Employment and Labor Law Section Newsletter

Vol. 1 No. 2 | Academy of Legal Studies in Business | August 1993

Amendment 2 Debate

As many of you are already aware, the Employment and Labor Law Section is proud to sponsor an unbelievable debate during the annual meeting in Colorado, focusing on Colorado's Amendment 2. The participants on the debate panel will be Will Perkins, from Colorado for Family Values, R. Terry Jackson, an attorney, Katherine Pease, from Ground Zero, and Greg Walta, an attorney who is sponsoring a compromise amendment. Their positions will be obvious as you read further. The debate will take place on **Thursday, August 19 at 1:30 p.m.**. Each participant will have the opportunity to present her or his perspective and then we will launch into a discussion/question and answer period. As the event will be publicized by its participants throughout the community, it is suggested that you provide Laura Pincus with written copies of any questions prior to the event in order to ensure that they are addressed. For more information, please call Laura at (312) 362-6569. The following articles were written by some of the participants in order to acquaint you with the history and issues surrounding Amendment 2.

■ ORIGINS OF AMENDMENT 2
by Will Perkins

In early 1991, a group of Colorado Springs citizens assembled the organization that would become Colorado for Family Values (CFV), and would culminate in the passage of Amendment 2.

The Colorado Springs Human Relations Commission, an unelected council-chartered panel, had deliberated an anti-discrimination ordinance endowing it with complete subpoena powers in enforcing minority status for homosexuals. CFV organized on several fronts, including a panel of speakers, and a massive 3x5 campaign targeting city council delegates. Soon, the Council not only forced the Commission to abandon the plan, but nearly abolished it in the process.

Despite the heartening victory, a far more sobering fact emerged: homosexuals seemed to have designated 1991 as their year for a staggering, statewide legislative onslaught. The State Legislature had been deliberating an "Ethnic Harassment Bill" with a clause making any speech negative to homosexuals a hate-crime. Homosexual activists had also planned a statewide "gay-rights" bill (essentially an imposition of the proposed Springs ordinance on the whole state) and a slew of AIDS-protective legislation. Remembering the time and energy our own local victory had cost us, we deliberated ways to keep the homosexuals' guerilla agenda from wearing family-values advocates down with countless city-by-city battles of attrition. For this Vietnam-era dilemma, a Reagan-era solution presented itself: we would erect a "high frontier" umbrella of protections to "shoot down" capricious enemy attacks as they occurred. A one-time "Strategic Defense" -- bearing indefinite long-terms benefits. Amendment 2.

Colorado media and homosexual leaders initially gave the effort little attention. After all, CFV seemed to them a provincial offspring of Colorado Springs conservatism, with no statewide figures attached. Secondly, they knew how many initiative efforts fall before the challenge of acquiring sufficient petition signatures (50,000 in Colorado). But this complacency turned to active opposition when CFV's first fund-raising letter appeared over the signature of Bill Armstrong, Colorado's respected retired Republican U.S. Senator, with the University of Colorado's popular football coach Bill McCartney as an advisory board member.

The first ambush came at a low-point in CFV's petition drive, with signatures lagging and prospects dim. Ludicrously attacked for mentioning his title in a CFV brochure, Bill took the microphone to defend himself and gave a bold statement of his personal beliefs, quoting the Bible's description of homosexuality as "abomination." The attack redoubled. But then a remarkable thing happened: despite nearly universal press bias against McCartney, a strong backlash emerged as Coloradans realized the attack on free-speech which was occurring. Within days, completed petition forms began streaming in. When the deadline came, we turned in 85,000 petition signatures -- a Colorado record for volunteer-conducted petition drives. Amendment 2 had reached the ballot.

The campaign against Amendment 2 took its cue -- and never deviated -- from the sanitized media manipulation advocated in "The Overhauling of Straight America"; a landmark magazine article (later the valuable book *After the Ball*) outlining a manipulative homosexual campaign to dupe America into affirming homosexuality. Television ads featured a respectable, white middle-aged couple calmly decrying the alleged plight of their homosexual son.

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Amendment 2 *cont.* . . .
CFV's campaign centered around a statewide education drive to acquaint voters with America's civil-rights laws. The tone of our campaign caught our opponents by surprise: spokesmen spoke calmly about fairness, discussed sophisticated legal issues, and refused to be drawn into protracted religious or moralistic discussions about homosexuality. (We did not, however, ignore the subject of homosexual behavior. Instead, we exposed it within the context of its inappropriateness within the civil-rights law.)

The "Yes on Amendment 2" campaign was conducted with no sponsored polling data (not for lack of desire, but lack of funds), with two full-time staff and an army of local and statewide volunteers. Also due to funding shortages, it was conducted without a major media campaign. When we did field television commercials late in the campaign, aggressive ten-second spots containing censored San Francisco gay-pride parade footage, nearly every station in Denver refused to run them. Since much of the state's population is centered around Denver, our opponents thought they had stalled our campaign outright. Once again, this media intransigence backfired - another free speech controversy ensued with Denver-area residents rising up to ask what the stations were afraid of. (Incidentally, scenes of the very same footage ran, without censorship and without objection, during Maria Shriver's worshipful, prime-time ode to homosexual rights.) What CFV was able to do with its limited resources was out-pamphleteer our opponents. During the last two weeks before the election, volunteers fanned out across Colorado to hand-deliver 750,000 copies of an eight-page tabloid packed with an extensive anthology of CFV's writings to date.

