hire Jantz, the suspect nature of the classification was not clearly established.

But it had by that time been established, as the district court recognized in Swift, that the government cannot "discriminate for the sake of discrimination." Qualified immunity is no defense where the action of the defendant was not in good faith, was undertaken arbitrarily and without any rational motivation, and motivated instead by a visceral, unreasoning prejudice against homosexuals. See Swift, 649 F.Supp. at 602. The present case provides no indication of any justification for the defendant's determination to discriminate on the basis of sexual orientation, nor, as the court has noted earlier, has the defendant attempted to supply one. The defendant has not only failed, but has indeed actively avoided attempting to articulate any rational basis for such a decision. Accepting as true the evidence offered by the plaintiff, as the court must under the relevant standards of review, the defendant acted arbitrarily, without any rational purpose, based upon personal prejudices against homosexuals. Under these circumstances, the defendant is not entitled to the defense of qualified immunity.

There are a few other matters present in the case which deserve some brief mention here. The defendant argues, without any great forcefulness, that the plaintiff's constitutional claims should be dismissed since the rights implicated are not stated with precision and clarity. The court finds this argument is without merit. The plaintiff's equal protection claim is stated clearly enough for any

reasonable person to understand the nature and context of the grievance asserted and the nature of the right implicated. And certainly, the defendant has no problem in apprehending the nature of the plaintiff's claim and proceeds to discuss the arguments relating to the plaintiff's equal protection claim in detail elsewhere in his briefs to the court.

The defendant also argues that the plaintiff's claims against him in his official capacity should be dismissed. The defendant argues that he did not have decision-making authority in job hiring, and therefore is not subject to any liability for actions in his official capacity pursuant to Jett v. Dallas Indep. School Dist., 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989).[6] The defendant's argument fails in its factual premise. It is correct that the district personnel office does have some input in the hiring process, and yes, the applicants for a job must first meet district-created job qualifications. The principal's discretion in hiring is not unfettered.

Nonetheless, the facts indicate that the decision by the principal is given great weight, and in virtually all circumstances is normally decisive. Ultimate hiring decisions rarely conflict with the decision of the school principal. More importantly, and aside from considerations relating to the district's hiring policies in general, there is no evidence in the present case that any other officer or agent of the school district participated in any way in the specific decision to hire Silverthorne and not to hire Jantz. The only person demonstrated to have been involved in that decision is the defendant Muci. That failure to interfere with the decision of the principal is wholly consistent with the effective, established policy of the district. The argument that Muci had little to do with the decision not to hire Jantz cannot be accepted in light of the evidence currently before the court and the relevant standards to be used in resolving the defendant's motion for summary judgment. The plaintiff's equal protection claims against Muci, in both his individual and his official capacities, may proceed.

Finally, the plaintiff also advances claims for invasion of constitutional rights to privacy and freedom of association. Most of the arguments advanced by the plaintiff in relation to these claims substantially duplicate those in the plaintiff's equal protection claim. The plaintiff fails to adequately articulate the nature of the asserted privacy and free association claims, and accordingly summary judgment will issue against the same.

IT IS ACCORDINGLY ORDERED this 29th day of March, 1991, that the defendant's motion for summary judgment (Dkt. No. 21), is granted as it relates to the plaintiff's privacy and free association claims; in all other respects, the motion is hereby denied.

MEMORANDUM ORDER

Defendant Cleofas Muci has moved for a reconsideration of the court's memorandum and order of March 29, 1991. The arguments made by the defendant in support of this motion are identical to those advanced in support of his original motion for summary judgment. They carry no greater weight now. Accordingly, the defendant's motion for reconsideration is hereby denied.

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[6] During the hearing of the present matter, the defendant also stressed the relevance of Ware v. Unified School Dist. No. 492, 902 F.2d 815 (10th Cir.1990). In Ware, the Tenth Circuit discussed the circumstances under which a school board might be held liable for actions taken by a subordinate official. Of course, the impact of the defendant's argument is limited to the plaintiff's claim against Muci in his official capacity; even if the defendant were correct, it would not eliminate the plaintiff's claim against Muci in his individual capacity. Here, the plaintiff has brought his claim only against the school official, not the school board. The secondary or derivative liability of the school board is not in issue. The Jett standards used to determine "the responsibility of the school district for the actions of [a p]rincipal" are relevant only to the action against Muci in his official capacity. 491 U.S. at 739, 109 S.Ct. at 2724, 105 L.Ed.2d at 628. As noted above, the plaintiff has demonstrated that the defendant is the agent responsible for the determination not to hire.

The defendant has also moved the court to certify the case as appropriate for interlocutory appeal under 28 U.S.C. § 1292(b). Of course, the denial of a defendant's motion for summary judgment asserting a defense of qualified immunity is in any event immediately appealable under 28 U.S.C. § 1291. Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F.2d 642, 644 (10th Cir.1988). However, in order to expedite the fair and complete resolution of the issues presented by the defendant's motion for summary judgment, the court finds appropriate an interlocutory appeal of the March 29 order. An interlocutory appeal would materially advance several controlling questions of law, concerning which there is a substantial disparity of opinion.

IT IS ACCORDINGLY ORDERED this 29 day of May, 1991, that the defendant's motion to reconsider and/or amend (Dkt. No. 32) is hereby denied. The court finds appropriate the taking of an interlocutory appeal from its March 29, 1991 order. Upon the taking of such an appeal, all proceedings in the district court shall be stayed.

976 F.2d 623

Vernon R. JANTZ,
Plaintiff-Appellee,

v.

No. 91-3245.

Cleofas F. MUCI,
Defendant-Appellant.

Lambda Legal Defense and Education Fund, Inc.; American Civil Liberties Union Foundation and American Civil Liberties Union of Kansas; National Conference of Gay and Lesbian Elected Officials,
Amici Curiae.

United States Court of Appeals,
Tenth Circuit.

Oct. 9, 1992.

Rehearing Denied Dec. 14, 1992.

Applicant for position of public high school teacher/coach brought civil rights action against high school principal alleging that he was denied position based on principal's perception that applicant had "homosexual tendencies." Principal moved for summary judgment. The United States District Court for the District of Kansas, Patrick F. Kelly, Chief Judge, 759 F.Supp. 1543, granted motion in part and denied motion in part. Principal appealed. The Court of Appeals, Baldock, Circuit Judge, held that: (1) principal was entitled to qualified immunity from applicant's civil rights claim, and (2) school district could not be held liable for damages resulting from civil rights action of applicant against high school principal in principal's official capacity.

David M. Rapp of Hinkle, Eberhart & Elkouri, Wichita, Kan., for defendant-appellant.

James S. Phillips, Jr. of Phillips & Phillips, Wichita, Kan., for plaintiff- appellee.

Stephen V. Bomse, Clyde J. Wadsworth of Heller, Ehrman, White & McAuliffe, San Francisco, Cal., and Mary Newcombe, Los Angeles, Cal., for amicus curiae Lambda Legal Defense and Educ. Fund, Inc.

Eric E. Davis of Saperstein, Mayeda, Larkin & Goldstein, Los Angeles, Cal., for amicus curiae National Conference of Gay and Lesbian Elected Officials.

William B. Rubenstein, Matt Coles, Ruth E. Harlow of American Civil Liberties Foundation, New York City, and David J. Waxse of Shook, Hardy & Bacon, Overland Park, Kan., for amicus curiae American Civil Liberties Union Foundation and the American Civil Liberties Union of Kansas.

Before BALDOCK and BARRETT, Circuit Judges, and PARKER, District Judge.*

* Honorable James A. Parker, United States District Judge for the District of New Mexico, sitting by designation.

BALDOCK, Circuit Judge.

Plaintiff-appellee Vernon R. Jantz brought this 42 U.S.C. § 1983 action against Defendant-appellant Cleofas F. Muci, the former principal of Wichita North High School (Wichita North), Unified School District No. 259 (District 259), in Wichita, Kansas. Plaintiff alleges that Defendant violated his Fourteenth Amendment equal protection rights under color of state law by denying him full-time employment as a social studies teacher/coach at Wichita North because of what Defendant perceived as Plaintiff's "homosexual tendencies." Plaintiff brought the action against Defendant in both Defendant's individual and official capacities. Defendant moved for summary judgment, claiming that Plaintiff had failed to place material facts in issue and that he was entitled to judgment as a matter of law. The district court refused to grant summary judgment, and Defendant appeals. We exercise jurisdiction pursuant to 28 U.S.C. § 1291, see Pueblo Neighborhood Health Centers, Inc. v. Losavio, 847 F.2d 642, 644 (10th Cir.1988), and we reverse. The case is remanded for entry of summary judgment in favor of Defendant.

I.

Plaintiff has taught continuously since early 1987 in various District 259 schools, including some work as a substitute teacher at Wichita North. He has twice been rejected, however, for full-time District 259 high school teaching positions. This case arises from his attempt to obtain a full-time position at Wichita North for the 1988-89 school year. Because of the merger of District 259 Ninth Graders into high school that year, the District created a new social studies teacher/coach position. Plaintiff interviewed for the position but was rejected in favor of Matthew Silverthorne, a recent college graduate who had student taught and coached at Wichita North. Defendant, the Wichita North principal, recommended that the District hire Mr. Silverthorne. It is undisputed on appeal that Jane Ware, Director of Secondary Personnel in District 259, actually made the employment offer to Mr. Silverthorne, but the district court found that Plaintiff had established on summary judgment that Defendant's decision not to recommend Plaintiff was an exercise of de facto hiring authority.

Defendant argued below on summary judgment that he recommended Mr. Silverthorne because he was better qualified than Plaintiff. He also argued that he was qualifiedly immune from the claim brought against him in his personal capacity and that he did not have final policy decisionmaking authority so as to give rise to entity liability for the claim brought against him in his official capacity. Plaintiff countered with summary judgment evidence to support his allegation that Defendant's decision resulted from prejudice against homosexuals; this, even though the record shows that Plaintiff is married, has two children, and does not claim to be homosexual or bisexual. The summary judgment evidence came in the form of deposition testimony from Defendant's secretary, Sharon Fredin, and the director of social studies at Wichita North, William Jenkins. Ms. Fredin testified that she had remarked to Defendant sometime during the 1987-88 school year that Plaintiff reminded her of her former husband, whom she believed to be a homosexual. Mr. Jenkins testified that he knew and respected Plaintiff based on Plaintiff's substitute teaching experience and that he had recommended Plaintiff for the new position. He further testified that sometime during the fall of the 1988- 89 school year he had inquired into why Plaintiff had not been hired and that Defendant had stated that it was because of Plaintiff's "homosexual tendencies." Defendant admitted in deposition testimony that he had conveyed Ms. Fredin's remark to Mr. Jenkins, but he denied that this was his reason for not recommending Plaintiff.

In denying Defendant's motion for summary judgment, the district court held that material issues of fact existed regarding whether Defendant had violated Plaintiff's Fourteenth Amendment equal protection rights by denying employment based on a perceived homosexual classification. The court broke new ground and held that, as of 1991, the date of the decision, homosexuals and those perceived as homosexuals are a suspect class deserving of heightened scrutiny in the equal protection context. 759 F.Supp. 1543, 1546-51. Nevertheless, the court recognized that this new suspect classification could not possibly have been clearly established in 1988 when Defendant allegedly discriminated against

Plaintiff. Id. at 1552. Therefore, the court analyzed Plaintiff's qualified immunity defense under a rational basis test, holding that it was clearly established in 1988 that the government could not " 'discriminate [against homosexuals] for the sake of discrimination.' " Id. at 1552 (citing Swift v. United States, 649 F.Supp. 596 (D.D.C.1986)). Applying this precept as clearly established by one fellow district court,[1] the court held that Defendant was not entitled to the qualified immunity defense because he did not offer a rational explanation for basing his hiring decision on a perception of "homosexual tendencies." Id. at 1553. Furthermore, the court rejected Defendant's argument with regard to the claim against him in his official capacity, noting only that Plaintiff had demonstrated on summary judgment that Defendant's failure to recommend Plaintiff for employment was consistent with an established District 259 policy of allowing school principals unchecked hiring authority and that Defendant had not adduced summary judgment evidence of the participation of any other official in the decision to reject Plaintiff. Id. at 1553 (citing Jett v. Dallas Independent School District, 491 U.S. 701, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989)).

This appeal centers on the district court's treatment of the qualified immunity issue and Defendant's argument that he did not have final policy decisionmaking authority. We address each issue in turn.

II.

