



REPORT ON LEGISLATION

COMMITTEE ON SEX AND LAW

S. 782
A. 811

Sen. Goodman
M. Of A. Sanders

AN ACT to amend the executive law, the civil rights law and the education law, in relation to prohibiting discrimination based on sexual orientation.

THIS BILL IS APPROVED

The Association of the Bar of the City of New York commends the State Assembly for passing Assembly Bill 811 and urges the State Senate to pass Senate Bill 782. These bills (collectively, the "Bill") amend provisions of the New York State Executive Law¹, Civil Rights Law², and Education Law³ to prohibit discrimination based on sexual orientation in the same areas in which it already prohibits discrimination on the basis of age, race, creed, color, national origin, sex, age, disability or marital status.

Currently, in New York State, it is perfectly legal for an employer to fire an employee because the employee is gay or is perceived to be gay⁴. In New York State, it is perfectly legal to deny housing, credit, an educational opportunity or even service at a restaurant to a lesbian or a person thought to be lesbian.

Discrimination on the basis of characteristics that are unrelated to individual merit or ability is harmful both to society as a whole and to those who are irrationally singled out for adverse treatment. The State of New York must not permit its citizens to be victimized by the irrationality of prejudice based on sexual orientation. Passage of the Bill is essential to effectuate the Fourteenth Amendment's promise

¹ N.Y. Exec. Law §§291, 292, 295, 296, and 296-a (McKinney's 1993).

² N.Y. Civ. Rights Law §40-c (McKinney's 1992).

³ N.Y. Educ. Law §31 (McKinney's 1988).

⁴ The use herein of any of the term "gay," "lesbian," bisexual," or "homosexual" is intended to include each of the other such terms, except where the context dictates otherwise.

of equal protection under the law. By prohibiting the use of sexual orientation as a basis for denying such things as employment, housing, access to education, public businesses and credit, the Bill provides an important means by which the State of New York can prevent such pernicious discrimination and provide an appropriate remedy when it occurs.

New York Currently Provides No Protection Against Sexual Orientation Discrimination

Despite the devastating effects of discrimination against gays and lesbians, New York State law currently provides no protection for the victims of such discrimination. Neither the State Constitution nor the Human Rights Law prohibits sexual orientation discrimination as it protects against discrimination faced by other minorities. Without specific language prohibiting discrimination against homosexuals, New York courts have declined to extend to victims of discrimination on the basis of sexual orientation the same protections extended by the State and the Human Rights Law to victims of discrimination based on the enumerated categories such as race and sex.⁵

As a result, existing New York law fails to prevent intolerable injustices. For example, New York State law does not protect employees who are fired merely because they are gay or lesbian. Similarly, it does not prevent a landlord from refusing to rent an apartment to a gay man or lesbian. It permits restaurants, hotels, bars, theaters, stores and other accommodations to refuse service to homosexual customers with impunity.

⁵ See *Chin v. Kelly*, 187 A.D.2d 128, 592 N.Y.S.2d 797 (1993). See also *Petri v. Bank of New York, Inc.*, 582 N.Y.S.2d 608 (Sup. Ct. N.Y. Co. 1992).

Gays and Lesbians are the Victims of Pernicious Discrimination.

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Gays and Lesbians are the Victims of Pernicious Discrimination.

Gays and lesbians in New York as elsewhere have experienced a history of discrimination which continues have a direct impact on the most fundamental aspects of their lives.⁶ They face, among other things, denial of employment, housing, educational opportunities and access to public businesses simply because of their sexual orientation. Justice Brennan once wrote in a case in which a teacher was fired from her job because she was a lesbian:

homosexuals constitute a significant and insular minority of this country's population. Because 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. Moreover, homosexuals have historically been the object of pernicious and sustained hostility, and it is fair to say that discrimination against homosexuals is "likely to reflect deep-seated prejudice rather than...rationality." *Rowland v. Mad River Local School*

⁶ Feidblum, C., *The Pursuit of Social and Political Equality: Sexual Orientation, Morality, and the Law: Devlin Revisited*, 57 U. Pitt. L. Rev. 237m 272 (Winter 1996), see also *The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification*, Harv. L. Rev. 1285, 1302 (April 1985).

