

State Discrimination Law Awaits Gay Rights Test

Homosexuals who work in New Jersey now have the benefit of being protected by one of the toughest anti-discrimination laws in the country. Unfortunately, few firms have redrafted and updated their employee policies to keep up with the recent amendment to the Law Against Discrimination. Furthermore, it appears that the legal community is still lagging a step behind in recognizing the new rights and benefits afforded to homosexuals.

The Law Against Discrimination, N.J.S.A. 10:5-1 et seq., enacted in 1945, prohibits discrimination in employment, labor organization membership, public accommodations and real estate, financial and business transactions. Prior to 1992, the LAD applied to discrimination based on race, color, creed, national origin, ancestry, age, sex, marital status and handicap status. See N.J.S.A. 10:5-3. In 1992, the New Jersey Legislature expanded the reach of the LAD, to cover "affectional or sexual orientation," which is defined as "male or female heterosexuality, homosexuality or bisexuality by inclination, practice, identity or expression, having a history thereof or being perceived, presumed or identified by others as having such an orientation." N.J.S.A. 10:5-5(hh).

The LAD made it unlawful for an employer to discriminate against any individual because he or she possesses any of the enumerated characteristics or "to print or circulate or cause to be printed or circulated any statement ... which expresses, directly or indirectly" such discrimination. N.J.S.A. 10:5-12(f). The statute also prohibits any person from refusing to transact business with another person for a discriminatory reason. N.J.S.A. 10:5-12(i),(m). Additionally, the LAD made it unlawful "(f)or any person, whether an employer or an employee or not, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this act, or to attempt to do so." N.J.S.A. 10:5-12(e). The state Legislature was careful to limit the expansion of the law so as to not require affirmative action programs to recruit or employ persons solely based on their affectional or sexual orientation. Additionally, the amendment stipulates that known or suspected child molesters may be turned down from employment in day care centers or similar facilities based on their affectional or sexual orientation. N.J.S.A. 10:5-27.

The first incarnation of the bill to amend the LAD was brought before the floor of the Statehouse in 1986. Special-interest groups combined forces for eight long years to pass the bill. The New Jersey Lesbian and Gay Coalition enlisted the help of members from the ACLU, NOW and the Campaign to End Discrimination. Supporters maintained that lobbying

and education, not demonstrations, led to the campaign's success. Commentators observed at the time that the amendment reflected the growing acceptance of gay rights by the community at large and the growing political power of lesbians and gays in New Jersey.

EMPLOYMENT LAW

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This trend seems to be gaining momentum across the country as well as in New Jersey. Evan Wolfson, a staff attorney with the Lambda Legal Defense and Education Fund Inc. in New York, a legal advocacy organization for homosexuals, says "currently there are seven states and several large cities, including New York City, which have adopted strong anti-discrimination laws." New Jersey was the fifth such state to do so in 1992. Two more states have added themselves to the list since then.

With the passage of the amendment, New Jersey followed Wisconsin, Connecticut, Massachusetts and Hawaii to become the fifth state with such an anti-discrimination law. This is significant because federal law, Title VII of the Civil Rights Act, does not prohibit employment discrimination linked to an individual's sexual orientation or affection. Accordingly, under federal law, if an employer harasses a lesbian or gay employee solely because of the individual's sexual orientation, the employer does not violate Title VII, because the harassment is not considered to be because of sex. In *Carrero v. Electrical Workers (IBEW) Local 226*, 54 FEP Cases 81, 82-83 (D. Kan. 1990), the court rejected the complainant's hostile environment claim, stating that the harassment cannot be based on a homosexual employee's sex. In that case, the plaintiff complained that his co-workers were harassing him because of his homosexual lifestyle. He cited several incidents of physical assault and verbal abuse. Apparently, the necessity for a law like the LAD was critical, given that sex-discrimination claims under Title VII had routinely failed when brought by homosexuals, bisexuals, transsexuals who underwent reassignment surgery, and effeminate men.

Federal courts also have rejected the position that discrimination against gays and lesbians is based on gender, because males who chose male partners are adversely treated, whereas females who chose male partners are not. Courts have also rejected the argument that homosexual discrimination is unlawful because it has a disproportionate impact against males. See *DeSanis v. Pacific Tele-*

phone & Telegraph Co., 608 F.2d 327, 19 FEP Cases 1493 (9th Cir. 1979).