Qualified immunity shields government officials from the burdens of lawsuits stemming from the exercise of discretionary authority, yet it also allows for the vindication of constitutional rights. See Harlow v. Fitzgerald, 457 U.S. 800, 818, 102 S.Ct. 2727, 2738, 73 L.Ed.2d 396 (1982); Hannula v. City of Lakewood, 907 F.2d 129, 130-31 (10th Cir.1990). In striking a balance between these two competing goals, the Supreme Court has formulated a test based on the "objective reasonableness" of the conduct at issue as compared with the state of the law at the time of the alleged violation. Harlow, 457 U.S. at 818, 102 S.Ct. at 2738; Snell v. Tunnell, 920 F.2d 673, 696 (10th Cir.1990), cert. denied, 499 U.S. 976, 111 S.Ct. 1622, 113 L.Ed.2d 719 (1991). Under this test, the burdens of a trial and personal liability may not be imposed on a government official for the exercise of discretionary authority unless his conduct violates "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow, 457 U.S. at 818, 102 S.Ct. at 2738. This "provides ample protection to all but the plainly incompetent or those who knowingly violate the law." Malley v. Briggs, 475 U.S. 335, 341, 106 S.Ct. 1092, 1096, 89 L.Ed.2d 271 (1986).

Qualified immunity differs from other affirmative defenses in that it protects the defendant from "the burdens associated with trial" as well as from personal liability. Pueblo Neighborhood Health Centers, 847 F.2d at 645; Hannula, 907 F.2d at 131. Therefore, our review of the district court's summary judgment determination differs from the norm. Hannula, 907 F.2d at 130. A defendant government official need only raise the qualified immunity defense to shift the summary judgment burden to the plaintiff. Id. This burden is quite heavy, id. at 131, for the plaintiff must do more than simply allege the violation of a general legal precept. Anderson v. Creighton, 483 U.S. 635, 639-40, 107 S.Ct. 3034, 3038- 39, 97 L.Ed.2d 523 (1987). The plaintiff must "instead demonstrate a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited." Hannula, 907 F.2d at 131. "The contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right."

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[1] Although the district court cited only to Swift, we note that there are earlier opinions from the 1960's by the D.C. Circuit which are consistent with Swift. See Norton v. Macy, 417 F.2d 1161 (D.C.Cir.1969) (mere homosexual conduct not grounds for dismissal from federal employment; instead the government must show a relationship between homosexuality and a negative effect on the efficiency of the government's service); Scott v. Macy, 349 F.2d 182 (D.C.Cir.1965) (government's refusal to hire plaintiff on grounds that he was homosexual was insufficient basis in absence of specific evidence of misconduct and the relationship of misconduct or immorality to occupation competence or fitness).

Anderson, 483 U.S. at 640, 107 S.Ct. at 3039. Clearly this standard does not require a precise factual analogy to pre- existing law; however, the plaintiff must demonstrate that the unlawfulness of the conduct was "apparent" in the light of pre-existing law. Id. Once the plaintiff meets his burden of coming forward with facts or allegations which demonstrate that the defendant's alleged violation should have been apparent in light of pre-existing law, the "defendant assume[s] the normal burden of a movant for summary judgment of establishing that no material facts remain in dispute that would defeat her or his claim of qualified immunity." Powell v. Mikulecky, 891 F.2d 1454, 1457 (10th Cir.1989).

Applying the qualified immunity analysis to this case, we must determine whether Plaintiff has met his burden of demonstrating that Defendant's alleged conduct violated clearly established law of which a reasonable person would have been aware in 1988. Plaintiff contends that clearly established Fourteenth Amendment equal protection principles prohibited state and local officials from arbitrarily discriminating against homosexuals when Defendant refused to recommend him for the new social studies teacher/coach position at Wichita North in 1988. The district court agreed with this assertion, relying solely on United States v. Swift, 649 F.Supp. 596 (D.D.C.1986). 759 F.Supp. at 1553. In Swift, the District Court for the District of Columbia held that "the government may not discriminate against homosexuals for the sake of discrimination, or for no reason at all." 649 F.Supp. at 602. By way of analogy, the district court in this case held that the government may not arbitrarily discriminate against "perceived homosexuals" either. 759 F.Supp. at 1553.

On appeal, Plaintiff goes beyond Swift, relying primarily on a general discussion of equal protection principles. For qualified immunity purposes only, he concedes, as the district court recognized, that government classifications based on sexual orientation were neither inherently suspect nor quasi-suspect as a matter of clearly established law in 1988. He concedes the same with regard to fundamental rights. Therefore, he does not discuss the higher levels of scrutiny applied to government actions which disparately affect such classes and rights.

Nevertheless, Plaintiff argues that Defendant's actions could not withstand the clearly established rational basis review applied to government classifications which do not call for higher levels of scrutiny. He cites United States Department of Agriculture v. Moreno, 413 U.S. 528, 93 S.Ct. 2821, 37 L.Ed.2d 782 (1973), in which the Supreme Court held that a provision of the Food Stamp Act which was designed to prevent hippies from participating in the Food Stamp Program could not withstand traditional rational basis review under a Fifth Amendment equal protection analysis. Id. at 533-34, 93 S.Ct. at 2825-26. The Moreno Court noted that "[f]or the constitutional conception of 'equal protection of the laws' to mean anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest." Id. at 534, 93 S.Ct. at 2826. Plaintiff also cites Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 446-47, 105 S.Ct. 3249, 3257-58, 87 L.Ed.2d 313 (1985), in which the Court applied the same principle under a Fourteenth Amendment equal protection analysis of a classification which disparately affected retarded citizens. We take it as given that the Moreno and Cleburne references to Congressional desire to harm an unpopular group apply also to a school administrator's decision to deny employment to an applicant. See Schware v. Board of Bar Examiners, 353 U.S. 232, 238-39, 77 S.Ct. 752, 756, 1 L.Ed.2d 796 (1957) (State cannot exclude person from occupation in contravention of Fourteenth Amendment Equal Protection clause). See also Yick Wo v. Hopkins, 118 U.S. 356, 373-74, 6 S.Ct. 1064, 1072-73, 30 L.Ed. 220 (1886) (Equal Protection clause applies to discriminatory administration of facially neutral statute). Accordingly, Plaintiff contends that Defendant's bare desire to harm homosexuals by denying him the full-time position at Wichita North violated equal protection principles clearly established in Moreno and Cleburne.

Plaintiff stresses that Defendant did not offer a rationale in district court for denying him the full-time position based on a perceived homosexual status. Therefore, Plaintiff argues, the decision was per se invidious discrimination against homosexuals in violation of the general principles established in

Moreno and Cleburne.[2] Plaintiff misapplies the qualified immunity standard, however. It was not Defendant's burden to demonstrate that his alleged conduct did not violate clearly established law. Rather it was Plaintiff's burden "to demonstrate a substantial correspondence between the conduct in question and prior law allegedly establishing that the defendant's actions were clearly prohibited." Hannula, 907 F.2d at 131. Rather than a survey of the generalized rational basis test as applied in Moreno and Cleburne, we think the "substantial correspondence" test at a minimum requires an examination of how courts have treated classifications affecting homosexuals, for the unlawfulness of the alleged activity must be "apparent" in light of pre-existing law before Defendant can be forced to endure the burdens associated with trial.

Examining the case law as it existed in 1988, we do not find a clearly established line of authority proscribing an adverse action against civilian job applicants based on homosexual or perceived homosexual orientation. In 1985, Justice Brennan aptly described the state of the law in this area: "[w]hether 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 lower courts in some disarray." Rowland v. Mad River Local School District, 470 U.S. 1009, 1015-16, 105 S.Ct. 1373, 1378, 84 L.Ed.2d 392 (1985) (Brennan, J., dissenting from the denial of certiorari). The appeals court in Rowland reversed a jury verdict in favor of a bisexual high school guidance counselor who had been discharged from employment because she had expressed her sexual orientation. Regarding her equal protection claim, the appeals court reversed on plain error grounds because she had failed to present "evidence of how other employees with different sexual preferences were treated." 730 F.2d 444, 450 (6th Cir.1984). Justice Brennan viewed this holding as a transparent effort to evade the central question in the case: "may a State dismiss a public employee based on her sexual status alone?" 470 U.S. at 1011, 105 S.Ct. at 1375. Justice Brennan further noted that the court of appeals had answered this question in the affirmative by reversing the jury's verdict. Id. at 1017-18, 105 S.Ct. at 1379.

Soon after Justice Brennan's dissent from the denial of certiorari in Rowland, the Court held in Bowers v. Hardwick, 478 U.S. 186, 194, 106 S.Ct. 2841, 2846, 92 L.Ed.2d 140 (1986) that homosexual sodomy was not a fundamental right under a Fourteenth Amendment substantive due process analysis. Plaintiff argues that Hardwick is inapposite because it dealt with a substantive due process analysis whereas his claim is based on the equal protection clause. For purposes of qualified immunity, however, we need not decide how Hardwick affects equal protection claims; we need only note that courts have reached differing conclusions on the issue. See, e.g., Ben- Shalom v. Marsh, 881 F.2d 454, 464 (7th Cir.1989) ("If homosexual conduct may constitutionally be criminalized, then homosexuals do not constitute a suspect or quasi-suspect class entitled to greater than rational basis scrutiny for equal protection purposes."), cert. denied, 494 U.S. 1004, 110 S.Ct. 1296, 108 L.Ed.2d 473 (1990); Woodward v. United States, 871 F.2d 1068, 1076 (Fed.Cir.1989) ("After Hardwick it cannot logically be asserted that discrimination against homosexuals is constitutionally infirm."), cert. denied, 494 U.S. 1003, 110 S.Ct. 1295, 108 L.Ed.2d 473 (1990); Padula v. Webster, 822 F.2d 97, 103 (D.C.Cir.1987) ("There can hardly be more palpable discrimination against a class than making the conduct that defines the class criminal."). But see Pruitt v. Cheney, 963 F.2d 1160, 1166 n. 5 (9th Cir.1992) (reviewing status-based

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[2] The district court agreed, although it relied only on Swift:

> The present case provides no indication of any justification for the defendant's determination to discriminate on the basis of sexual orientation, nor, as the court has noted earlier, has the defendant attempted to supply one.... Accepting as true the evidence offered by the plaintiff, as the court must under the relevant standards of review, the defendant acted arbitrarily, without any rational purpose, based upon personal prejudices against homosexuals.

759 F.Supp. at 1553 (citing Swift, 649 F.Supp. at 602).

discrimination against homosexuals under an active rational basis review, distinguishing Hardwick as conduct based discrimination); High Tech Gays v. Defense Indust. Security Clearance Office, 895 F.2d 563, 573 (9th Cir.1990) (same).

Plaintiff argues that, even though the cases interpreting Hardwick have reached differing results on the level of scrutiny applied to classifications based on homosexual conduct or status, each court applied at least the minimal rational basis test of Moreno and Cleburne. We agree, and prior to Hardwick we twice applied rational basis review to classifications which disparately affected homosexuals. See Rich v. Secretary of the Army, 735 F.2d 1220, 1229 (10th Cir.1984); National Gay Task Force v. Board of Educ., 729 F.2d 1270, 1273 (10th Cir.1984), aff'd by an equally divided court, 470 U.S. 903, 105 S.Ct. 1858, 84 L.Ed.2d 776 (1985).[3] The Supreme Court, however, held in Hardwick that the community's notions of morality were sufficient to provide a rational basis for the statute. Id. 478 U.S. at 196, 106 S.Ct. at 2846. See also Barnes v. Glenn Theatre, Inc., 501 U.S. 560, ----, 111 S.Ct. 2456, 2468, 115 L.Ed.2d 504 (1991) (Scalia, J., concurring) ("In Bowers, we held that since homosexual behavior is not a fundamental right, a Georgia law prohibiting private homosexual intercourse needed only a rational basis in order to comply with the Due Process Clause. Moral opposition to homosexuality, we said, provided that rational basis."). Although the Hardwick Court did not deal with an equal protection claim, for qualified immunity purposes we think its holding, and the general state of confusion in the law at the time, cast enough shadow on the area so that any unlawfulness in Defendant's actions was not "apparent" in 1988. And we do not find Swift, 649 F.Supp. 596, which formed the basis of the district court's holding in this case, to clarify the law. Therefore, we hold that Defendant is entitled to qualified immunity.

III.