District, Montgomery County, Ohio 470 U.S. 1009, 1377 (1985) (Brennan, J. dissenting from denial of *certiorari*) (citing *Plyler v. Doe*, 457 U.S. 202, 216 (1982))

The tragic death of Matthew Shepard, the 21-year old gay student, who was beaten, tied to a rail and left in freezing temperatures in a Wyoming field in October 1998, illustrates the extreme animosity that homosexuals can face. The National Coalition of Anti-Violence Programs reports that documented incidents of anti-homosexual violence continue to rise. Such incidents increased by 6% in 1996 and by 2% in 1997.⁷ In New York City, the number of such incidents increased by 14% between 1996 and 1997.⁸

Employment discrimination is one of the most frequently encountered forms of sexual orientation discrimination. Gay men and lesbians are denied employment, harassed on the job, denied promotions and lose their jobs because of their sexual orientation.⁹ This form of discrimination is deeply rooted in our society. In the 1950s, the Senate Investigation Subcommittee recommended that all homosexuals be dismissed from government employment¹⁰. In 1953, President Eisenhower issued Executive Order 10450 calling for the dismissal of all government employees who were homosexual.¹¹ It is estimated that from 1947 to 1950, 1,700 people were denied employment by the federal government because of their alleged homosexuality.¹²

⁷ National Coalition of Anti-Violence Programs, *Anti-Lesbian, Gay, Bisexual and Transgendered Violence in 1997* (viewed April 4, 1999) <<http://www.avp.org/ncavp/1997/summary.htm>>

⁸ *Id.*

⁹ M.V. Lee Badgett, *Income Inflation, the Myth of Affluence among Gay, Lesbian, and Bisexual Americans* (December 3, 1998) <<http://www.nglcf.org/pub.html#best>>

¹⁰ Patricia Cain, *Litigating for Lesbian and Gay Rights, a Legal History*, 79 Va. L. Rev. 1551, 1565 (1993).

¹¹ *Id.*

¹² *Development in the Law - Sexual Orientation and the Law*, 102 Harv. L. Rev. 1508, 1556 (1989).

Professor M.V. Lee Badgett of the University of Massachusetts at Amherst has found that studies comparing gay and heterosexual workers with the same qualifications often find that gay workers earn less than heterosexuals as a result of discrimination.¹³ Badgett has noted that "[b]etween 1/4 and 2/3 of lesbian, gay, and bisexual people report experiences of losing jobs or promotions because of their sexual orientation."¹⁴ The National Commission on Employment Policy has found that 42,000 gay and lesbian workers are dismissed each year because of their sexual orientation.¹⁵

Examples of sexual orientation discrimination abound. Jeffrey Blain, an employee of a manufacturing company, had a good work record and received a 37.5% raise during his first six months of employment. After being fired, he took his employer to court claiming that he was terminated because he was gay. After the judge instructed the jury that an employee is not wrongfully terminated if he is fired solely for being a homosexual, Blain lost his case.¹⁶ Robin Shahar was an honor student from Emory Law School who had accepted a job with the Georgia Attorney General's Office. The job offer was withdrawn when the Attorney General discovered that Shahar had participated in a wedding ceremony with her lesbian partner. Georgia, like New York, has no statute protecting its residents from discrimination on the basis of sexual orientation. Shahar, like Blain, lost her case.¹⁷

Incidents of sexual orientation discrimination occur frequently in New York, as they do elsewhere.

¹³ M.V. Lee Badgett, *Vulnerability in the Workplace: Evidence of Anti-Gay Discrimination*, *Angles*, Sept. 1997, at 1.