November third, with Amendment 2 up to eight points behind in most tracking polls and liberals exulting over Clinton's electoral landslide, Colorado's voters stunned the nation, and themselves, by voting 53.5% to 46.5% to deny homosexuals protected minority status. Today, despite a failed boycott, Hollywood's derision, a legal challenge and a hate campaign against their beautiful state, a clear majority of Coloradans still stand by their rational, considered decision to maintain homosexuals' equal rights, yet deny them "special rights." As polls continue to show, opposing homosexual militarism doesn't require hatred. Just a healthy dose of facts.

■ WHY AMENDMENT 2?
by R.T. "Terry" Jackson, Esq.

I am a relative newcomer to the debate over Amendment 2. Though I signed the petition to get the measure on the ballot and voted for it in November, 1992, I did not become publicly involved until this year.

My wife and I have lived in Colorado for more than 16 years, having moved from Topeka, Kansas, following my graduation from Washburn University Law School in December, 1976. In addition to my J.D. degree, I hold a B.S. degree in journalism from Kansas State University. I have a general practice providing legal services to businesses and individuals.

The campaign to enact Amendment 2 was begun in response to the fact that Boulder, Aspen and Denver had adopted ordinances giving homosexuals special protection from discrimination, other Colorado cities had considered similar measures, and a comparable bill had been brought before the state legislature. The campaign reflected a decision to take pre-emptive action to maintain the recent *status quo*, rather than to act defensively in response to numerous local attacks.

My support of Amendment 2 rests on five arguments, and I believe my views to be shared by the majority of Colorado voters. Before we consider those arguments, however, we would be well advised to touch on the use of the word "discrimination."

Many people within and without Colorado, have objected to the reference in Amendment 2 to "claim[s] of discrimination." In my estimation, such reference was necessitated by the traditional statutory scheme used to grant special protection or advantages to certain groups of people. The federal civil rights acts, the Americans with Disabilities Act, and the Colorado civil rights laws bestow such protection on various groups by prohibiting "discrimination" against them in certain situations. If Amendment 2 was to be effective at pre-empting such special protection, it had to be phrased in the same legal language.

Nevertheless, "discrimination" is one of those words loaded with sentiment. Most people don't want to think of themselves as discriminatory, nor do they want to be discriminated against by others. The opposition had tried to capitalize on this sentiment, even at the expense of accuracy, so I prefer to use the word "differentiate" instead.

My first reason for favoring Amendment 2 is that we in Colorado do not need another protected class of people. Every time we add a new criterion to the list of factors which may not be used to differentiate between people with respect to employment, housing, and public accommodation, we create a whole new industry which adds nothing to our national productivity in a global market. American authors write about it, American lawyers litigate it, American judges opine about it, and American business pays for it. And then the American people wonder why we can't compete with foreign enterprise.

Second, in order to grant any group of people protection from discrimination, government must limit or take away the rights of others to use their own criteria when differentiating between people. Historically, American civil governments (both state and federal) have been understandably reluctant to do this without substantial justification. In 14th Amendment civil rights litigation, the courts are required a showing that the complainant in a member of a "suspect class," i.e., a class which is characterized by some immutable trait or condition, the object of historic discrimination, and without economic or political power. Clearly, homosexuals do not meet these prerequisites for protection under normal analysis.

Third, sodomy is an inherently unsafe practice which, if tolerated by society at

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all, should be permitted only when engaged in privately by consenting adults. The high incidence of gay bowel syndrome, hepatitis, and AIDS among homosexuals is more than sufficient to justify heavy restrictions on the public practice and promotion of sodomy, and to warrant denial of any special rights to people simply because they engage in this behavior.

Fourth, sexuality is and should remain a private and personal matter. As recently as 1960, sodomy was illegal in all 50 United States. These laws were repealed or decriminalized largely because it was believed that government ought to stay out of people's bedrooms. Conversely, what goes on in people's bedrooms ought not to be displayed or made an issue in public. If this is not to be the case, then sodomy should be evaluated and dealt with like any other type of public health problem.

Fifth, homosexuality, and more precisely the practice of sodomy, is an affront to natural order. Humans have two genders for the self-evident purpose of procreation. Attempting to substitute sodomy for heterosexual relations is an assault on this order.