At issue next is whether Defendant may be held liable--i.e. whether District 259 may be held liable--for damages resulting from the suit brought against him in his official capacity.[4] Section 1983 liability for the single act of an employee may not be imposed on a local government entity under a respondeat superior theory. Monell v. City of New York Dep't of Social Services, 436 U.S. 658, 694, 98 S.Ct. 2018, 2037, 56 L.Ed.2d 611 (1978). Rather, such liability may be imposed only if the employee possesses "final authority" under state law to establish policy with respect to the challenged action. See Jett v. Dallas Indep. School Dist., 491 U.S. 701, 736-38, 109 S.Ct. 2702, 2722-23, 105 L.Ed.2d 598 (1989); City of St. Louis v. Praprotnik, 485 U.S. 112, 127, 108 S.Ct. 915, 926, 99 L.Ed.2d 107 (1988); Pembaur v. City of Cincinnati, 475 U.S. 469, 481-84, 106 S.Ct. 1292, 1299-300, 89 L.Ed.2d 452 (1986); Ware v. Unified School District No. 492, 902 F.2d 815, 817 (10th Cir.1990). Whether Defendant possessed such "final authority" is a question of state law. Ware, 902 F.2d at 817. We review the denial of summary judgment on this issue under the same standard as the district court. Osgood v. State Farm Mut. Auto Ins., 848 F.2d 141, 143 (10th Cir.1988). Summary judgment is appropriate if "there is no genuine issue as to any material fact and ... the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c).

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[3] Given our disposition of this case on immunity grounds, we need not address the district court's holding that classifications based on homosexual status as opposed to homosexual conduct are inherently suspect. 759 F.Supp. at 1546-51. We note, however, that the court failed to cite Rich, in which we held that a status-based classification was not inherently suspect. Were we to have the issue before us, we would not be entitled as a three-judge panel to overrule circuit precedent. United States v. Spedalieri, 910 F.2d 707, 710 n. 3 (10th Cir.1990).

[4] Plaintiff's official capacity action against Defendant is in reality an action against District 259, and District 259 has had notice and an opportunity to respond. See Kentucky v. Graham, 473 U.S. 159, 166, 105 S.Ct. 3099, 3105, 87 L.Ed.2d 114 (1985) ("As long as the government entity receives notice and opportunity to respond, an official-capacity suit is, in all respects other than name, to be treated as a suit against the entity."). District 259 may not plead qualified immunity. See Owen v. City of Independence, 445 U.S. 622, 657, 100 S.Ct. 1398, 1418-19, 63 L.Ed.2d 673 (1979).

This issue is controlled by our decision in Ware. In Ware we interpreted Kansas law and held that final hiring authority in the Kansas school system rests in the school boards. 902 F.2d at 818 (citing Kan.Stat.Ann. § 72-8202c (1985)). Furthermore, we held that the school boards had no statutory authority to delegate hiring authority to subordinates. Id. (citing Hobart v. Board of Educ. of Unified School Dist. No. 309, 230 Kan. 375, 634 P.2d 1088, 1094 (1981)). Therefore, in this case it is beyond dispute that Defendant, as principal of Wichita North, did not have "final authority" under Kansas law to hire teachers. In Ware, however, we noted "that lawfully empowered decisionmakers cannot insulate themselves from liability under section 1983 by knowingly allowing a subordinate to exercise final policymaking authority vested by law in the decisionmakers." Id. (citing Praprotnik, 485 U.S. at 126-27, 108 S.Ct. at 926.) (emphasis in original). This type of delegation "arises when a subordinate's decision is couched as a policy statement expressly approved by the policymaking entity, or when the decision manifests a custom or usage of which the entity must have been aware." Id. (citing Praprotnik, 485 U.S. at 130, 108 S.Ct. at 927-28). Plaintiff does not contend that Defendant's decision was couched in terms of a policy statement. Rather, he contends that District 259 delegated hiring authority to Defendant by "custom or usage," noting that the district court found that Defendant and other principals had virtual de facto hiring authority. The district court anchored its summary judgment determination on this finding, although it did not discuss Kansas law. 759 F.Supp. at 1553.

The district court noted that "[u]ltimate hiring decisions rarely conflict with the decision of the school principal[s] [in District 259]." Id. "Simply going along with discretionary decisions made by one's subordinates, however, is not a delegation to them of the authority to make policy." Praprotnik, 485 U.S. at 130, 108 S.Ct. at 927-28. Delegation must be absolute to give rise to the "final authority." If the board retains the authority to review, even though it may not exercise such review or investigate the basis of the decision, delegation of final authority does not occur. See id. See also Williams v. Butler, 863 F.2d 1398, 1402 (8th Cir.1988) ("A clear message from Praprotnik is that an incomplete delegation of authority--i.e., the right of review is retained--will not result in municipal liability, whereas an absolute delegation of authority may result in liability on the part of the municipality."), cert. denied, 492 U.S. 906, 109 S.Ct. 3215, 106 L.Ed.2d 565 (1989); Worsham v. City of Pasadena, 881 F.2d 1336, 1341 (5th Cir.1989) (citing Williams v. Butler). The uncontroverted record on summary judgment in this case demonstrates that the Board retained the right to review hiring decisions made by District 259 principals, including Defendant. See 759 F.Supp. at 1553 ("The principal's discretion in hiring is not unfettered."). Therefore, we do not find a delegation of policymaking authority. Summary judgment should have issued in favor of Defendant on the official capacity claim.

Kansas Equality Coalition

Our mission is to end discrimination based on sexual orientation and gender identity, and to ensure the dignity, safety, and legal equality of all Kansans.

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Testimony of Thomas Witt, Chair, Kansas Equality Coalition
Senate Committee on Federal and State Affairs
In Support of SB53
February 8, 2011

Good morning Mr. Chairman and members of the committee. I am here today to speak in support of SB53, and I thank you for the opportunity to do so.

My name is Thomas Witt. I am Chair of the Kansas Equality Coalition, which works to eliminate discrimination based on sexual orientation and gender identity. In the five years since we formed, we have organized eleven chapters around the state and have nearly 2000 members. Today we ask you to amend the Kansas Acts Against Discrimination to add protection for sexual orientation and gender identity, whether actual or perceived.

This law currently protects Kansans from discrimination in housing, employment, and public accommodations based on race, religion, color, sex, disability, familial status, national origin, or ancestry. Kansas Acts Against Discrimination was originally established in 1953, and has been amended at least nine times since then. We have continued to amend the Kansas Acts Against Discrimination as the need has been shown to protect the fundamental rights of employment, housing, and public accommodations for those who have been – and still are - targets of discrimination.

This bill does not include any amendments to the current affirmative action statutes. There are no quotas, no mandate requiring benefits that must be offered, and private/fraternal/religious organizations are exempt from this bill. Furthermore, this law does not apply to private organizations such as the Boy Scouts, Elks, and others.

There are currently 26 states, plus Washington DC, that have some level of protection against discrimination based on sexual orientation. There are more than 200 towns, cities and counties that ban sexual orientation discrimination. There is also a Presidential Executive Order banning discrimination in Federal employment. In September 2007 Governor Sebelius issued an executive order protecting state employees in Kansas from discrimination on the basis of sexual orientation and gender identity.

A statewide poll conducted by Jayhawk Consulting Services taken in mid-January of 2008 showed that Kansans support extending protection from discrimination based on sexual orientation. 79 % of Kansans believe that no one should be fired just because they are gay or lesbian. 68% of those who oppose such discrimination support passing legislation to make such discrimination illegal, as SB 53 would.

411 of the Fortune 500 companies have banned discrimination based on sexual orientation in their workplaces. These companies know that to remain competitive, that to attract qualified people, and to maintain a safe working environment for their employees, they must insist on fair treatment for all.

In April of 2000, the United States General Accounting Office released a report (attached) of the number of complaints that had been filed in eleven states that had enacted protections similar to those in SB53 during the 1990s. The GAO report found that complaints ranged from 0.8% to 3.3% of the total complaints filed. A study by the Southern California Law Review further found that the rate of complaints based on sexual orientation or gender identity matched, when adjusted for percentage of the workforce, state-by-state rates of gender-bias complaints.

Over the past 10 years, the average number of complaints filed with the Kansas Human Rights Commission has been 960. That number has ranged from a low of 710 complaints in 2002 to a high of 1120 in 2000 The number of complaints reported by the KHRC has varied significantly from year to year, with a maximum annual variation in excess of 300 complaints.

If the number of Kansas complaints based on sexual orientation or gender identity is similar to those of other states at the higher 3.3% rate, we can expect an average of 32 such complaints per year. However, if we look at the state-by-state numbers of two other Midwestern states, I believe that the number of complaints Kansas can expect will be lower than the 32 cited above. From the GAO report, Wisconsin (2000 census population 5.3 million) and Minnesota (2000 census population 4.9 million) show complaint rates of ~8 to ~10 per million in population. We believe that would put Kansas, with a 2009 population estimate of 2.8 million, at 25 or so complaints per year. The Kansas Human Rights Commission estimates this amendment will generate 50 complaints per year

As late as the day prior to today's hearing, the fiscal note for SB53 was not available. However, in the fiscal note for the 2009 version of this bill, the KHRC suggested additional staffing will be required to handle the increase in complaints, for a cost in excess of $110,000. However, if KHRC can absorb variations in complaints in the hundreds per year without requesting additional staffing or budget requests, we believe an extra 25 to 50 complaints per year is well within their current staffing capacity.

Some claims that those who oppose nondiscrimination laws often make:

"No one knows you're gay unless you tell them." This is demonstrably false. Anti-gay stereotyping is firmly embedded in our culture. In a conversation I recently had with one Kansas lawmaker, I was told that they wouldn't have known I am gay had I not said so. The fact is, however, I don't open conversations with announcement, "Hi, I'm Thomas Witt, and I'm a homosexual." The lawmaker assumed I'm gay because of the organization I represent. I'll note here, however, that the Equality Coalition has previously retained two other lobbyists, former State Representative Jim Yonally, and Jana Mackey, neither of whom are gay or lesbian.

The reality of the closet is far different than many understand. Imagine, for a moment, that you work in an office environment with many co-workers and colleagues. Nearly everyone has pictures of family on their desks or in their cubicles. Parents, children, spouses, pets, etc. At the water cooler, everyone talks about their weekend, or their holiday, or the latest news of their family. In an environment where discrimination is tolerated, however, gay people have no pictures, have no conversations, and are put in a position of isolation and dishonesty. This is no way to live.

Anti-gay stereotyping also extends to straight people. In a case tried in Wichita 20 years ago, a straight man with a wife and children was denied employment because the principal at the school where he applied thought he "acted gay." The teacher, Vernon Jantz, sued over this overtly discriminatory act, but his case was dismissed because discrimination based on sexual orientation is currently permissible under law.

"Heterosexuality is not a sexual orientation, and shouldn't be included in this bill." Gay or straight, everyone has a sexual orientation. As with the case of Mr. Jantz, we all deserve protections from discrimination based on actual or perceived sexual orientation.

"Sexual orientation laws are special rights:" The concept of "special rights" is legally meaningless. Nondiscrimination laws simply prevent discrimination for everyone based on certain characteristics. In this case, everyone has a sexual orientation and this bill would protect everyone based on that characteristic.

"Sexual orientation is a choice that shouldn't be protected:" First, we currently protect people from discrimination based on other things that are a choice, such as religion and marital status. Secondly, courts across the country have ruled that sexual orientation is an immutable characteristic. More and more cities and states have recognized unfair treatment occurs and that protecting people from discrimination based on sexual orientation is the fair thing to do.

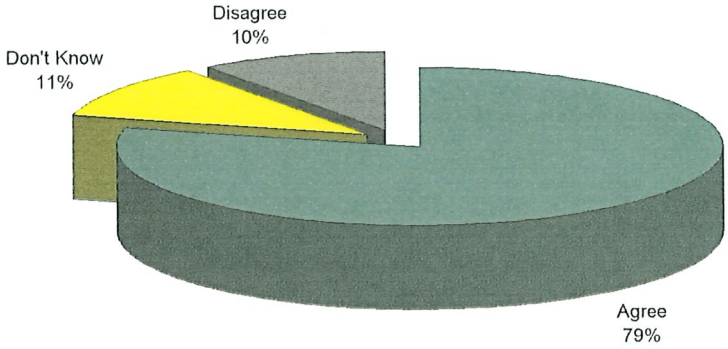
"Sexual orientation discrimination does not exist:" Opponents of nondiscrimination legislation make two conflicting claims: 1) discrimination based on sexual orientation does not exist and 2) nondiscrimination laws will lead to a flood of litigation. The General Accounting Office report in 2002 showed that both of these claims were false. A survey of discrimination in Topeka conducted in 2004 clearly shows that gay and lesbian Kansans are indeed victims of discrimination. A copy of that survey is attached to my testimony, as is a report on discrimination based on gender identity.