Two Avenues of Relief

The LAD has been a strong tool in providing the New Jersey public with expansive civil rights. Under the LAD, one can obtain relief either by filing a complaint with the New Jersey Division of Civil Rights or by commencing suit in Superior Court without first filing an administrative complaint. N.J.S.A. 10:5-13. Moreover, "any individual who has been discriminated against" and "any organization which represents or acts to further the interests of individuals who have been discriminated against" have standing to enforce the provisions of the LAD. N.J.S.A. 10:5-38.

The Division of Civil Rights is also entitled to intervene in any private enforcement action. N.J.S.A. 10:5-13. The remedies authorized by the statute include awards of compensatory and punitive damages, fines and double attorneys' fees. See N.J.S.A. 10:5-3, 10:5-14.1a and 10:5-27.1. Recently decided cases, which predated the 1992 Amendment, resulted in multimillion-dollar jury verdicts. While several sexual orientation discrimination cases have been filed in Superior Court, as of yet, none have been decided.

To date, the only published case dealing with sexual orientation discrimination is *Presbytery of New Jersey v. Florio*, 830 F.Supp. 241 (D.N.J. 1993), which challenged the constitutionality of the 1992 amendment to the LAD. The district court dismissed the action as nonjusticiable. In that case, the Orthodox Presbyterian Church stated that it discriminates against and publicly condemns homosexuals, bisexuals and heterosexuals who engage in sex outside marriage. The church alleged that the 1992 amendment to the LAD violated their First, Fifth, Ninth and 14th Amendment rights. Defendants argued that plaintiffs did not have standing to litigate the action and that their claims were not ripe for adjudication.

The court in *Presbytery of New Jersey* noted that the ripeness doctrine seeks to prevent courts from addressing federal constitutional matters where it would be premature. 830 F.Supp. at 247. In determining whether a matter is ripe, the court must evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. The court held that plaintiffs failed to demonstrate that the matter was justiciable. As of the time the matter was heard, no enforcement action or private suit had been commenced against plaintiffs as a result of the 1992 amendments to the LAD. Moreover, the plaintiffs could not demonstrate a real and substantial probability that a public or private lawsuit pursuant to the 1992 amendment would arise in the future. This case is awaiting leave to appeal from the Third Circuit.

Another case that is testing the waters of the LAD protection of lesbians and gays is *James Dale v. Boy Scouts of America*. It is going to serve as the blueprint for the ramifications of the LAD, and the weight and importance of the final verdict cannot be underestimated. The attorney for Dale, Lewis Robertson of the Red Bank firm of Evans, Osborne & Kreizman, characterizes this case as a constitutional or civil rights case as opposed to a traditional employment matter.

The *Dale* case involves a 12-year member of the Boy Scouts who was dismissed from his position of scout leader because he is a homosexual. He received notice of his expulsion shortly after his picture appeared in a Newark *Star-Ledger* article in connection with the Rutgers University Lesbian and Gay Alliance. Proponents of homosexual rights are hopeful that a successful outcome would set a strong precedent for subsequent cases.

One can expect that future cases based on the 1992 amendment of the LAD will effectively expand litigation to include gays and lesbians. However, it is too early to tell whether the public support, present during the passage of the bill, will translate into high jury awards. Some attorneys who specialize in employment law believe that a potential problem with the law is that jurors may bring their in-

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grained prejudices with them to a trial and provide unfair judgments. Others, like Wolfson, with the Lambda Legal Defense and Education Fund, argue that once jurors see a plaintiff as an individual and get beyond stereotypes, they will act appropriately. Wolfson's confidence in jurors rests on his feeling that people are fundamentally indignant about discrimination. He further states that once a trial begins, jurors do not base their decisions on generalized stereotypes, but rather assess the situation based on the specific issues at hand. He notes that the objective for an attorney representing a homosexual is to humanize the plaintiff. Wolfson stresses, "The jurors have to get past stereotyping the plaintiff." In support of his position, Wolfson cites a recent California example in which a jury awarded an individual \$5.3 million in a case against Shell Oil.

Utilizing expert testimony is seen as a useful way of dealing with any potential prejudice in the minds of jurors. Employment law attorney Lewis Robertson, of Red Bank's Evans, Osborne, asserts that at trial a

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viable option is to educate a jury through the use of an expert witness. An expert witness can show that while gays and lesbians are perceived as not normal, their actions are really a result of biological differences and not a choice in lifestyle. Thus, he contends, that an individual discriminated against because of his or her sexual orientation is similar to one discriminated against because of his or her skin color. Consequently, the individual is viewed as being in a class protected by the Law Against Discrimination. Additionally, an expert can explain how gays and lesbians have had to cope with discrimination and/or harassment and be in a situation where they can not do anything to prevent it. This allows the jury to develop an understanding of the psyche of the homosexual plaintiff.