In conclusion, the battle over Amendment 2 is clearly an attempt by a vocal and politically powerful minority to impose their will on the majority. While "majority rule" provides no guarantee that the majority will make good rules, "minority rule" is no more inherently virtuous. In this case, the vote of the majority on Colorado to pre-emptively prevent the legitimizing of sodomy is consistent with (1) a reluctance to add to what could be an infinite list of protected classes, (2) an acceptance of traditional discrimination analysis, (3) a desire to withhold preferred status from a public health risk, (4) a determination to maintain the privacy we normally associate with sexual behavior, (5) a respect for, in the words of Thomas Jefferson, "the laws of nature and of nature's God."
[© 1993, R.T. "Terry" Jackson]

■ THE EFFECTS OF AMENDMENT 2

by Katherine Pease
Ground Zero
© 1992

On November 3, 1992, the United States entered a new era of debate over the progress of civil rights in this country. By a margin of 53% to 47%, Colorado Amendment 2 passed, amending the state constitution to allow private prejudice through state sanctification. Quite simply, Amendment 2 is an amendment to the Colorado constitution which allows for legal discrimination against a particular group of people, namely, gay men, lesbians, and bisexuals. Technically, **the amendment prohibits any city or local governmental agency from ever passing laws that protect gays, lesbians and bisexuals from discrimination based on their sexual orientation.**

Furthermore, the amendment nullifies previously existing laws which were democratically passed in the cities of Denver, Boulder, and Aspen. These three cities had civil rights ordinances which protect people from discrimination on the basis of many things: race, ethnicity, gender, religion, political affiliation, marital status, sexual orientation, etc... In violation of Colorado "Home Rule" laws, Amendment 2 invalidates the laws that these cities democratically enacted. Without some type of civil rights protection, discrimination in employment, housing and public accommodation is completely legal in Colorado. There is no federal protection, no state protection, and where there used to be local protection in three cities, now there is none.

Today, one of the most frequently asked questions is: How did Amendment 2 ever pass, when it is so blatantly discriminatory and constitutionally dubious? The proponents of Amendment 2, namely Coloradans for Family Values (CFV), led a campaign which misinformed the voters of the real issues behind the amendment. Through the rhetoric of "Special Rights," CFV persuaded Coloradans that if the Amendment did not pass, gays, lesbians and bisexuals would become recipients of affirmative action and quota protection legislation. This notion is particularly unbelievable in light of the fact that nowhere in the U.S. has a gay or lesbian leader of movement ever demanded enactment of affirmative action or quota laws for gays and lesbians.

Yet it is significant that CFV's campaign was carried out in the context of both an unhealthy economy, and 12 years of the Reagan/Bush administrations demanding the curtailment of affirmative action protection for people of color and women. The campaign played on the fears and ignorance of a population which heard campaign rhetoric that sounded identical to the platforms of the past 12 years in the Oval Office. There is no doubt that the majority of the voters were duped. Even the media referred to Amendment 2 as the "No Special Rights Amendment," or the "Gay Rights Amendment." There is nothing "special" about being able to file a claim of discrimination when you are fired from your job because of who you love.

Nor is there anything special about being able to file a claim of discrimination when you are fired from your job because of your race, or your gender, or your religion. The attack against gays, lesbians and bisexuals must be viewed, and indeed **is viewed** by many, as an attack against civil rights in general. Once personal discrimination is sanctified by the state in one arena, it can be sanctified by the state in all arenas.

It is undeniable that Amendment 2 is frighteningly reminiscent of the Jim Crow laws of the South, of the anti-suffragette laws of the turn of the century, of the anti-semitic actions of Nazi Germany, and of the contemporary attack against all civil rights led by the Religious Right.

Thus civil rights leaders across the county are protesting Colorado Amendment 2 and coming together to denounce discrimination against gays, lesbians, and bisexuals, and drawing attention to the similarities all minorities experience. Amendment 2 is nothing new. The group under fire this decade has changed, but the tactics have not. Stripped of all of the rhetoric, Amendment 2 is yet another way to prevent yet another group of people from obtaining equal rights.

Essential Versus Nonessential Job Functions Under the Americans With Disabilities Act

by
Charlie C. Jones
East Central University

On July 26, 1990, President George Bush signed into law the Americans with Disabilities Act of 1990. Title I of the Act seeks to remove barriers that prevent qualified individuals with disabilities from enjoying the same employment opportunities that are available to persons without disabilities. To be a "qualified individual with a disability" and, therefore, protected under Title I, the disabled person must satisfy the necessary skill, experience, education, and other job-related requirements of the job such individual holds or desires, and be able to perform the essential functions of that job with or without reasonable accommodation.

Use of the concept "qualified individual with a disability," with its reference to essential job functions, is a significant departure from the concept of "otherwise qualified" under section 503 of the Rehabilitation Act of 1973 which does not include an essential job function limitation. Congress intended to make it clear by including such a limitation under the ADA that an employer may reject individuals who would not be qualified even if provided with a reasonable accommodation. Moreover, an employer is free under the Act to select the most qualified individual available, so long as that decision is unrelated to the existence or consequence of a disability.