"Banning this kind of discrimination will lead to a flood of expensive litigation." In actuality, including sexual orientation and gender identity in the Kansas Act Against Discrimination is a very cost-effective way of protecting Kansans. First, in practice, the burden of proof rests largely with the accuser. Second, many cases of discrimination in Kansas are settled through mediation, or administratively. KAAD provides a process that is fair to employers and to employees, and has served our state well for many years.

I thank you for your time and attention. I would be happy to take questions or to provide further information.

Please support SB53!

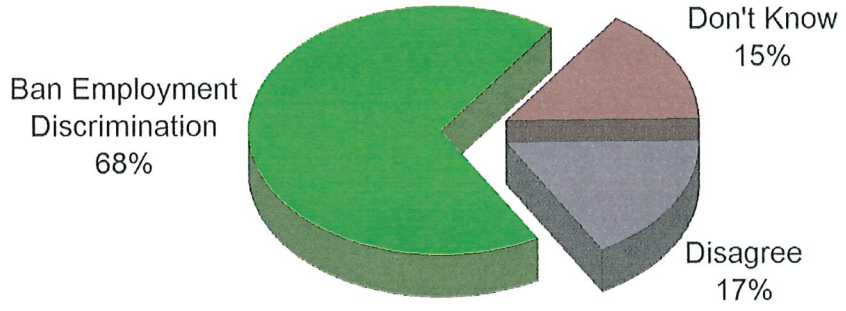
Amend the Kansas Act Against Discrimination to provide fair treatment for ALL Kansans!



79% of Kansans believe it is WRONG to fire someone for being gay or lesbian.

Many gay and lesbian Kansans have been discriminated against in employment and housing, and do not have the ability to file a complaint or seek any redress. SB53 simply provides the ability for a Kansan to file a complaint and have that complaint investigated if they've been discriminated against.

68% of Kansans favor banning discrimination against gay and lesbian Kansans



Based on a statewide poll by Jayhawk Consulting Services taken in mid January of 2008

This bill provides the ability to file a complaint if someone is discriminated against in employment, housing, or public accommodations. It does not amend the current affirmative action measures in Kansas law.

The Kansas Act Against Discrimination exempts religious and nonprofit fraternal or social associations.

31 other states provide some type of protections from discrimination on the basis of sexual orientation: Alaska, Arizona, California, Colorado, Connecticut, Delaware, District of Columbia, Hawaii, Illinois, Indiana, Iowa, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Hampshire, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wisconsin.

Fairness is a KANSAS value!

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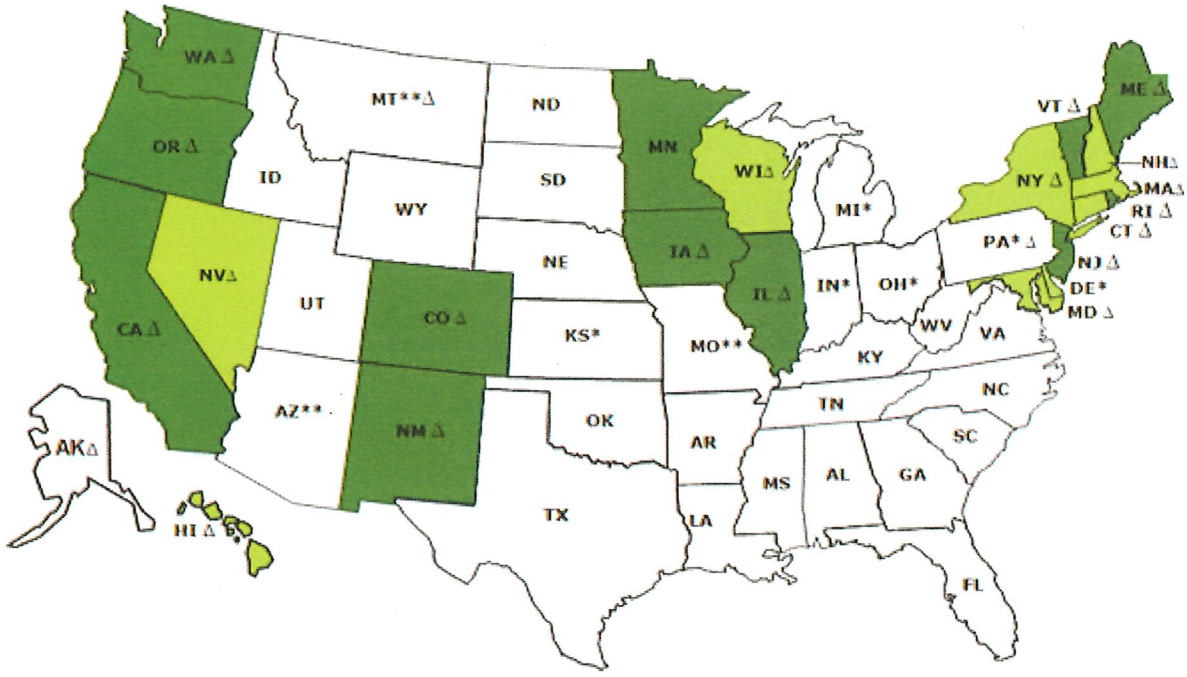
HUMAN RIGHTS CAMPAIGN

Statewide Employment Laws & Policies



States that prohibit discrimination based on sexual orientation and gender identity. (12 states and D.C.)

- *California (1992, 2003), Colorado (2007), District of Columbia (1977, 2006), Illinois (2006), Iowa (2007), Maine (2005), Minnesota (1993), New Jersey (1992, 2007), New Mexico (2003), Oregon (Jan. 2008), Rhode Island (1995, 2001), Vermont (1991, 2007) and Washington (2006).*
- *State courts, commissions, agencies, or attorney general have interpreted the existing law to include some protection against discrimination against transgender individuals in Connecticut, Florida, Hawaii, Massachusetts and New York.*

States that prohibit discrimination based on sexual orientation. (21 states and D.C.)
In addition to the same states above – Connecticut (1991), Delaware (2009), Hawaii (1991), Maryland (2001), Massachusetts (1989), Nevada (1999), New Hampshire (1998), New York (2003), and Wisconsin (1982).

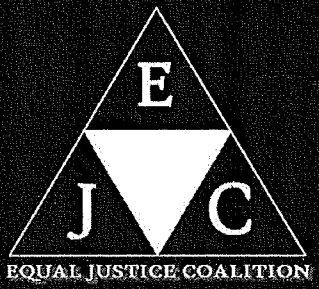
Laws and Policies Covering Public Employees Only:

The laws referenced above apply to public and private employers (with some limitations) in the respective states. Additionally, there are 6 states (*) that have an executive order, administrative order or personnel regulation prohibiting discrimination against public employees based on sexual orientation *and* gender identity and 3 states (**) prohibit discrimination against public employees based on sexual orientation *only* (Missouri order only covers executive branch employees). In 22 states and the District of Columbia (Δ) state employees are provided with domestic partner benefits.

POLICY BRIEF

The Extent of Sexual Orientation Discrimination in Topeka, KS

by Roddrick Colvin



National Gay and Lesbian Task Force Policy Institute

The Extent of Sexual Orientation Discrimination in Topeka, KS

INTRODUCTION

Ten years after a mayoral task force called for government action to stop discrimination against lesbians and gay men in Topeka, KS, a new survey of 121 gay, lesbian, and bisexual city residents conducted from October 2003 through January 2004 has documented continued widespread sexual orientation discrimination in employment, housing and government services.[1]

On July 9, 1993, the Mayor's Task Force on Gay and Lesbian Concerns issued a report on lesbian and gay people in the City of Topeka and their experiences. The report noted that despite being integrated into every aspect of local life, lesbians and gay men faced pervasive harassment and discrimination in Topeka. The report recommended action by the City to help curb harassment and discrimination against lesbian and gay people. Ten years later, harassment and discrimination against gay, lesbian, and bisexual people in Topeka continues, and the city government still has not passed legislation banning discrimination on the basis of sexual orientation and gender identity.

The conclusions of the survey are inescapable: discrimination in employment, housing, and public accommodation on the basis of sexual orientation continues to be a problem in the City of Topeka.

This report is based on an analysis of 121 surveys completed by residents of Topeka from October 2003 to January 2004. This project is the result of collaboration between the Equal Justice Coalition of Topeka and the National Gay and Lesbian Task Force Policy Institute.

1. None of the 121 respondents identified as transgender. Thirty-nine percent were female, 60% male, and 1% identified their gender as "other." Thirty-one percent identified as lesbian, 58% as gay (this includes some women who identified as gay), 10% as bisexual, and 2% as "other."

RESULTS IN BRIEF

- 16% of respondents reported that they were *denied employment* because of their sexual orientation or gender identity
- 11% reported that they were *denied a promotion*, and 18% reported that they were *overlooked for additional responsibilities* at work due to their sexual orientation or gender identity
- One fifth to one third of respondents reported that they *had observed people being denied employment, denied a promotion, or overlooked for additional responsibilities at work* due to their sexual orientation or gender identity
- 15% of respondents reported that they were *fired* because of their sexual orientation or gender identity, and another 24% have observed someone being fired for those reasons
- 35% had received *harassing letters, e-mails, or faxes* at work because of their sexual orientation
- 17% of respondents reported experiencing discrimination *buying or renting a home*, and another 20% observed such discrimination
- 11% of respondents reported that they experienced discrimination *seeking police protection*, and another 27% observed such discrimination
- 29% of respondents had observed discrimination based on sexual orientation *seeking social or government services*. 9% reported experiencing such discrimination

The conclusions of the survey are inescapable: discrimination in employment, housing, and public accommodation on the basis of sexual orientation continues to be a problem in the City of Topeka. This climate has a direct impact on the lesbian, gay, bisexual and transgender community as well as the city at large. These results underscore the need for the City of Topeka to adopt and enforce an ordinance to ban discrimination based on sexual orientation and gender identity.

EMPLOYMENT DISCRIMINATION

In Topeka, sexual orientation bias in employment is pervasive. Sixteen percent of the gay, lesbian and bisexual residents surveyed reported that they were denied employment because of their sexual orientation or gender identity. Fifteen percent reported that they were fired because of their sexual orientation or gender identity. Sixteen percent of respondents reported that their workspace was vandalized, and 24% reported being teased and harassed because of their sexual orientation or gender identity. As a result of a discriminatory work environment, 47% of respondents reported that they had to conceal their sexual orientation or gender identity to protect their jobs.

Forty-seven percent of respondents reported that they had to conceal their sexual orientation or gender identity to protect their jobs.

"My job found out that I was a lesbian and my 'friend' that came in every night was my girlfriend. She was told not to come in anymore or I would be fired. And later because she came in I was fired."

—A lesbian Topeka resident

"I've had a boss that told gay jokes about an employee he perceived to be gay. That boss gave the dirty work assignments to that man."

—A gay Topeka resident

"As soon as my newly appointed Republican boss suspected I was gay, he harassed me until I took a job with another state agency. Prior to that I had three outstanding employee evaluations, but he couldn't find anything I did right. There was no protection. The various state affirmative action and discrimination offices were a slow-moving joke."

—A gay Topeka resident

JOB DISCRIMINATION	Personally Experienced	Observed
Terminated	15%	24%
Denied Employment	16%	31%
Denied Promotion	11%	18%
Overlooked for Additional Responsibilities	18%	31%

JOB HARASSMENT AND VIOLENCE	Personally Experienced	Observed
Verbal or Physical Abuse	41%	35%
Vandalized Workspace	16%	22%
Harassing Communications	35%	28%
Teased or Harassed	24%	27%

HOUSING DISCRIMINATION

According to survey respondents, living in Topeka can be a challenge. Residents face numerous difficulties getting settled in the city. The most challenging difficulty is renting an apartment or buying a home. Seventeen percent of survey respondents reported anti-gay discrimination buying a home or renting and apartment in Topeka, and 20% observed such housing discrimination. Furthermore, 20% reported having trouble getting housing and renters' insurance because of their sexual orientation or gender identity.

HOUSING DISCRIMINATION	Personally Experienced	Observed
Buying/Renting a Home	17%	20%
Seeking Insurance	20%	19%

This discrimination did not end after the survey respondents found a place to live. In fact, 9% of respondents reported moving to a different home within the last five years as a result of harassment and discrimination. Additionally, 33% of survey respondents stopped walking together or holding hands, and 10% left a local house of worship as a result of harassment and discrimination.