¹⁴ *Id.*

¹⁵ See Kovach, K.A., *ENDA Promises to Ban Employment Discrimination for Gays*, *Personnel Journal*, August 1995.

¹⁶ *Blain v. Golden State Container, Inc.*, No. CV 94-0102 (Ariz. Ct. App. May 5, 1994).

¹⁷ *Shahar v. Bowers*, 114 F.3d 1097 (11th Cir. 1997).

The New York press recently has reported the disturbing details of cases in which individuals charge that they were fired by their employers because of their sexual orientation. *New York Newsday* reports that Jeff Mandel, a New York computer salesman, charges that, despite outstanding evaluations from his supervisor, he was harassed at the job, was told by supervisors that he must remove a photograph of him and his partner from his desk, was advised that his partner should drop him off 100 yards from the company entrance for appearance reasons, and eventually was fired because he was gay¹⁸. Similarly, *New York* magazine reports that Joe Daniel, after working at an investment bank in New York City for five years, charges that he was terminated after his employer learned that he was gay¹⁹. No matter what the merits of these charges, neither of these individuals would have a claim under the New York State Human Rights Law.

The widely reported mistreatment of public high school student Jamie Nabozny in Wisconsin demonstrates the need for legislation to protect homosexuals from discrimination in education²⁰. Nabozny was subjected to verbal and physical abuse by fellow students while at school and was repeatedly struck and spit upon because he is gay. Nabozny asked school officials to protect him and punish his assailants to no avail. School administrators actually mocked Nabozny's predicament. The court described one of Nabozny's experiences as follows:

The boys carried out a mock rape [on Nabozny] while twenty other students looked on and laughed. Nabozny escaped and fled to [principal] Podlesny's office. Podlesny's alleged response is somewhat astonishing; she said that "boys will be boys" and told Nabozny that if he was

¹⁸ Richard J. Dalton, Jr., *Man Says He Was Fired For being Gay, With No Bias Law For Support, He Cites CA's Company Policy*, *N.Y. Newsday*, December 31, 1998, at A56.

¹⁹ Alan Deutschman, *Wall Street's Secret Society*, New York, March 29, 1999.

²⁰ *Nabozny v. Podlesny*, 92 F.3d 446 (7th Cir. 1996).

"going to be so openly gay," he should "expect" such behavior from his fellow students. In the wake of Podlesny's comments, Nabozny ran home. The next day, Nabozny was forced to speak with a counselor, not because he was subjected to a mock rape in a classroom, but because he left the school without obtaining the proper permission. No action was taken against the students involved.²¹

Ultimately, the harassment became so unbearable that Nabozny dropped out of school and twice attempted suicide.²²

Nabozny's experience, while extreme, was certainly not isolated. According to the 1997 Youth Risk Behavior Study conducted by the Massachusetts Department of Education, 22% of gay, lesbian and bisexual students had skipped school in the preceding month because they felt unsafe.²³ Other research indicates that the average high school student hears anti-gay epithets 25 times a day and that teachers who hear these slurs fail to respond 97% of the time.²⁴ The National Coalition of Anti-Violence Programs reports that anti-gay violence at schools and colleges rose 34% in 1997 and that the number of victims under the age of 18 rose by 10% in 1997.²⁵

Many Other Jurisdictions and Private Entities Already Prohibit Sexual Orientation Discrimination

Discrimination on the basis of sexual orientation already has been banned by many other states and

²¹ *Id.* at 451.

²² *Id.* at 452.