The EEOC advises that any inquiry into whether a particular function is essential should first focus on whether the employer actually requires current or prior employees in the position to perform these functions. For example, an employer may assert in a job description or elsewhere that driving is an essential function of a particular job. However, if the employer has never required any employee in that position to drive as part of his or her job, this would indicate that driving is not actually an essential function of the job. Conversely, a job description might omit a function that is regularly performed by incumbents and is expected of all persons in the position. The fact that it was not included in the job description does not automatically eliminate it from being an essential function since it is regularly performed and expected of all persons in the position.

If an incumbent or a predecessor in a position is or has been required to perform a function, then the EEOC advises that the next step is to inquire whether removing the function would fundamentally alter the position. A job function may be considered essential under this second step for any of several reasons, including one or more of the following three reasons. First, a function may be essential because the reason the job exists is to perform the function. For example, an employer may hire a chauffeur for its top executives to use. In this situation, the ability to drive would be an essential function since this is the only reason the job exists.

Second, a function may be essential because of the limited number of available employees among whom the performance of that job function can be distributed. For example, assume that a small retail business can afford to employ only one person and, therefore, this person must be able to open-up, stock, sell, check-out, close, and deposit the daily receipts. If it is necessary to be able to drive so that the daily deposit can by made, driving would be an essential function of this job since there is no one else who can perform this task. Conversely, there may be periods of high volume that might require that each employee be able to perform a multitude of tasks. The EEOC recognized that where there is an ebb and flow of work, employers are more limited in reorganizing their procedures or job functions during peak periods, and infrequently used skills may be essential.

Third, the function may be highly specialized so that the person is hired for his or her expertise or ability to perform that particular function. Although it may appear similar to the first reason that a function may be essential, this third factor is actually different because it centers on characteristics of the person hired for the job as opposed to the reason why the job exists. For example, if an employer needed someone to perform the functions of driving its top executives where they needed to go, it could hire any person with a valid chauffeurs license. But, if the company needed someone to perform the function of driving their "Indy 500" race car that they used for promotional purposes, the person hired would have to have the ability to drive such a car.

Whether removal of a function would fundamentally alter a job and, therefore, be considered essential under this second step is a determination that must be made on a case-by-case basis. In determining whether a particular function is essential, all relevant evidence should be considered. Evidence such as the employer's judgement as to which functions are essential, any written job descriptions prepared before advertisement of the job opening or interviewing of applicants for the job, and the amount of time spent on the job performing the function may help in this determination. Furthermore, evidence such as the consequences of not requiring the person holding the job to perform the function, terms of any collective bargaining agreement that covers that particular job and its functions, work experience of past employees in the job, and/or current work experience of employees in similar jobs also may help in this determination.

Woman's Work: Equality in Form and Fact

by
Brian G. Sullivan
Western Kentucky University

(Editor's note: The following is a summary of a paper previously presented.)

The paper presented was a work in progress that distinguished between legal equality in the formal treatment of sexes and the workplace reality of significant disparity in actual status. After almost three decades of statutory mandates most occupations have remained gender segregated or stratified. This paper's premise is that the customary legal response has been on gender differences rather than gender disadvantage. This, coupled with an individualistic approach to remedies and enforcement, has provided an inadequate theoretical base for gender desegregation policies.

Unlike a neoclassical approach, the paper favors the strengthening of affirmative action by shifting focus from an individualistic rights approach toward an analysis of structural factors that contribute to significant gender disparity. The paper holds that institutional forces that have contributed most toward gender disadvantage have not been confronted by legal strategies. Our current antidiscrimination mandate offers only a limited response to occupational inequality. If the law is to become more effective, a different analytical focus will be required. Currently the law fails to address structural barriers that inhibit occupational equality.

In order to reach occupational equity a social policy will be required to extend beyond affirmative action in order to respond to women's subordinate workforce status. In additions to current mandates, a new focus is required to provide a framework in which to resolve these structural barriers. The new legal framework, in addition to encouraging flexible work schedules and child care programs, would focus on vocational education and job training programs as well as the creation of financial incentives to challenge occupational segregation in recruitment practices and promotional ladders. The most important structural modification would be toward welfare programs in order to create a separate system of government supported "fringe benefits" for all workers.

Under the current strategies, the upper echelons of the socio-economic system can now employ women and other minorities. The lower echelon can employ fewer full-time workers of any description and offer them fewer benefits. To overcome this, occupational equity issues must be conceptualized within a broad political framework which seeks to better accommodate the realities of public and private life. The framework must go beyond the law's traditional individualistic approach to remedies and begin to foster a strategy that would contribute to a structural solution. An expanded version of this paper will be presented at the ALSB Annual Meeting in Colorado Springs.