PUBLIC ACCOMMODATIONS AND SERVICES

In the sphere of public accommodations, sexual orientation discrimination in Topeka is pervasive and damaging. These survey results suggest that gay, lesbian and bisexual people face hostility and discrimination when they try to access many basic services.

"My boyfriend is not allowed to see his kids anymore because he is gay, and his ex-wife thinks we will do something to the boys."

—A gay Topeka resident

"My BF [boyfriend] at the time got violent with me. When I called the police, 911 did not seem concerned and when the officers showed up and realized it was a same-sex domestic [incident], they basically laughed, told us to work it out, and left. I did not feel secure."

—A gay Topeka resident

"[The i]nsurance company cancelled [my] auto insurance after I put a non-related person ([my same-sex] spouse) living in [the] same residence as a principle driver of one of the vehicles I own."

—A gay Topeka resident

"My son read a book on AIDS in 5th grade and was harassed for years, being singled out by other students and called 'fag' and rumors circulated about, 'He must have AIDS and be a faggot.' The school system must educate children more in both areas because the parents are definitely not doing their job."

—A Topeka mother

PUBLIC ACCOMMODATION DISCRIMINATION	Personally Experienced	Observed
Seeking Medical Care	12%	15%
Seeking Police Protection	11%	27%
Applying for Bank Credit or a Loan	4%	9%
Seeking Custody or Visitation Rights	10%	25%

THE CONSEQUENCES OF DISCRIMINATION

The results of the survey reveal the effects of harassment and discrimination on lesbian, gay, and bisexual Topekans. This climate of hostility has a detrimental effect on the lesbian, gay, bisexual and transgender (LGBT) community, and on the City of Topeka as a whole. Almost half (45%) of respondents reported that discrimination had an effect on their physical or emotional health. Furthermore, respondents expressed real concern about discrimination in Topeka. Forty-three percent were "somewhat" or "very" concerned about housing discrimination and 54% were concerned about employment discrimination. Such anxieties about discrimination help to explain the high rates of physical and emotional stress.

Almost half (45%) of respondents reported that discrimination had an effect on their physical or emotional health.

THE POLICY SOLUTION: A NONDISCRIMINATION LAW

While many aspects of discrimination cannot be solved solely through nondiscrimination laws, many of the concerns raised in this report can be addressed with a local ordinance. A comprehensive nondiscrimination law that includes sexual orientation and gender identity or expression could address the pervasive forms of discrimination in employment, housing, and public accommodation documented in this study. Respondents of the survey agree with this assessment: 89 % would prefer a formal remedy to discrimination.

A comprehensive nondiscrimination law could address the pervasive forms of discrimination documented in this study.

Despite the mayoral commission's call to action to stop anti-gay discrimination a decade ago, no action has been taken. As this study shows, discrimination on the basis of sexual orientation or gender identity continues to be a problem and a concern of many Topeka residents. Only with corrective action and enforcement of nondiscrimination statutes by local government can Topeka decrease anti-gay harassment and discrimination in Topeka.

METHODOLOGY

The findings in this report are based on 121 surveys completed and returned to the Equal Justice Coalition of Topeka. The National Gay and Lesbian Task Force Policy Institute then analyzed these survey data. Five hundred surveys were distributed, with an acceptable response rate of 24%. While not identical, the socioeconomic demographics of respondents closely resemble the Census data for the City of Topeka. This suggests that the respondents of the survey closely match the population of lesbian, gay, bisexual and transgender people in Topeka.

2. Respondents were asked what, if any, corrective action they would prefer if they experienced harassment or discrimination. Eighty-nine percent selected register a complaint, file a lawsuit, or going to a Human Rights Commission. Eleven percent preferred some other option.

SURVEY DEMOGRAPHICS

AGE	Number	Percent
18-24	30	25%
25-34	27	23%
35-44	32	27%
45-54	19	16%
55-64	10	8%
65-74	2	2%
75+	0	0%

RACE		
White	87	73%
Latino/a or Hispanic	12	10%
Multi-racial	10	8%
African American	6	5%
Native American	4	3%
Other	1	1%
Middle Eastern/Arab	0	0%
Asian Pacific Islander	0	0%

GENDER		
Male	73	60%
Female	47	39%
Transgender or Intersex	0	0%
Other	1	1%

SEXUAL ORIENTATION		
Gay	69	58%
Lesbian	37	31%
Bisexual	12	10%
Other	2	2%
Questioning	0	0%

EDUCATION		
Some High School	5	4%
High School	15	13%
Some College	51	43%
Two Year Degree	7	6%
Four Year Degree	25	21%
Post Graduate Work	8	7%
Post Graduate Degree	9	8%

EMPLOYMENT		
Part-time	11	9%
Full-time	69	57%
Self Employed	10	8%
Retired	6	5%
Stay Home Parent	0	0%
Unemployed	15	12%
Student	7	6%
Other	3	2%

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Office of the General Counsel

B-284923

April 28, 2000

The Honorable James M. Jeffords
Chairman, Committee on Health, Education, Labor and Pensions
United States Senate

Subject: Sexual-Orientation-Based Employment Discrimination: States' Experience With Statutory Prohibitions Since 1997

Dear Mr. Chairman:

Three federal statutes—Title VII of the Civil Rights Act of 1964, the Americans With Disabilities Act, and the Age Discrimination in Employment Act—together make it unlawful for an employer to discriminate against an employee on the basis of characteristics such as race, color, religion, sex, national origin, disability, and age; these laws do not cover discrimination based on sexual orientation. In 1997, we reported to you our findings regarding the experience of 11 states and the District of Columbia[1] with statutes prohibiting discrimination in employment on the basis of sexual orientation.[2]

As a principal sponsor of S. 1276, the Employment Non-Discrimination Act of 1999 (ENDA-99), a bill that would prohibit employment discrimination on the basis of sexual orientation, you asked, in a March 7 letter, that we update our earlier report. Specifically, you asked that we report on (1) characteristics, coverage, and exclusions of any new state laws and (2) the enforcement experience of the states since our earlier report.

To respond to your request, we looked for changes in state statutes or new state statutes since 1997. To get information about states' experience, we spoke with

[1] The states were California, Connecticut, Hawaii, Maine, Massachusetts, Minnesota, New Hampshire, New Jersey, Rhode Island, Vermont, and Wisconsin. In the following discussion, "state" includes the District of Columbia.

[2] Sexual-Orientation-Based Employment Discrimination: States' Experience With Statutory Prohibitions, (GAO/OGC-98-7R, Oct. 23, 1997).

officials charged with enforcing the state laws governing employment discrimination. Specifically, we collected readily available data from each state on the numbers of employment discrimination complaints filed, and the proportion of those complaints involving sexual orientation, for fiscal years since our earlier report. All data are as reported by the state agency; we did not independently verify them. We also asked state officials to identify any significant litigation of which they were aware; and we searched electronic databases for court decisions addressing state laws that prohibit employment discrimination on the basis of sexual orientation. To update that portion of our earlier report that discussed pending federal legislation, we compared ENDA-99 to its counterpart in the 105th Congress, S. 869 (ENDA-97).

SUMMARY

Twelve states currently have laws that prohibit discrimination in employment on the basis of sexual orientation.[3] The content of these laws varies, but they share many significant features. Eleven of the states were on the list in our earlier report, but Maine is no longer included—a 1998 referendum repealed that part of Maine's law that made it unlawful to discriminate in employment on the basis of sexual orientation[4]—and we have added Nevada, where a law barring employment discrimination on the basis of sexual orientation took effect on October 1, 1999.[5]

Formal complaints of employment discrimination based on sexual orientation continue to be filed in the states that permit them. However, as was the case in 1997, we found that these complaints are a relatively small proportion of all employment discrimination complaints in those states. We also found, as before, no indication that these laws have generated a significant amount of litigation.

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[3]California, Connecticut, Hawaii, Massachusetts, Minnesota, New Hampshire, New Jersey, Nevada, Rhode Island, Vermont, Wisconsin, and the District of Columbia. Since our earlier report, a presidential directive has expanded equal employment opportunity protections in the federal government to include sexual orientation. Executive Order 13087, May 28, 1998.

[4] It is possible that coverage in Maine will be restored. The Governor has signed into law a statute that would protect against discrimination on the basis of sexual orientation in employment, housing, public accommodations and credit. However, by its terms, this law will not take effect unless of majority of those voting in the state's general election in November endorse it.

[5] In the discussion below, we compare Nevada's new law to those of the other states, but significant information on enforcement does not yet exist. Like the laws in the other 11 states, Nevada's law shares a number of features with ENDA-99.

STATE LAWS AND ENDA-99 SHARE FEATURES

State laws that protect against employment discrimination on the basis of sexual orientation differ in some respects, but generally address the same issues and share a number of features with one another and with ENDA-99. In our earlier report, we discussed in detail the significant features that are common to state laws barring employment anti-discrimination statutes on the basis of sexual orientation and to ENDA-97.[6] The significant features shared by these laws, and how ENDA-99 compares, may be summarized as follows:

- State statutes define the term "sexual orientation" as heterosexual, homosexual, or bisexual, and generally include both actual and perceived sexual orientation.
  - ENDA-99's coverage is similar; in addition, it would bar discrimination based on the sexual orientation of anyone with whom the employee has or is believed to have associated.
- Coverage provided by the state statutes is not universal: whether an employer is subject to the law depends on the number of workers employed and the nature of the work. Concerning the latter point, all the state laws cover both private and public employment; all exempt religious organizations; most exempt nonprofit organizations.
  - ENDA-99 generally applies to employers with 15 or more employees. Civilian federal employees, including the Congress, the White House, and the Executive Office of the President, are covered. ENDA-99 exempts religious organizations to the extent they are engaged in religious activities,[7] as well as tax-exempt private membership clubs (other than labor organizations).

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[6] See GAO/OGC-98-7R, Oct. 23, 1997. Except for Maine, where voters repealed the sexual orientation provision, the state laws analyzed in our 1997 report have not changed. ENDA-99 differs from its predecessor, ENDA-97, in two noteworthy respects: ENDA-99's description of discriminatory conduct proscribed now tracks Title VII of the Civil Rights Act of 1964; in addition, ENDA-99 excludes imposition of affirmative action as a remedy. See the enclosure for a summary comparison of ENDA-97 and ENDA-99.

[7] The exemption would not be available where an employee's duties for a religious organization pertain solely to an activity that generates "business taxable income" unrelated to the organization's religious activities.

- The state laws designate a state agency to handle discrimination complaints, but differ concerning the circumstances under which complainants may seek judicial enforcement.

  - ENDA-99 provides that the enforcement procedure would be the same as that now followed for complaints of employment discrimination under Title VII of the Civil Rights Act of 1964. That procedure is analogous to those state procedures under which the complainant must bring the complaint to an administrative agency before being allowed to sue.[8]

- State laws protect complainants and witnesses from retaliation.

  - ENDA-99's provisions are comparable.

- All state statutes provide a range of remedies, which can include back pay awards, punitive damages, or civil penalties.

  - ENDA-99's range of remedies does not include civil penalties.

- States are split on the use of quotas or preferential treatment: five of the state statutes prohibit quotas or preferential treatment; two permit preferential treatment; five are silent.

  - ENDA-99 prohibits employers from adopting or implementing quotas, or from giving preferential treatment to individuals on the basis of sexual orientation and provides explicitly that affirmative action may not be imposed. This is an exception to the general provision of ENDA-99 that the same procedures and remedies applicable to a violation of Title VII of the Civil Rights Act of 1964 are applicable to claims under ENDA-99. The Civil Rights Act, under certain conditions, permits employers to voluntarily adopt race- or gender-based preferences.

Nevada Law Similar to Other States' Laws and to ENDA-99

Nevada's statute, which took effect on October 1, 1999, is similar in substance to the other states' laws barring employment discrimination on the basis of sexual orientation:

- Sexual orientation is defined as having, or being perceived to have, an orientation for heterosexuality, homosexuality, or bisexuality.

[8] For more information, see GAO/OGC-98-7R, at 7.

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- The law applies to private and state employers with 15 or more employees, employment agencies, and labor organizations. Exempted are out-of-state employees, religious organizations,[9] Indian tribes, and tax-exempt private membership clubs.

- Employees may file a complaint concerning unlawful employment practices with Nevada's Equal Rights Commission and, after an unfavorable decision, may seek court relief. A complainant is entitled to file suit once administrative remedies have been exhausted, and to have a trial *de novo.* (This means in effect that the court will proceed as if there had been no administrative proceeding.)