²³ Gay, Lesbian & Straight Education Network, *What's It Like to be Young and Gay in American Schools Today* (viewed March 22, 1999) <http://www.glsen.org/pages/sections/library/reference/014_article>

²⁴ *Id.*

²⁵ National Coalition of Anti-Violence Programs, *Anti-Lesbian Gay, Bisexual and Transgendered Violence in 1997* (viewed April 4, 1999) <<http://www.avp.org/ncavp/1997/summary.htm>>.

localities. California,²⁶ Connecticut,²⁷ the District of Columbia,²⁸ Hawaii,²⁹ Massachusetts,³⁰ Minnesota,³¹ New Hampshire,³² New Jersey,³³ Rhode Island,³⁴ Vermont,³⁵ and Wisconsin³⁶ all have passed legislation prohibiting in some form discrimination on the basis of sexual orientation. Executive orders at the federal level³⁷ and in the states of Colorado,³⁸ Louisiana,³⁹ Maryland,⁴⁰ New Mexico,⁴¹ Ohio,⁴² Pennsylvania⁴³ and Washington⁴⁴ prohibit discrimination in public employment. In addition, the State of New York itself, through an executive order of Governor Cuomo that has been continued to date by Governor Pataki, has prohibited discrimination on the basis of sexual orientation in state employment.⁴⁵ Nearly 200 localities in the United States (including, in the State of New York, the cities of Albany, Alfred, Brighton, Buffalo, East Hampton, Ithaca, New York, Plattsburgh, Rochester, Southampton, Syracuse, Troy, and Watertown and the

²⁶ Cal. Civ. Code § 51.7(a) (West 1995); Cal. Lab. Code §§ 1101, 1102, and 1805(c)(5) (West 1995).

²⁷ Conn. Gen. Stat. Ann. §§ 46a-814 and 10-15e(a) (West 1994).

²⁸ D.C. Code Ann. §§ 1-2501, 1-2512, 1-2519, 36-1008, and 1-601.2(b)(5) (West 1981).

²⁹ Haw. Rev. Stat. §§ 368-1 to 378-3 (West 1998).

³⁰ Mass. Gen. Laws Ann. § 151B and §§ 3-4 (West 1982).

³¹ Minn. Stat. § 363 (West 1996).

³² N.H. Rev. Stat. Ann. § 354-A (West 1997).

³³ N.J. Stat. Ann. §§ 10:5-5, 10:5-12, and 11A:7-1 (West 1993).

³⁴ R.I. Gen. Laws §§ 11-24-2.1 and 28-5-1-9 (West 1995).

³⁵ Vt. Stat. Ann. tit. 21, § 495; tit. 9 § 4502, 4503; tit. 3, § 961(6) (West 1994).

³⁶ Wis. Stat. Ann. §§ 11.19-111.36, 230.18 and 230.01 (West 1988).

³⁷ Executive Order No. 13087 (1988), 63 Fed. Reg. 30697 (1998), *reprinted in* 42 U.S.C. § 2000e (1998).

³⁸ Executive Order No. 90-13-98 (1990).

³⁹ Executive Order No. Ewe 92-7 (1992).

⁴⁰ Executive Order No. 01-01.19 (1995).

⁴¹ Executive Order No. 85-15 (1985).

⁴² Executive Order No. 83-64 (1983).

⁴³ Executive Order No. 1988-1 (1988), 4 Pa. Code § 1.161 (1988).

⁴⁴ Executive Order No. 85-09 (1985), Wash. Admin. Code § 356-09-020 (1985).

⁴⁵ Executive Order No. 28 (1983), N.Y. Comp. Codes R. & Regs. tit. 9, § 4.28 (1998), *amended by* Executive Order No. 33 (1996), N.Y. Comp. Codes R. & Regs. tit. 9, § 5.33 (1998).

counties of Albany, Onondaga, Suffolk, and Tompkins) have enacted laws that prohibit some forms of discrimination on the basis of sexual orientation such as discrimination in public and private employment, housing and education.⁴⁶