Actions generally would arise under this law in two ways. The first being a "quid pro quo" situation where a superior of the same sex would solicit a subordinate employee for sexual favors in return to job advancement or security. The other manifestation is the "hostile workplace" situation, as mentioned in the *Carreno* case. To establish a hostile environment claim under the LAD, the plaintiff must demonstrate that the complained-of conduct would not have occurred but for the employee's gender, and that it was severe or pervasive enough to make a reasonable person of the same sex believe that the conditions of employment have been altered and have created an intimidating, hostile, or offensive working environment. The typical example is a person who is harassed by vulgar and degrading sexual comments or behavior based on one's sexual preference or affection. See *Lehmann v. Toys 'R' Us, Inc.*, 132 N.J. 587 (1993). This type of discrimination must result from a pattern of sufficiently severe and/or pervasive harassment. This would be the most common type of scenario arising from the 1992 amendment.

Protection From Misconceptions

This new law also raises issues in the ancillary areas of discrimination. It can protect homosexuals from traditional associations and misconceptions of them. The view of homosexuals as AIDS carriers, child molesters and promiscuous "cruisers," and the characterization as such by the media and ultra-conservative press, can be dispelled by focusing on the individual facts and circumstances in a given case. Indeed the court in *Paff v. Caro*, 228 N.J. Super. 370 (Law Div. 1987), understood this when it stretched the applicability of the LAD to cover sexual orientation discrimination before the law was amended in 1992. In *Paff*, a landlord refused to rent an apartment to three gay males because he feared that they might later acquire AIDS and expose his family to the disease. The court held that AIDS is a handicap covered under the LAD and that discrimination against persons perceived to be handicapped is banned by the LAD. The court also held that discrimination against persons who are neither handicapped or perceived to be presently handicapped is unlawful when based on a belief that they might subsequently become handicapped. 228 N.J. Super. at 376-78.

The court closed its opinion by stating:

To refuse to extend [the] protection [of the LAD] to homosexuals because they may be more susceptible to a dread disease would mark a return to a past of judging individuals on the basis of ignorance and prejudice. A home is a basic human need. Homosexuals also need homes. They should not be denied that basic need by a democratic and caring society. [228 N.J. Super. at 381.]

The 1992 amendment to the LAD included AIDS and HIV infection as protected handicaps. N.J.S.A. 10:5-5(q). Thus, the law against discrimination of homosexuals provides a crucial and legitimate forum to show that gays and lesbians are fully functional members of society.

Currently, lesbians and gays have extensive experience in covering up their sexuality due to a legitimate fear of discrimination and harassment in the workplace. Many are not even aware of the 1992 amendment. Even those who are aware of the law are uncomfortable with instituting litigation with an untested law. Some feel that as with the civil rights movement, it will be a long process for this law to effectively change the atmosphere in the landscape of the New Jersey workplace. In the long run, it is believed that this law will help improve New Jersey's ability to attract and maintain skilled and educated workers.

To date, most New Jersey firms have not adopted policies with regard to sexual orientation harassment and/or discrimination. This is not true, however, in the New Jersey public sector. In 1991, an executive order provided that all executive branch departments and agencies must prohibit sexual orientation discrimination in matters relating to state employment. Executive Order No. 39, par. 1 (Aug. 16, 1991). Also, in 1990, the

New Jersey Rule of Professional Conduct, section 8.4(g), was amended to prohibit lawyers from engaging, in a professional capacity, in conduct involving sexual orientation-based discrimination.

Employers should set up safeguards to prevent litigation that could mean a high jury verdict against them for sexual orientation discrimination.

Employers would be well-advised to set up safeguards to minimize the negative impact that could potentially arise in high jury verdicts against

them. One possible measure would be redrafting employee handbooks to include sexual orientation or affection discrimination so that it would be clear to employees that the corporation regards gays and lesbians as a protected class. Another measure that companies could adopt is proper utilization of management training in areas including: hiring, interviewing, performance appraisal, privacy, sexual harassment, progressive discipline and other similar topics. Corporations also can provide all employees with sensitivity workshops. They can also develop effective complaint resolution procedures, which would allow a potentially discriminated employee with internal avenues of redress. The repercussions that result from the 1992 amendment of the LAD have yet to be felt. However, many agree that once the first case based on the amendment is decided, and is spread by the media, litigation in this area will expand rapidly. ■

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