- Discrimination against anyone for filing a complaint, appearing as a witness, or assisting in an investigation is explicitly prohibited.

- The enforcement agency has authority only to assess back pay and seek the reemployment of the complainant. It cannot assess penalties, or award punitive damages or attorney's fees.

- Preferential treatment as a remedy for correcting imbalance in the percentage of persons employed who belong to a protected group appears to be permitted but is not required.

NO SUBSTANTIAL INCREASE IN COMPLAINTS OF EMPLOYMENT DISCRIMINATION BASED ON SEXUAL ORIENTATION SINCE 1997

In 1997, we reported that, in those states with statutes making it illegal to discriminate in employment on the basis of sexual orientation, relatively few formal complaints or lawsuits alleging such discrimination had been filed. Subsequent data provided by the states show that complaints of employment discrimination based on sexual orientation continue to be filed in the states. While there has been some variation over time, both the number and the percentage of such complaints as a portion of overall complaints of employment discrimination filed may still be characterized as relatively small. We also found no indication of a substantial amount of litigation since 1997; the number of lawsuits brought under these laws remains small.

Few Complaints of Sexual Orientation Discrimination in Employment Filed

Of the 12 state statutes prohibiting discrimination in employment on the basis of sexual orientation, 3 have been in effect for over 10 years. The earliest, in the District

[9] A religious organization is not exempt if the employee is performing work not connected with the employer's religious activities. This provision is similar to those in ENDA-99 and in some of the other states' laws.

of Columbia, was enacted 23 years ago. Seven laws date from between 1991 and 1995. The most recent is Nevada's, which took effect in October 1999.

Overall, the states' data show that relatively few complaints of discrimination in employment on the basis of sexual orientation have been filed each year, whether measured in absolute numbers or as a percentage of all employment discrimination complaints. The data do not reveal any obvious growth trend in the number of complaints, nor is there evidence of large numbers of complaints filed immediately after a sexual orientation protection statute takes effect.

For example, in California, 159 complaints of sexual orientation discrimination (1.2 percent of all employment discrimination complaints) were filed in 1993, the year California's statute became effective. In 1999, 154 complaints were filed (0.8 percent of all employment discrimination complaints). Nevada has had one complaint filed since its law took effect 6 months ago.

Similarly, 12 complaints of sexual orientation discrimination were filed in Hawaii in 1992, the year after its anti-discrimination statute took effect. This was 2.2 percent of its overall employment discrimination complaints. In 1998, the most recent year for which statistics are available, six complaints were filed, representing 1.1 percent of the state's overall discrimination complaints.

Since 1997, New Jersey has seen a decline in the number of complaints filed based on sexual orientation discrimination in employment. There were 35 such complaints in 1997 as compared to 21 complaints in 1999. However, the total number of employment discrimination complaints filed during the same period also decreased, from 1,580 complaints in 1997 to 1,202 complaints in 1999. As a result, the percentage of complaints based on sexual orientation discrimination remained constant.

Detailed information on numbers and percentages of complaints filed in the states by fiscal year is shown in table 1. The latest years for which complete data were available are shown for each state.

Table 1: Data on States' Experience With Sexual Orientation Employment Discrimination Complaints

Fiscal year	Total employment discrimination complaints	Sexual orientation employment discrimination complaints	Sexual orientation complaints as a percentage of total employment discrimination complaints
California (law effective 1993)			
1993	13,362	159	1.2
1994	15,780	159	1.0
1995	16,206	161	1.0
1996	17,164	173	1.0
1997	18,752	151	0.8
1998	18,892	127	0.7
1999	18,644	154	0.8
Connecticut[a] (law effective 1991)			
1993	2,035	20	1.0
1994	2,404	32	1.3
1995	2,668	23	0.9
1996	2,262	44	1.9
1997	2,355	41	1.7
1998	2,107	48	2.2
1999	2,100	28	1.3
District of Columbia (law effective 1977)			
1992	214	7	3.3
1993	304	9	3.0
1994	344	3	0.9
1995	337	8	2.4
1996	230	7	3.0
1997	277	6	2.1
1998	295	[b]	
Hawaii (law effective 1991)			
1992	555	12	2.2
1993	364	6	1.6
1994	367	13	3.5
1995	396	15	3.8
1996	415	11	2.7
1997	483	10	2.0
1998	537	6	1.1

Massachusetts (law effective 1989)[c]			
1990	3,232	43[d]	1.3
1991	3,496	83	2.3
1992	3,225	73	2.2
1993	4,372	135	3.0
1994	4,592	142	3.0
1995	5,144	146	2.8
1996	4,990	155	3.1
1997	5, 173	148	2.9
1998	4,558	169	3.7
1999	4,180	113	2.7
Minnesota (law effective 1993)			
1995	886	34	3.8
1996	980	24	2.4
1997	1,436	34	2.3
1998	1,299	26	2.0
1999	1,268	32	2.5
Nevada (law effective October 1, 1999)[e]			
New Hampshire (law effective 1998)			
1998	220	2	0.9
1999	241	8	3.3
New Jersey (law effective 1992)			
1992	2,712	17	0.6
1993	2,159	20	0.9
1994	1,919	25	1.3
1995	2,127	30	1.4
1996	1,277	20	1.6
1997[f]	1,580	35	2.0
1998	1,495	27	2.0
1999	1,202	21	2.0
Rhode Island (law effective 1995)			
1996	317	2	0.6
1997	449	14	3.1
1998	428	5	1.1
1999	337	5	1.4
Vermont (law effective 1991)[g]			
1993	139	4	2.9
1994	136	5	3.7
1995	152	2	1.3
1996	129	2	1.6
1997	115	6	5.2
1998	200	6	3.0
1999	150	4	2.7
Wisconsin (law effective 1982)			
1996[h]	3,653	43	1.2
1997	4,619	61	1.4
1998	4,073	64	1.6
1999	3,598	65	1.8

[a] For 1998 and 1999, Connecticut gave us exact data on the number of employment sexual orientation cases. At the time of our 1997 correspondence, they did not have those data and estimated that approximately 90 percent of the total sexual orientation cases involved employment.
[b] Data on the number of complaints based on sexual orientation were not available for 1998.
[c] Massachusetts provided data for all discrimination complaints filed and the number of sexual orientation complaints filed. The state does not keep separate records on the number of employment discrimination complaints. The figures are for calendar years.
[d] These are actual numbers of sexual orientation complaints filed between 1990 and 1999.
[e] Only one employment discrimination complaint on the basis of sexual orientation has been filed since the new law went into effect (fiscal year 2000). In fiscal year 1999, the total number of employment discrimination complaints for Nevada was 1,070.
[f] In our previous correspondence, the data for fiscal year 1997 were estimates.
[g] Data provided are for calendar years.
[h] Data were not readily available for these earlier fiscal years.

As table 1 indicates, complaints of employment discrimination based on sexual orientation have remained low as a portion of total discrimination complaints filed each year with the 12 states. The percentage of sexual orientation cases relative to total complaints ranged in 1999 from 0.8 percent to 3.3 percent. The highest percentage in the 1992-1999 period was 5.2 percent in Vermont in 1997. However, that percentage is the result, not of an unusually large number of complaints based on sexual orientation--six were filed, just as in the following year when they were 3 percent of the total—but rather of an unusually small number of total employment discrimination complaints, less than any of the other years.

Litigation under State Laws on Sexual Orientation Rare

In 1997, we found few decisions by courts under the states' laws prohibiting discrimination in employment on the basis of sexual orientation, and that has not changed in the intervening time. A current search of standard sources for the 12 states found few court rulings under the states' laws prohibiting discrimination in employment on the basis of sexual orientation since 1997. Follow-up discussions with state officials responsible for enforcing the prohibition against employment discrimination confirmed that since 1997, a small number of lawsuits have been filed in court under their employment discrimination statutes.

As agreed with your office, unless you publicly announce its contents earlier, we plan no further distribution of this report until 30 days from the date of this letter. At that time we will send copies to interested parties. We will make copies available to others upon request.

This report was prepared by Stefanie Weldon, Senior Attorney, and Dayna K. Shah, Assistant General Counsel. Please call me at (202) 512-8203 if you or your staff have any questions.

Sincerely yours,

Barry R. Bedrick
Associate General Counsel

Enclosure

4-23

B-284923

ENCLOSURE ENCLOSURE

ENDA-97 and ENDA-99: Selected Provisions Compared

Provision	ENDA-97
Coverage	Law generally would apply to an employer with 15 or more employees (but not to a tax-exempt private membership club), to an employment agency, labor organization, joint labor-management committee, and certain other entities.
Sexual orientation	Homosexuality, bisexuality, or heterosexuality, whether the orientation is real or perceived. Would also bar discrimination based on the sexual orientation of anyone with whom the employee has or is believed to have associated.
Discrimination prohibited	Proscribes conduct which subjects individuals to a different standard or treatment or otherwise discriminates
Enforcement Procedures	Procedures the same as those followed for employment discrimination complaints under Title VII of the Civil Rights Act of 1964
Enforcement and Remedies	Expressly bars quotas and preferential treatment as remedies Provides for all other remedies available under applicable civil rights laws (which do not include civil penalties)
Affirmative Action	No specific provision
Retaliation and Coercion Prohibited	Prohibits retaliation against individuals because they oppose an act or practice prohibited by the bill, or testified or assisted in an investigation
Disparate Impact	Fact that employment practice has a disparate impact on the basis of sexual orientation does not establish a prima facie violation of the Act.

4-25

B-284923

ENCLOSURE ENCLOSURE

Provision	ENDA-99
Coverage	Coverage similar. Definitions of employer, employment agency, and labor organization now more closely track definitions in Title VII of the Civil Rights Act of 1964.
Sexual orientation	Same
Discrimination prohibited	By taking language directly from existing civil rights laws, it clarified and expanded what is proscribed conduct for employer practices, employment agency practices, labor organizations, and training programs. Such proscribed conduct includes failure or refusal to hire; discrimination respecting compensation, terms, conditions, and privileges of employment; or limiting, segregating, or classifying in a way that deprives or adversely affects opportunities. It also includes failure or refusal to refer for employment; exclusion or expulsion from membership in a labor organization; and exclusion from apprenticeship, training, and on-the-job programs.
Enforcement Procedures	Same
Enforcement and Remedies	Same
Affirmative Action	Affirmative action for a violation of this Act may not be imposed.
Retaliation and Coercion Prohibited	Same
Disparate Impact	Same

(996230)

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Dana Lippoldt

(5)

KFPC
Family Policy Council
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Wichita, Kansas 67226
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Kansas Family Policy Council's mission statement includes serving and strengthening Kansas families. We are a Christian organization that partners with Focus on the Family and Family Research Council on the national level. We are a Christian organization and ministry. We do not hate anyone. Our Lord in the Scriptures teaches us that all people are created by God and equally share the status of being made in His image. He directs us to show respect and courtesy to everyone. We recognize our sacred responsibility to love all human beings as Christ does and we do. We wish no harm on the LGBT groups. We have friends who are LGBT. We reject and oppose all forms of prejudice. But, advancing godly behavior does not constitute prejudice.

We are here to testify today against establishing a "protected class" and special privileges for Lesbian, Gay, Bisexual, Transgender persons. Kansas Family Policy Council cannot approve of that which we believe to be morally wrong. In section 1 line 13 you have said that public accommodations will be open to Transgendered persons. We find that problematic for the protection of families. Does that include those who have not had sex change surgery? Are we to understand that a little girl could be in a restroom next to a stall with a person that is biologically male, just because they feel they are female? We owe it to our children to protect them. Women and children will be at risk if this bill becomes law. Can you imagine gender neutral locker rooms as you suggest in public swimming pools? On page 2 line 43, you mention swimming pools, skating rink, bowling alley, amusement parks. How are parents to know where their children are to use the restroom?

I would also like to suggest, with absolutely no reference to an LGBT person, that if this law passes, the state would open itself up to litigation as predators, again let me emphasize, not LGBT persons, but predators would lurk around looking for a victim. The state of Kansas could then be sued for such a law.

In section 1 line 28 you say that LGBT people cannot be discriminated against in employment. If a Christian business owner denies employment because of their right of conscience according to this bill they can be sued. If a Christian Day Care owner does not want to hire a Lesbian, because of a difference in their belief system, you have denied rights of conscience to that business owner. You also would subject them to loss of income if they did hire a LGBT person. We believe this violates individual Religious Liberties as given to all citizens of America in our constitution.