Many prominent New York institutions such as Columbia University, Cornell University, New York University, Brooklyn College, and The Association of the Bar of the City of New York itself have adopted anti-discrimination policies that include sexual orientation as a protected category.⁴⁷ In addition, numerous major corporations doing business in New York have adopted policies prohibiting sexual orientation discrimination, including American Express, AT&T, IBM, Colgate Palmolive and the Equitable Companies. In testimony before the U.S. House of Representatives, Michael Morley, Senior Vice President and Director of Human Resources at Eastman Kodak Company, expressed his firm's support for federal legislation prohibiting sexual orientation discrimination in employment as follows:

By recognizing the need to protect our gay and lesbian employees equally with the rest of our work force, Kodak joined a rapidly growing trend in corporate America. More than half the Fortune 500 companies have instituted similar [non-discrimination] policies, and that number is growing steadily. Our non-discrimination policy has worked well. In the ten years since we included sexual orientation in our policy, its implementation has been accepted broadly, and we believe it has affected our bottom line for the better.⁴⁸

Because local ordinances are limited in application to the jurisdictions in which they have been enacted, the protections established by municipalities protect some but not all citizens of New York who

⁴⁶ Lambda Legal Defense and Education Fund, *Summary of States, Cities and Counties Which Prohibit Discrimination Based on Sexual Orientation* (December 7, 1998, last modified February 22, 1999) <<http://www.lambdalegal.org/cgi-bin/pages/documents/record/record-185>>.

⁴⁷ For a fuller list, see The Human Rights Campaign, *Employers with Non-Discrimination Policies that Include Sexual Orientation* (last modified March 17, 1999) <www.hrc.org/issues/workplace/nd/ndlist.html>.

⁴⁸ Testimony of Michael P. Morley to the U.S. House of Representatives, Committee on Small Business, Subcommittee on Government Operations, July 17, 1996 (viewed April 3, 1999) <<http://www.hrc.org/issues/workplace/enda/hearing2/kodak.html>>.

face sexual orientation discrimination. Nondiscrimination policies of private entities, unlike specific statutory provisions, provide a relatively weak basis for challenging discriminatory actions. Local antidiscrimination laws and private policies do not all offer the same scope of protections that would be provided by the Bill. A comprehensive law providing basic legal protection is the only way to ensure that all gay men and lesbians in New York are entitled to equal opportunity.

The Bill Would Extend to Homosexuals the Protections of Existing Antidiscrimination Laws

New York State should not lag behind other jurisdictions in enacting legislation to protect its gay and lesbian residents. New York has led other states in recognizing the need to protect groups that are traditionally victimized by discrimination and in passing specific legislation to combat such discrimination. The New York Constitution already forbids discrimination on the basis of race, creed, color, and religion.⁴⁹ Similarly, the New York State Human Rights Law already makes it illegal to discriminate on the basis of age, race, creed, color, national origin, sex, age, disability, or marital status in employment, housing, education, public accommodations, credit, and other areas.

However, these laws provide no protection to victims of sexual orientation discrimination.⁵⁰ If passed, the Bill would simply grant to gays and lesbians the same protections that the Legislature has recognized are necessary to protect other groups that have traditionally suffered unequal treatment.

The Bill Would Not Create Special Rights

⁴⁹ N. Y. Const. Art. 1, §11 (McKinney's 1998).

⁵⁰ See note 5, *supra*.

As the U.S. Supreme Court observed in *Evans v. Romer*, antidiscrimination laws do not create “special rights.”⁵¹ No special advantages arise from laws that require that all individuals be treated equally. Accordingly, the Bill would not extend “special rights” to homosexuals. It would not, for example, require that employers establish affirmative action programs to hire gays and lesbians. Similarly, it would not require that landlords give preferences to homosexuals who want to rent apartments. Rather, the Bill would simply level the playing field, it would place all New Yorkers on an equal footing, regardless of their sexual orientation. The Bill provides that gays and lesbians must be afforded equal access to such basic things as jobs, education, and housing. It merely requires that gays and lesbians be treated no differently from anyone else under the law.