Genetic Testing in the Workplace

by
Eileen Kelly
Ithaca College

Tremendous advances in genetic research during the past decade, particularly in the area of recombinant DNA, have led to dramatic improvements in the diagnosis and understanding of a significant number of human diseases. As a result of these technological breakthroughs, a growing number of employers are performing genetic testing on applicants and employees. Genetic testing involves the use of various medical techniques to examine workers for particular inherited genetic traits or for environmentally induced changes in the genetic material of certain cells. Genetic testing can be subcategorized into two basic forms: genetic monitoring and genetic screening. In genetic monitoring, groups of workers are examined on a periodic basis, typically through blood samples, to determine whether exposure to certain workplace toxins has caused genetic damage to the cell structure. Genetic screening, on the other hand, is a one-time testing procedure. Its purpose is to determine whether an individual retains particular genetic traits, regardless of occupational exposure to hazardous agents.

Employers engaged in genetic testing attempt to determine not only which individuals are currently unable to perform the job, but also which have an increased risk of medical problems in the future. The ability to identify these individuals in advance, could conceivably save companies considerable expense in terms of workers' compensation, health insurance, sick leave, absenteeism, and turnover.

A number of federal and state laws banning discrimination may provide protection to workers subjected to genetic discrimination. Many genetic diseases are distributed unequally across groups within legally protected classes, e.g. sickle cell anemia among blacks and Tay-Sachs disease among Ashkenazi Jews. Thus, genetic tests often have clear effects along the lines of

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Genetic *cont.* . . .
race and national origin. If an individual falls into one of the protected classes and is denied an employment opportunity because of a genetic defect, the individual may raise a Title VII claim.

Victims of genetic discrimination may also be protected under the Rehabilitation Act of 1973 of the Americans with Disabilities Act, both of which prohibit employment discrimination on the basis of handicap. Like the Rehabilitation Act, the ADA defines a "qualified" individual as one who, with or without reasonable accommodation, is capable of performing the essential components of the job at the time of the employment decision. Potential disability is not a factor. The ADA expressly prohibits the use of genetic tests prior to the offering of a job. However, the ADA does permit a pre-employment medical examination to be performed after the job offer has been made. Conceivably, a genetic test could be part of that examination. However, the results of the genetic test may not be used to exclude an individual from the job unless the exclusion is shown to be job related, consistent with business necessity, and not amenable to reasonable accommodation. Current employees are similarly protected under the ADA from genetic testing.

All fifty states have laws prohibiting discrimination on the basis of handicapped status. In many of these states, the definition of handicapped is broad enough to cover individual with a genetic predisposition. Four states currently have laws prohibiting discrimination based on genetic traits. A growing number of states are passing laws specifically regulating the use of genetic information by employers or insurers.

Tax Abatement Agreements for Employers

by
Brad Reid
Abilene Christian University

Plant closings are frequently difficult to challenge. The traditional judicial attitude is illustrated in *Local 1330, United Steel Workers of America v. United States Steel Corp.*, 631 F.2d 1264 (6th Cir. 1980) in which Chief Judge Edwards wrote for the court:

> This court has examined these allegations with care and with great sympathy for the community interest reflected therein. Our problem in dealing with plaintiffs' ... course of action one of authority. Neither in brief nor in oral argument have plaintiffs pointed to any constitutional provision contained in either the Constitution of the United States or the Constitution of the State of Ohio, nor any law enacted by the United States Congress or the Legislature of Ohio, nor any case decided by the courts of either of these jurisdictions which would convey authority to this court to require the United States Steel to continue operations in Youngstown which its officers and Board of Directors had decided to discontinue on the basis of unprofitability.

Texas is one state that has responded to this challenge with legislation. The Texas Tax Code allows municipalities to enter into contractual agreements for tax abatement and improvements "to streets, sidewalks, and utility services or facilities associated with the property." V.T.C.A., Tax Code Sec. 312.205. These agreements may be "for a period not to exceed ten years." V.T.C.A., Tax Code Sec. 312.204. The Texas Tax Code also allows such agreements by other taxing entities.

States should consider legislation that will allow a contractual basis for claims against employers who have received special treatment by government with the understanding that the company in return would provide jobs to the community. It is a reasonable requirement that taxpayers either receive an assurance of jobs or the employer who closes or reduces the employment at a facility return some portion of the public investment.

Discussion Group Notice

Again this year, members of the Feminist Legal Studies section will hold a self-study discussion group on feminist readings. Dawn Bennet-Alexander, Ken Schneyer and Renee Culverhouse will serve as discussion leaders for what promises to be a provocative session. All ALSB members are invited and are encouraged to read the following articles before the session: Janet Halley, *The Politics of the Closet: Towards Equal Protection for Gay, Lesbian and Bisexual Identity*, 36 UCLA L. Rev. 915 (1989) and Adrienne Rich, *Compulsory Heterosexuality and Lesbian Experience*, (This article is an oft-cited piece that originally appeared in 5 SIGNS 631 (1980); reprinted in Rich, *Blood, Bread and Poetry*.)