In section 1 line 15 you include housing in this proposed bill. Have you given any thought to the landlord who might have a rule in a college town, that they only rent a one bedroom apartment to a single individual? If that person refused to rent to a Lesbian or Gay couple, could they be

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sued? I believe the answer to that according to your bill would be yes. That violates that person their Religious Liberties.

Let's say a Christian owns a photography business. Do they have the right to refuse business to anyone? Let's say they are asked to photograph a Lesbian ceremony of some sort and they refuse. This bill would not allow them to deny services without a threat of being sued. Again we believe this would constitute a violation of individual religious liberties. There are many examples of this around the country.

We also do not believe we need more bureaucracy or larger government. Creating a new commission to implement this law would be cost prohibitive to the state. What are the qualifications of such a commission that is given the power to issue a subpoena? It sounds like you want to create a new government as you say they have the power to create advisory agencies and conciliation councils, local, regional or state-wide on page 5 line 42. On page 6 line 1&2 you suggest that this commission become lobbyist for LGBT persons to promote their lifestyle, by going through the community to educate elements of the population. We already have indoctrination in the schools. We do not believe it is the role of government to promote, a lifestyle that makes up 2.4% of the population and that is morally opposed to the Christian population. You mention federal funding for such a program. At a time when our society is facing financial challenges, we believe another commission is unnecessary. Kansas can do better than this. We love the people in the LGBT community.

In conclusion, Kansas Family Policy Council would like to say we cannot stand by and see an immoral lifestyle that leads to harm for children be presented as law in our state. We are for the protection of families and stand firmly against Senate Bill 53.

(6)

Awaken Manhattan

February 8, 2011

Dear Committee on Federal and State Affairs:

I am representing Awaken Manhattan in opposition to the proposed bill for the inclusion of sexual orientation and gender identity in the Kansas Act Against Discrimination. Awaken Manhattan was organized last fall by a group of 27 local pastors in Manhattan, Kansas to stand in opposition to a proposed amendment to our city anti-discrimination ordinance that would make sexual orientation and gender identity protected classes, as is being proposed before you today. While attempting to promote our concerns for this proposed ordinance, we are also attempting to promote love, respect, mutual understanding, and compassion toward lesbian, gay, bisexual, and transgendered (LGBT) individuals.

Seeing that Manhattan is facing nearly identical legislation that you are facing, we have attached a letter that the 27 pastors leading this initiative wrote to our city commission expressing why they as pastors are very concerned about such legislation. We have also attached the cover page of a document explaining the top ten reasons why Manhattan should not adopt the ordinance that is being proposed in our city. Although some specifics of the ordinance are different than the bill before you today, most of our objections would pertain to this bill, as well. To read the entire document containing detailed explanations of each of the ten points, please see our "What's the Problem?" article on our website: www.awakenmanhattan.com.

Lastly, we want to affirm again that Awaken Manhattan is partly an initiative to protect lesbian, gay, bisexual, and transgendered individuals from harassment and unfair treatment. But rather than invoking the force of government to change people's attitudes, rather than waiting for third parties to fix injustices, and rather than trying to promote inclusiveness through the creation of even more classes of citizens, we believe these problems are best addressed through personal initiative, through friends, and through the teaching of sound values in our families, schools, and churches.

Those on both sides of this debate in Manhattan have already demonstrated their desire and willingness to meet together in private and to work toward mutual understanding and respect. Friendships have been made and tensions between groups have waned as a result of these personal initiatives. This isn't an issue that requires severe governmental intervention but one that requires people to work together to promote and protect the value and dignity of every human being, to better understand the many beliefs and values that we each hold, and to better learn how to allow for such diversity while loving our neighbors as ourselves.

Thank you for considering.

Brent Pinkall
Awaken Manhattan
www.awakenmanhattan.com

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2-8-11

. astors' Letter

November 2, 2010

Dear Mayor Snead and Manhattan City Commissioners,

We are a group of pastors and leaders who serve several churches and organizations throughout Manhattan. These are made up of people who live out their faith at home, at school, at work, and while participating in a variety of civic groups. We share love for and allegiance to Jesus Christ, confidence in his power to give new life, and fidelity to the Bible as God's word to us.

In the Bible He calls us to honor and pray for you as leaders. Where we have failed to do this we seek the Lord's mercy and your forgiveness as well as the strength to obey. We intend to submit joyfully to the laws you establish until they require us to compromise our worship and devotion to Jesus.

Our Lord in the Scriptures teaches us that all people are created by God and equally share the status of being made in His image. He directs us to show respect and courtesy to everyone. We recognize our sacred responsibility to love all human beings as Christ does. We humbly acknowledge that we have often fallen short of this standard and rejoice in our Lord's love and forgiveness to us. We affirm that the core of our mission in this city is to offer hope and restoration to all in following Him.

We reject and oppose all forms of prejudice. But, advancing godly behavior does **not** constitute prejudice. God's design for human flourishing as revealed in the Bible includes the enjoyment of sexual intimacy only within the beauty and bounds of a marriage commitment between a man and a woman. All other sexual behavior is sin, subject to God's judgment.

We acknowledge that we too have sinned. Jesus Christ entered our world to confront this disaster. He lived free from any sin. He always enjoyed God's favor. He deserved no condemnation but endured death on a cross to take the judgment due sinners. Three days later, He returned to life, conquering death and hell. We now celebrate the forgiveness He offers to all who trust Him.

We conclude that creating protected classes in an anti-discrimination ordinance for self-selected behaviors and personally chosen identities would be bad law. We unite in concern that such an ordinance might silence individual Christians in response to the acceptance or practice of immorality when their silence would indicate consent.

Offering help to those who seek to reverse immoral directions in life might be labeled as discrimination requiring a costly legal defense. Churches and Christian organizations might be pressured to hire, to allow into membership, and to make facilities available to those who openly practice and promote what we cannot condone.

So we appeal to you not to amend the anti-discrimination ordinance according to current proposals. We pledge to pray as you consider your decision in this matter.

Yours for the Good of Our City,

(signatures on reverse)

Robert W. Anderson
Christian Challenge
New Hope Community Church

Paul Barkey
Ashland Community Church

Pat Bennett
Westview Community Church

Ben Deaver
New Hope Community Church

Bob Flack
Grace Baptist Church

Dave Gevock
Christian Challenge

Tim Gotchey
College Heights Baptist Church

Ryan Hayden
University Christian Church

Jonathan Hupp
Bluemont Church

J. Kevin Ingram
President
Manhattan Christian College

Darryl Martin
Manhattan Christian Fellowship Church

Dick Miller
Harbor Church

Rick Neubauer
First Baptist Church

Robbie Nutter
Christian Challenge
New Hope Community Church

Ryan Nutter
New Hope Community Church

Ryan Stelk
Christian Challenge

Todd Stewart
New Hope Community Church

Brian Sturm
Christian Challenge

Dennis Ulrey
Manhattan Baptist Church

Ed Walker
Manhattan First Assembly of God

Dan Walter
Vintage Faith Church

Gary Ward
Living Word Church

Pat Weyrauch
First Church of the Nazarene

Devin Wendt
Crestview Christian Church

Rick Whitney
Vintage Faith Church

Nate Wilson
Christ the Redeemer Church

Matt Zodrow
Christ Fellowship Church

Awaken Manhattan

TO: Friends of Awaken Manhattan

FROM: Bob Reader and Brent Pinkall, On behalf of Awaken Manhattan

Date: February 3, 2011

Re: The Top Ten Reasons that the City Commission in Manhattan, Kansas should not implement the proposed changes defined by Draft #4 of the Discrimination Ordinance, which is scheduled to be read at the next City Commission meeting on Tuesday, February 8.

Awaken Manhattan was organized by a group of pastors in Manhattan, Kansas and now has hundreds of supporters who are willing to take a public stand in opposition of the creation of special rights for lesbian, gay, bisexual and transgender people through the extension of "protected class" status to "sexual orientation" and "gender identity."

As many throughout our community have acknowledged, the proponents of such legislation are quick to accuse anyone standing in opposition as being full of hate. However, we believe that local proponents have come to understand that Awaken Manhattan and many others locally are indeed NOT speaking out of hate, but rather out of political differences on this issue. We stand with the proponents in taking offense to anyone who would otherwise presume to speak out in hate on this or any issue, and choose instead to simply look at the policy issues involved.

The Top Ten Reasons for Not Implementing the Proposed Ordinance

1. It approves of that which is morally wrong.
2. The City has not demonstrated a need.
3. It violates numerous Constitutional provisions.
    a. U.S. Freedom of Religion and Kansas Right of Conscience
    b. Freedom of Speech
    c. Due Process of Law
    d. Principle of Sovereign Immunity
4. It promotes the very discrimination it seeks to prevent.
5. Compliance will be virtually impossible.
6. Compliance will be very expensive.
7. Though well-intentioned, there are grave unintended consequences.
8. The cost to the City will be exorbitant.
9. A Voluntary Board will be given vast powers.
10. There are better alternatives.

(read the "What's the Problem?" article at www.awakenmanhattan.com to see the detailed explanations of each of the ten points outlined in this letter.)

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Senate Federal and State Affairs Committee
February 8, 2011
10:30 PM

Testimony in Opposition to SB 53
Michael Schuttloffel
Executive Director, Kansas Catholic Conference

Mr. Chairman and members of the Committee,

The Catholic Church has historically been an advocate for those who suffer unfair discrimination and has condemned all forms of hostility towards any individual on the basis of sexual orientation. However, we are deeply concerned that this legislation goes far beyond protecting against discrimination on the basis of orientation, and that it has serious implications for religious liberty.

SB 53 is presented as protecting individuals on the basis of sexual orientation, but in fact does not make a clear distinction between sexual orientation and conduct, as the Church has been very careful to do. By implicitly bringing most same-sex sexual conduct into the scope of its protection, the proposed legislation extends well beyond the advertised protection of "orientation," where the Church shares the concern over unjust discrimination. Instead, the bill goes much farther, specially protecting and expressing government approval for conduct that the Church teaches to be morally wrong.

The Church is not morally neutral on homosexual behavior and does not support the proposition that such behavior merits the same protection as characteristics such as race or gender. The Church cannot support legislation that would stigmatize adherents of Catholic teaching on human sexuality as being somehow worthy of the opprobrium of the state. While the bill provides special protections for some, it does not protect the far greater number of Kansans whose freedom to live their faith would be impinged upon.

In 2008, a young Christian husband and wife who operated a photography business in New Mexico declined to photograph a same-sex "commitment ceremony" on the basis of their

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religious beliefs, and were subsequently fined nearly $7,000 by the State Human Rights Commission. Their right to operate their private business in accordance with their faith was violated, their beliefs stigmatized and criminalized by the state. SB 53 will open the door to precisely this kind of discrimination against people who hold traditional Christian beliefs. It is also a veritable invitation to endless litigation, especially given the extraordinarily amorphous concept of "gender identity."

Finally, it is not entirely clear that the exemption for religious institutions is sufficient to allow churches to continue to pursue all of their various ministries in accordance with their teachings on human sexuality.

The Church strongly supports efforts to protect persons with a homosexual inclination from unjust discrimination. That does not mean, however, that homosexual conduct should be elevated to having a specially protected status under the law, especially at the expense of the religious liberties of individuals and religious institutions. While the bill purports to oppose discrimination -- even as it would open the door to discrimination of a different sort -- it is in fact part of a larger project to delegitimize traditional beliefs regarding human sexuality, and to reduce freedom of religion to freedom of private worship. This should be opposed, and the state government, which derives its power from the people, should not suddenly announce to its people that their moral objections to homosexual conduct are no longer acceptable.

Thank you for your consideration.

8

TESTIMONY AGAINST S 53

Adding a behavior and perceived identity to civil rights is a bad precedent

Senator Brungardt and Members of the Senate Federal and State Affairs Committee:

Concerned Women for America, the largest public policy women's organization, is opposed to **S 53**.

CWA of Kansas is opposed to adding sexual orientation and gender identity to discrimination statutes. Discrimination and civil rights laws have traditionally been based upon immutable characteristics such as gender, age, ethnicity, race, and handicaps ; all things that are clearly visible and unchangeable. In addition, there must be demonstrable economic effect based on those immutable characteristics in order for it to qualify as discrimination, and the affected group must demonstrate a history of discrimination and political powerlessness. Facts show that homosexual behavior and cross-dressing fit into none of these requisite categories.

In the case of sexual orientation and gender identity, the proposed addition to discrimination statutes is based on an undefined *behavior.* This is a dangerous precedent affecting public policy regarding marriage, families and the culture in general. A chosen behavior should not be the basis for changing law.