Antidiscrimination Legislation Has Not Generated Excessive Litigation

Some critics have argued that enacting legislation to prohibit sexual orientation discrimination would overburden the courts with litigation. However, the Bill is designed to reduce discrimination on the basis of sexual orientation by deterring discriminatory behavior. Although antidiscrimination statutes provide an important basis for victims of sexual orientation discrimination to assert their rights, such statutes in other states have not generated an inordinate volume of litigation. In 1997, the United States General Accounting Office conducted a comprehensive study of the effects of state laws prohibiting sexual orientation-based discrimination. The report found that “the states’ percentages of employment discrimination complaints on the basis of sexual orientation relative to the total number of employment

⁵¹ *Romer v. Evans*, 517 U.S. 620, 631 (1996).

discrimination cases generally ranged from approximately 1 percent to 3 percent a year."⁵²

The Public Has Expressed Strong Support for Antidiscrimination Legislation.

A majority of Americans erroneously believes that gay men and lesbians *already* enjoy protection against arbitrary discrimination in the workplace, suggesting that antidiscrimination legislation is not especially controversial.⁵³ In fact, strong support exists among the public for legislation that protects homosexuals from discrimination. In a 1998 survey conducted by Mason-Dixon, New York residents were asked the following: "The New York legislature has a bill before it which, if passed, would prohibit discrimination against gay people in employment, education, public accommodations and other areas. Would you like your representative in Albany to vote against such a measure?" Sixty-four percent of those surveyed said that their legislators should approve such a measure.⁵⁴ A 1995 study by the *Albany Times Union* and the *Syracuse Herald American* found that 70.3% of those in New York State favor lesbians and gay men having the same rights as others in terms of job opportunities and access to housing.⁵⁵ A 1993 study conducted in eight senatorial districts found that 75% of the population in each district believed that gay men and lesbians should have equal access to job opportunities and housing, and that between 57% and 74% of those in each district believed that New York should pass a law banning

⁵² United States General Accounting Office, *Sexual-Orientation-Based Employment Discrimination: States' Experience with Statutory Prohibitions*, October 23, 1997, at 1-4.

⁵³ David A. Kaplan & Daniel Klaidman, *A Battle, Not the War*, *Newsweek*, June 3, 1996, at 24-25.

⁵⁴ Empire State Pride Agenda, *New Yorkers' Views of Discrimination Against Lesbians and Gay Men* (viewed March 22, 1999) <www.espany.org/pr/de/sondaviews.html>

⁵⁵ *Id.*

discrimination on the basis of sexual orientation⁵⁶. Another 1993 poll, conducted by the state Republican Party, found that 65% of New York State residents believe that New York should pass laws to protect homosexuals, as it protects other groups.⁵⁷

Ensuring equality of all citizens by protecting members of politically unpopular groups is a basic tenet of our society. Therefore, passing legislation to protect gays and lesbians from discrimination should not be controversial.

Conclusion

Eliminating discrimination based on sexual orientation is mandated by basic concepts of justice, equal protection and fairness. Legislative action in this area is critical because, despite increasing popular support for equal rights for gays and lesbians and despite the adoption of protective measures by many localities, corporations, and private organizations, gay and lesbian New York residents continue to suffer the devastating personal consequences of discrimination.

Although the widespread support for laws protecting homosexuals from discrimination is illustrated by the many states and localities that have adopted anti-discrimination provisions, only state legislation can ensure that all New York State residents are treated fairly, regardless of their sexual orientation. The Bill would not provide gay men and lesbians with special rights but would simply require that homosexuals, bisexuals, and heterosexuals be treated equally under the law.

Therefore, the Association of the Bar of the City of New York respectfully urges that the Senate

⁵⁶ *Id.*

⁵⁷ *Id.*

pass this Bill to protect all New York state residents from the devastating effects of discrimination on the basis of sexual orientation and thereby resume its role as a leader in the commitment to equality for all people under the law