A man coming home from his job relaxes, puts on his slippers and turns on the radio. Married women with hungry children waiting and with a house to tidy up are not so lucky, and they show it in their work. A woman might cry under most stresses which cause her male fellow worker to curse. (1943)

The physical organization, the natural responsibilities, and the moral sensibility of woman, prove conclusively that her labors should be only of a domestic nature. (1836)

Boxed quotes used with permission from Kritzberg, Joan, "Social and Legal Control of Women's Work," unpublished manuscript, and are provided as food for thought and awareness regarding America's employment history, and do not necessarily express the views of the editors.

March on Washington Solely for *Human* Rights

by
Dawn Bennet-Alexander
University of Georgia

(Editor's Note: This article originally appeared as a Letter to the Editor in the *Red and Black*, University of Georgia, and is reprinted here at the request of Laura Pincus, Co-Editor-in-Chief of this Newsletter.)

As an attendee who saw first hand the recent March on Washington for Gay, Lesbian and Bi Equal Rights and Liberation, I was extremely disappointed with the coverage in the *Red and Black's* article. I was even more disappointed when I learned that the *Red and Black* actually sent a reporter (and a photographer?) to cover the march, so they were not limited to the information coming across the wire services. To look at the pictures chosen to represent the flavor of the march, the march appeared alternately as some sort of "love-in" or angry lopsided face-off between marchers and march protesters. What a travesty to have minimized the efforts of so very many people and reduced this important and unprecedented gathering to such a ridiculous and unrepresentative scenario. I can only think that the paper's depictions were either due to insensitivity and ignorance, or the wish to pander to sensationalism. The fight for basic civil rights for gays and lesbians is much too serious to be trivialized.

It is not about sex. It is not about sensationalism. It is not about hysteria. It is not about special privileges. The reason I volunteered my time in helping with the march is because it is about millions of the productive, decent, hardworking citizens you know who daily go about their lives quietly, hiding a part of themselves from their families, their friends and their co-workers out of fear of not being accepted for who they are. It is about the loss of job productivity, the angst, the loss of friendship and the loss of closeness that pretending to be someone other than who you are produces - a loss for us all. The truth is much less dramatic, much less sensational, and much more compelling.

You come into contact with us every day and don't realize it. We are millions of people who worry about the same things everyone does: interest rates on mortgages, how to keep our kids in check, the economy, war, stubborn crabgrass and whether the car will start.

Boring isn't it? Makes much less sensational copy for a newspaper, doesn't it? Who wants to do a story about 1.1 million people who look just like every other part of society marching on Washington for basic civil rights like job protection and the right to continue to serve honorably in the military? It is far more sensational, and sells more papers, to feed the old stereotypes which tug at the deeply rooted ignorance and fear victimizing us all.

But it is irresponsible if one is a journalist whose job is to accurately report events to those who were not present and wish to find out what occurred. It is also irresponsible to continue to contribute to negative perceptions of a group of people who, as a result, may be physically or emotionally harmed by others because of that ignorant perception. Gay bashing is furthered by such biased reporting. It is also an injustice to the readers who trust you to be responsible, accurate purveyors of the truth, so that they can have solid information upon which to base decisions. These are people's lives we are dealing with here. It cannot be reduced to a picture of two males kissing, any more than anyone's life can be reduced to that. While I am sure the pictures were real, they were such an insignificant part of the march and its related events, that it does the readers an injustice to imply that this is what the march was about or representative of what went on.

While in D.C., I participated in the march's lobby days in Congress. As I sat in one Congressman's office with about 20 other gays and lesbians of color and lobbied for the lifting of the military ban on gays and basic civil rights to protect us from, among other things, unwarranted job and housing discrimination, I was overcome with emotion. Thirty years ago I participated in the 1963 March on Washington at which the Rev. Dr. Martin Luther King Jr. delivered his famous "I Have a Dream" speech. I was only 12-years-old at the time, but I vividly remember how strange it felt to have to do something like have all these people come from all over the world to march in order to convince a government that we were human beings worthy of having basic civil rights like job protection and education. Here I was 30 years later, sitting in a congressman's office along with a room full of other bright, capable, accomplished human beings again, feeling like I was on my knees begging for basic civil rights. Here I was, again, trying to convince a national legislator that I was just another human being worthy of the promise of liberty and justice for all, when I am as much of a person as anyone else on this earth. How in the world can it make sense to discriminate against a person based upon who they feel drawn to emotionally. How significant is who you went to bed with last night to your ability to perform your job the next morning? As unsensational as it is, and as much as it seems to go against what we've been taught all our lives, sex us such a minimal issue in this fight for human rights as to be a non-issue, and I refuse to expend precious time and energy on it. Anyone who attempts to make it more is simply uninformed or mean-spirited. As I sat there on Capitol Hill looking at the faces of these people and thinking about this, the weight of the ridiculousness of the situation was crushing. Having just visited the U.S. Holocaust Museum the day before, I was painfully aware of what denying people their basic civil rights as human beings can lead to when taken to extremes.