In addition, legal scholars and same-sex marriage advocates have stated that elevating sexual orientation to a protected status in nondiscrimination laws is an important step on the "incremental path" to same-sex marriage. Several state courts have cited sexual orientation nondiscrimination laws in decisions mandating same-sex marriage or some other form of legal recognition for homosexual unions. In fact, no state has legislatively redefined marriage without first enacting a sexual orientation nondiscrimination law. Yale law professor William Eskridge writes, the "tried and true path" to same-sex marriage is "incremental" and involves a "step-by-step" "sequential" process. [William N. Eskridge, Jr, "Equality Practice: Civil Unions and the Future of Gay Rights" xiii (2002)] Yuval Merin, formerly a visiting scholar with the Williams Institute at UCLA Law School, states that "nondiscrimination laws are an essential step in the necessary process for legally recognizing homosexual unions." [Yval Merin, "Equality for Same-Sex Couples 326 (2002)] An op-ed published in *The Washington Blade* likens ENDA and other gay-rights legislation to the structure of a house with civil unions as the "roof structure" and same-sex marriage as the "shingles." "There is a logical progression to all of this .... You don't build a house upside down." [Monica Helms, Op-Ed., "Building a House from the Roof Down", *Washington Blade*, August 24, 2007.]

Comment [KB1]: I am not sure I got the quotation marks right on this sentence. Please double-check them.

By voting for a marriage amendment to the Kansas Constitution, seventy-one percent of Kansans said they wanted traditional marriage to be held sacred It is clear that homosexual activists are using non-discrimination laws as a wedge to overturn Defense of Marriage Acts (DOMA) and marriage amendments in the courts.

Adding "gender identity" as an expression of self image or identity not associated with one's biological gender forces Kansas' employers and Kansas citizens to pretend, by force of law, that a man is a woman or vice versa based on that person's self-perception or behavior.

This bill places sexual orientation and self-perceived gender identity not as a protected class, but as a privileged group. Sexual orientation and other manifestations of gender identity do not fit into what constitutes a true minority and should not be added to laws dealing with discrimination.

Judy Smith
State Director of Concerned Women for America of Kansas

P.O. Box 11233

Shawnee Mission, KS 66207

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2-8-11

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MEMBER OF KANSAS SENTENCING COMMISSION

CHAIR:
NATIONAL CONFERENCE OF STATE LEGISLATORS COMMITTEE ON LAW AND CRIMINAL JUSTICE

Testimony on SB 53
Senate Federal and State Affairs

February 8, 2011

Chair Pete Brungardt and members of the committee, thank you for the opportunity to present written testimony on this bill. Due to the House schedule on February 8, 2011, I was unable to be in your committee hearing except briefly while testimony was being presented by the Proponents.

I have a concern about language that is stricken on page one, Section 1, Line 4, "Housing by reason of race, religion, color" and suspect that it may be a printing or drafting error.

This bill would add "sexual orientation or gender identity"to the Kansas Act Against Discrimination. The classes protected now are: race, religion, color, sex, disability, natural origin or ancestry. This act prohibits discrimination in employment, public accommodations (defined on Page 2, Lines 37-43 and Page 3, Lines 1-3, such as stores, lodging, food service, bars, etc.).

An additional statute, also prevents discrimination based on age, and also familial status can not be a factor of discrimination in most housing.

The Federal Civil Rights Act of 1964 does not include "sexual orientation or gender identity" as a protective class.

The definition of sexual orientation on Page 4, Lines 13-14, states that" sexual orientation" means actual, or perceived, male or female heterosexuality, homosexuality and bisexuality by inclination, practice or expression". Once "sexual orientation" includes heterosexuality, any person is in this protected class.

Kansas is an at-will employment state. Absent discrimination under our Civil Rights Act, an employer can fire an employee (or not hire an individual) based on any factor, even sometimes as minor as someone having blue eyes. This change in our law would increase litigation, because any individual could claim being in this protected class. The issue of proof would possibility be difficult to prove but easy to raise, increasing the length of litigation.

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If this bill is passed, the Kansas Human Rights Commission will have to design an educational program for public schools to add in material (see Page 5, Lines 35-38) as "to the origin of prejudice against such groups, its harmful effects and its incompatibility with American principles of equality and fair play" to cover the new classes of sexual orientation and gender identity. Also, the Commission would be mandated to set up advisory and conciliation councils to aid in effectuating the purpose of this act as to the two new categories. This Commission must also issue publications to eliminate discrimination in these two categories.

I would urge this committee not to pass this bill as this would be a major policy shift in Kansas; one that even the Federal Government has not passed.

Donia J. Pauls

(10)

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K A N S A S

KANSAS HUMAN RIGHTS COMMISSION

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WRITTEN TESTIMONY OF THE KANSAS HUMAN RIGHTS COMMISSION REGARDING S.B. 53 FEBRUARY 8, 2011

Staff Attending Hearing: William V. Minner, Executive Director
Ruth Glover, Assistant Director
Joseph P. Mastrosimone, Chief Legal Counsel

Possible Drafting Error in Need of Correction

Section 1, line 14, appears to have a drafting error because there is a strikeout to "housing by reason of race, religion, color". The supplement housing portion of the Kansas Act Against Discrimination beginning at KSA 44-1005 remains part of the overall act, and "race, religion, and color" appear throughout the remainder of the Act. Because wording should be consistent throughout the Act, this strikeout appears to be a mistake. We ask that this apparent error be corrected.

Other Comments

S.B. 53 proposes to amend the Kansas Act Against Discrimination (K.S.A. 44-1001, et seq., hereinafter referred to as "KAAD") to add provisions prohibiting discrimination on the basis of "sexual orientation" or "gender identity" with regard to employment, housing and public accommodations.

"Sexual orientation" is defined in section 2 of the bill as "actual or perceived, male or female heterosexuality, homosexuality, or bisexuality by inclination, practice or expression". "Gender identity" is defined, in part, as "having or expressing a self image or identity not traditionally associated with one's gender". The definition for "gender identity" also states "this term shall not prohibit an employer from requiring an employee, during the employee's hours at work, to adhere to reasonable dress or grooming standards not prohibited to other provisions by federal, state, or local law."

The Kansas Human Rights Commission (KHRC) is responsible for administering and enforcing the provisions of the KAAD. KHRC is committed to its mission of preventing and eliminating discrimination and segregation in the State of Kansas and opposes discrimination which prevents individuals from obtaining employment for which they qualify, or that prevents persons from obtaining housing and the services of public accommodations which they can afford.

The Kansas Act Against Discrimination, KSA 44-1001 et seq, is proposed to be expanded to prohibit discrimination based upon sexual orientation or gender identity, in addition to the current prohibitions on discrimination based on race, religion, color, sex, disability, ancestry, national origin, the use of genetic information in the area of employment only, familial status in the area of housing only, and retaliation. The Kansas Age Discrimination in Employment Act sets forth age as an impermissible consideration for adverse employment decisions.

Federal employment laws, specifically Title VII of the Civil Rights Act of 1964 and the federal Fair Housing Act, do not prohibit discrimination based on sexual orientation or gender identity. Federal civil rights laws do not protect against discrimination based upon sexual orientation or gender identity in regard to public accommodations.

Federal Executive Order 13087, which was signed on May 28, 1998, prohibits discrimination in federal civilian employment based on sexual orientation, as well as the more traditional bases of race, color, religion, sex, national origin, handicap, and age.

Executive Order 07-24, issued by Governor Sebelius in August 2007, commits the State of Kansas to employment practices which will prevent discrimination and harassment on account of sexual orientation and gender identity, as well as several other bases

The City of Lawrence, Kansas, currently prohibits discrimination based upon sexual orientation. The City of Manhattan has scheduled a second reading for February 8, 2010 of a city ordinance prohibiting discrimination in employment, housing, and public accommodations based on sexual orientation and gender identity. We are not aware of any other Kansas municipalities that provide such protection. The City of Topeka considered prohibiting discrimination based upon sexual orientation as part of their local ordinance in recent years, but opted to limit the prohibition to internal City hiring practices.

Other local governmental entities and businesses may have ordinances or policies prohibiting sexual orientation or gender identity discrimination in their own employment practices.

The neighboring states of Missouri, Nebraska, and Oklahoma do not have statutory provisions prohibiting discrimination based on sexual orientation or gender identity. Colorado has prohibited discrimination based on sexual orientation and gender identity in all employment since 2007. Discrimination based on sexual orientation and gender identity has been prohibited in Iowa since July 1, 2007.

Although we were unable to survey all states due to time constraints, we were able to identify twenty-one states (California, Colorado, Connecticut, Delaware, Hawaii, Illinois, Iowa, Maine, Maryland, Massachusetts, Minnesota, Nevada, New Hampshire, New Jersey, New Mexico, New York, Oregon, Rhode Island, Vermont, Washington, and Wisconsin) and the District of Columbia that have some type of statutory prohibition of discrimination based upon sexual orientation and/or gender identification in the areas of employment, public accommodation, and/or housing.

Eleven other states (Alaska, Arizona, Delaware, Indiana, Kentucky, Michigan, Montana, Ohio, Pennsylvania, Virginia, and Wisconsin) prohibit discrimination based on sexual orientation and/or gender identity in their own employment practices.

As an unbiased, fact-finding, investigative body, the KHRC has taken a neutral stance on the proposed legislation. It is vital that "Probable Cause" or "No Probable Cause" determinations made in regards to

complaints filed with this agency be accepted with credibility. Therefore, we have not taken a stance on this bill in order to avoid presumptions that we may favor one side or the other if this legislation is adopted.

The KAAD constitutes a statement of the public policy of Kansas which disfavors discriminatory conduct. If the Legislature and Governor choose to expand the public policy of the State of Kansas as proposed by S.B. 53, the Commission stands ready to enforce the provisions of the bill, subject to the proviso that there is an expansion of budget and personnel resources provided to KHRC to handle anticipated increases in the number of complaints filed with KHRC, as more fully set out in the Fiscal Note accompanying S.B. 53. Although KHRC did not seek the introduction of the bill, KHRC would not oppose its adoption in light of the above.

With fairly minimum expansion of resources, KHRC believes it could implement the provisions of S.B. 53 without significant concerns that the new provisions would return the agency to the days of an extensive backlog of cases. However, it is impossible to predict with absolute certainty, the number of complaints that might be filed based upon these new provisions in the law, so that would have to be monitored and addressed through the budget process as appropriate in the future. As with any expansion to the KAAD, we can be fairly certain that complaints testing the legislation will be filed and will need to be processed, placing demands on agency resources and personnel.

We surveyed 13 states about the number of complaints they received alleging discrimination based upon sexual orientation and/or gender identity. Based on the number of complaints they received for their population and adjusting for the population of Kansas, we expect to receive approximately 50 additional complaints per year and 300 additional public contacts should the proposed legislation be enacted.

The projected receipt of 50 sexual orientation complaints and 300 public contacts represents an increase of almost 5 percent over the Fiscal Year 2010 level of 1,044 complaints received and the 6,171 public contacts made. Given that Special Investigators currently have annual quotas of 36-72 completed complaints, based on various criteria, the additional workload cannot be absorbed within current funding and personnel levels. We anticipate that one additional FTE, a Special Investigator II, at a cost of $65,375 in State General Fund will be needed to investigate and process complaints in Fiscal Year 2012 to implement the provisions of S.B. 53.

During the 2009 Legislative session, advocates of a sister bill to SB 53 felt the agency could absorb the additional complaints within existing resources given the ebb and flow in the number of complaint receipts and resolutions experienced by the agency each year. Any rise in complaints received correspondingly increases the workload for the agency and increases the processing time for all complaints received if additional staffing resources are not available.

FY 2011 could be our third consecutive year of 1,000 plus complaint receipts, given actual complaints of 1,071 in FY 2009 and 1,044 in FY 2010. We have not received 1,000 plus complaints in three consecutive years since FY 1999 – FY 2001. At that time, the agency had 37-40 positions, versus the currently filled 22 positions. Complaint receipts grew by 12 percent and 17 percent in fiscal years 2008 and 2009, respectively, whereas the number of filled Special Investigator positions declined by 25 percent during the same time period due to budget restrictions. We are currently holding open ten vacant positions which were filled at the beginning of FY 2009 or nearly 29 percent of our FTE due to funding shortfalls. As a result, resolutions have fallen and processing time has increased due to the concurrent decrease in staffing and an increase in the number of complaints. It would be a disservice to all parties to increase the agency's workload without providing resources to address the additional duties.

We will be glad to answer any questions that you might have.