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For it is not a question of her "right" to her job; the question is even more fundamental than that. Let's face it; a man's very life is his job; he feels it is his reason for being. A man needs a job more than he needs a wife, whereas what woman, if she were offered a choice, would take the job and throw away the man? (1944)

March *cont.* . . .
Many who will wonder why I have chosen to write this piece. It isn't really a choice. I cannot say I believe in human rights for all, then watch as a newspaper portrays events in ways which would help to deny those rights to a significant segment of the population. I cannot lecture my students about truth and integrity, and not live those lessons myself. It is a commitment which I am compelled to honor.

There is a story from the march that still sends chills down my spine every time I hear it. One of the gay men's choruses which came to the march was riding the Metro subway system to the march and spontaneously broke into song along the way. A couple with a young son was in the car with them. The young boy asked his father what the men were doing. His father looked at the sea of faces singing earnestly in the subway car, turned to his son and said, simply: "They're singing for their freedom." Not one among them could have given a better answer. It does not help this cause to have our accomplishments trivialized and sensationalized by irresponsible media coverage.

If you would like to write an article for the newsletter, or even a blurb which discusses your article, please send or fax it to Laura B. Pincus, Department of Management, DePaul University, 25 E. Jackson Blvd., Chicago, IL 60604. Phone (312) 362-6569, FAX (312) 362-6973

Employment and Labor Law Section Newsletter

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This Newsletter is made possible, in part, by grants from Eastern New Mexico University and its College of Business.

Recent Developments in Employment Law

by
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■ SEXUAL HARRASSMENT (Burden of Proof)

On March 1, 1993, the Supreme Court granted the petition for a writ of certiorari in *Harris v. Forklift Systems.* (Nos. 91-5301, 91-5871, 91-5822 (6th Cir. Sept. 17, 1992)). The question presented to the Court is whether "a plaintiff in a sexual harassment case [is] also required to prove, in order to prevail, that she suffered severe psychological injury when the Trial Court has found that she was offended by conduct that would have offended a reasonable victim in the position of the plaintiff." (Petition for Writ of Certiorari, *Teresa Harris v. Forklift Systems, Inc.*, U.S.Sup.Ct. Docket No. 92-1168, at i).

Teresa Harris was a rental manager for the defendant, Forklift Systems, Inc., for nearly two and a half years. After her resignation, she filed a Title VII claim for sex discrimination and constructive discharge, alleging that sex-based, derogatory behavior directed at her and other women in her workplace, by Charles Hardy, the president of Forklift Systems, created a hostile workplace. (*Harris v. Forklift Systems*, No. 3:89-0557 (M.D. Tenn. Nov. 27, 1990, slip op. at _)). The trial court found that Harris "was the object of a continuing pattern of sex-based derogatory conduct from Hardy[.]" (*Id.* at _). This included both crude remarks, such as suggestions that Harris must have promised sexual favors to a customer to acquire a particular account and that her raise be negotiated "at the Holiday Inn," and crude behavior, such as asking her to retrieve coins from his front pocket and commenting on the attire of female employees after asking them to pick up objects he had intentionally thrown on the ground. (*Id.* at _).

A plaintiff in a sex discrimination case can prevail by showing sexual harassment. Actionable sexual harassment can be proved by showing that the complained-of conduct either created a hostile work environment (*Meritor Savings Bank v. Vinson*, 477 U.S. 57, 106 S.Ct. 2399, 91 L.Ed.2d 49 (1986) at _), or amounted to a *quid pro quo* arrangement (29 C.F.R. § 1604.11 (1980)).

Two different standards have emerged from the Courts of Appeals as to what elements a employee must prove in order to prevail, in a hostile workplace cause of action. In the Sixth Circuit, an employee is required to prove that: "(1) the employee was a member of a protected class; (2) the employee was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature; (3) the harassment complained-of was based on sex; (4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiffs' work performance in creating an intimidating, hostile or offensive working environment *that affected seriously the psychological well-being of the plaintiff*; and, (5) the existence of *respondeat superior* liability." (*Rabidue v. Osceola Refining Co.*, 805 F.2d 611 (6th Cir. 1986), at 619-620. Emphasis added.) Two other circuits have adopted some form of 'injury' requirement similar to the one in the fourth element of the *Rabidue* test. (*See Scott v. Sears, Roebuck and Co.*, 798 F.2d 210 (7th Cir. 1986) and *Brooms v. Regal Tube*, 830 F.2d 1554 (11th Cir. 1987)).

In the Third, Eighth and Ninth Circuits, however, no proof of psychological injury is required. (*See Andrews v. City of Philadelphia*, 895 F.2d 1469 (3rd Cir. 1990); *Burns v. McGregor Electronic Industries, Inc.*, 955 F.2d 559 (8th Cir. 1992); and, *Ellison v. Brady*, 924 F.2d 872 (9th Cir. 1991)).

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Proof of injury is neither required nor textually precluded by EEOC Policy Guidance. "[I]t is sufficient for the charging party to show that the harassment was unwelcome and that it would have substantially affected the working environment of a reasonable person." (*Equal Employment Opportunity Commission Policy Guidance on Current Issues of Sexual Harassment*). However, the proof-of-injury requirement does go beyond the standard set in the EEOC's Guidelines on Discrimination Based on Sex, which provide that unwelcome verbal or physical conduct of a sexual nature constitutes a violation of section 703 of Title VII when "such conduct has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile or offensive working environment." (29 CFR §1604.11(a) (1980)). The language of the guideline is virtually identical to the fourth element of the *Rabidue* test, except for *Rabidue*'s additional requirement that the plaintiff prove that the working environment "affected seriously the psychological well-being of the plaintiff." (*Rabidue* at _).

Although the Supreme Court did not elaborate the components of a proof of a sexually hostile working environment in *Meritor*, it did set forth a guiding principle. In *Meritor*, the Court endorsed the EEOC's conclusion that "Title VII affords employees the right to work in an environment free from *discriminatory* intimidation, ridicule, and insult" as "fully consistent with [] the existing case law," (*Meritor*, at 65 (emphasis supplied)). Thus, *Meritor* does not require that the "intimidation, ridicule, and insult" be *injurious*, only that it be *discriminatory*. And, discriminatory means acting on the basis of some difference. The trial court, in *Harris*, was clear that Hardy's persistent, sexually oriented behavior, which it characterized, variously, as insensitive, denigrating and offensive, was directed at the women in the office, not the men. (*Harris*, slip op. at _ [writ app. at A-9]). Hardy selected his targets on the basis of the difference between their gender and his.

The implication of the injury requirement is that an employer could legally subject an employee to the continual indignities of a persistently insulting, but slightly non-actionable work environment, so long as no 'injury' is inflicted. This is precisely the situation the Supreme Court sought to identify as unacceptable when, in *Meritor*, it cited with approval from *Henson v. Dundee*, 682 F.2d 897, 902 (1982): "Surely, a requirement that a man or woman run a gauntlet of sexual abuse in return for the privilege of being allowed to work and make a living can be as demeaning and disconcerting as the harshest of racial epithets."

The decision in *Harris* will resolve this split among the circuits as to whether a plaintiff must show injury in order to meet the burden of proof in a hostile work environment case. Upholding the injury requirement would appear to alter *Meritor* and undermine the position of the EEOC. On May 24, 1993, the Supreme Court granted the motion of the Acting Solicitor General for leave to participate in oral argument as *amicus curiae* and for divided argument. (Supreme Court Order List, May 24, 1993). The Acting Solicitor General advocates the position asserted by Ms. Harris.

■ AGE DISCRIMINATION

Walter Biggens sued his former employer, alleging violations of the Age Discrimination in Employment Act of 1967 (ADEA), the Employment Retirement Income Security Act of 1974 (ERISA) and state law. He was terminated just a few weeks prior to his tenth anniversary, when his pension benefits would have vested. He was 62 years old. In his ADEA claim, he asserted that his termination violated the ADEA since his age was the determinative factor in the termination decision. He also asserted that the dismissal constituted a "willful" violation of the ADEA. The court of appeals affirmed the trial court's finding of ADEA and ERISA violations and, reversing the trial court, found that the ADEA violation was willful.

The Supreme Court addressed both assertions in *Hazen Paper Co. v. Biggens*, 507 U.S. __, 123 L.Ed.2d 338, 113 S.Ct. (1993). On the issue of whether an employer's interference with the vesting of pension benefits violates the ADEA, the Court held "that there is no disparate treatment under the ADEA when the factor motivating the employer is some feature other than the employee's age." (*Id.*, at 346). Noting that appellate courts have inconsistently used employee traits other than age, but which are "empirically correlated with age" (*Id.*, at 345) such as years of service, in evaluating ADEA violations, the Court also stated that "[b]ecause age and years of service are analytically distinct, an employer can take account of one while ignoring the other, and thus it is incorrect to say that a decision based on years of service is *necessarily* 'age-based.'" (*Id.*, at 347, emphasis added). The Court was careful to point out, however, that pension status *may* be a proxy for age, and age discrimination might result, if the employer "suppose[s] a correlation between the two factors and act[s] accordingly." (*Id.*, at 348).

On the issue of "willfulness," the Court held that the rule from *Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111 (1985) applies to disparate treatment cases under the ADEA. An employer that has willfully violated the ADEA can be liable for liquidated damages. Willfulness is present when the employer either "knew or showed reckless disregard for the matter of whether its conduct was prohibited by the ADEA." (*Thurston*, at 126). Simple use of age as a factor in an employment decision does not rise to the level of willfulness. The employer must either know that such use violates the Act or recklessly disregard that possibility.

There are two interesting peripheral issues in this case. First, the Court emphasized that this was a disparate treatment case and that it has never held that *disparate impact* liability can arise under the ADEA. Justice Kennedy devoted his short concurrence to underscoring this point and he noted that "there are substantial argument that it is improper to carry over disparate impact analysis from Title VII to the ADEA." (*Id.*, at 352).

Then, as the Court was pointing out that pension interference, without more, does not violate the ADEA, it also noted that the

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