



Education Department Resource

Overview of the Rights of Gay, Lesbian and Bisexual Teachers

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An essay addressing the major legal principles governing the employment of GLBT teachers in public and private school, based on examination of federal and state statutes as well as labor union policies.

This essay does not provide a comprehensive analysis of each state's law, nor does it in any way substitute for a particularized assessment of an actual problem by an attorney familiar with the governing local laws. Do not rely on this article as specific legal advice because the law constantly changes and is different in different places.

I. INTRODUCTION

These are charged and hopeful times for gay, lesbian and bisexual people. Teachers work in the context of growing recognition of gay issues nationwide, including recognition of the existence and needs of gay, lesbian and bisexual youth. Schools are not remote from this phenomenon; rather they are part of it. Indeed, in some areas, schools have become a battle ground of sorts in which any school's movement toward acceptance of gay, lesbian and bisexual teachers, or any curriculum content related to sexual orientation is greeted with organized protest from those who want gay people to go back in the closet and stay there.

This essay addresses the major legal principles governing the employment of gay, lesbian and bisexual teachers in public and private (but not religious) schools.

Section 2 discusses the rights and protections afforded by the United States Constitution, particularly the First Amendment. Section 3 addresses the widely varying state law protections which may be available to gay, lesbian and bisexual teachers. Section 4 addresses the role of unions and collective bargaining agreements for unionized employees. The Conclusion, at Section 5, sets out practical advice.

II. THE UNITED STATES CONSTITUTION

The United States Constitution^[3] is a primary source of legal rights for public school gay, lesbian and bisexual teachers. The Constitution and the amendments apply to government action, whether federal, state or local (including school boards), rather than the acts of private individuals or organizations. Unfortunately then, these constitutional principles do not apply to truly private schools.^[4]

At a minimum, the Constitution guarantees that when the government acts, it must act rationally and not capriciously.^[5] While no government can be compelled to treat everyone in exactly the same way, the same basic rules which apply to the treatment of heterosexual teachers should be applied to gay, lesbian and bisexual teachers.

A caveat is important here: while rights may exist, they are only real when the individuals asserting them encounter judges actually willing to uphold those rights by rendering decisions [6] interpreting the law to apply to gay, lesbian and bisexual people.

A. WHY A SCHOOL BOARD SHOULD NOT BE ABLE TO FIRE OR REFUSE TO HIRE A TEACHER SIMPLY BECAUSE THE TEACHER IS LESBIAN, GAY OR BISEXUAL

We have not yet arrived at the time when the presence of openly gay, lesbian and bisexual teachers in the public schools is applauded as an expression of diversity which aids the educational process or which provides for role models to gay, lesbian and bisexual students. However, even in those many places in which a gay presence is not welcomed, there is a legal bar to overt hostility from the government. The Fourteenth Amendment guarantees both "due process" before being deprived of life, liberty or property, and "equal protection" of the laws. These clauses have been interpreted to mean that government actions must be rationally related to a legitimate government purpose. In other words, the government cannot act on whim, nor may its objectives be illegitimate (i.e., e.g., punitive, craven or discriminatory). When applied to the rights of gay, lesbian and bisexual people, it is clear that the courts have wide latitude in interpreting these principles.

In the 1969 case of *Norton v. Macy* [7], these principles were used to require the reinstatement of a gay man to his federal job at the National Aeronautics and Space Administration. He succeeded because the government was not able to establish a rational relationship between Mr. Norton's sexual orientation and the efficiency of governmental operations, which the government claimed might be impaired by retaining Mr. Norton in his position. The important and enduring theme here is that the appropriateness of an employee for his

or her position must be judged individually rather than on the supposed characteristics of all "homosexuals."

In 1969, the California Supreme Court applied the Norton principles in the case of *Morrison v. State Board of Education* [8], involving a school teacher. The Morrison court adhered to the fundamental constitutional guarantee that teaching qualifications cannot be revoked because of homosexual conduct unless the school authorities could demonstrate "unfitness to teach." Critically, the Court also required specific factual evidence of fitness rather than mere speculation about immorality. [9]

Despite the analytic soundness of the decisions in *Norton* and *Morrison*, other courts have capitulated to anti-gay hysteria in cases involving gay and lesbian school teachers. For instance, in *Gaylord v. Tacoma School District No. 10* [10], the Washington Supreme Court upheld the dismissal of a gay teacher on the grounds that his status as a "known homosexual" automatically impaired his efficiency as a teacher and, thus, justified his dismissal. A high school student who had sought Gaylord's advice outed him to the school principal. Ignorant about homosexuality, the Court resorted to encyclopedias, including the *New Catholic Encyclopedia*, for a definition. The Court then determined that homosexuality, which it deemed to include homosexual acts, was implicitly immoral, although the state sodomy law had been repealed by the time of trial. As an immoral person, Gaylord could not be trusted to instruct students in morality, nor did the school wish to be viewed as approving of Mr. Gaylord. Therefore, despite twelve years as a teacher in this school with positive performance evaluations, the Court ruled Gaylord's presence at the school would be inherently disruptive. In a popularity contest type of analysis, the Court based its conclusion on the testimony of one student and three teachers who objected to a known homosexual teaching at the school, and the opinion of the administration that his

presence of the faculty "would create problems." No problems were actually demonstrated. [11]

One can only hope that decisions like these will soon be anachronistic. In the meantime, whether the law is "good" or "bad" in your area, a common sense approach combined with an assessment of the support and backbone of your colleagues, the school administration and school board is advisable.

B. BACKGROUND ON FIRST AMENDMENT RIGHTS OF TEACHERS: TEACHERS, AS GOVERNMENT EMPLOYEES, ARE SCRUTINIZED FOR WHAT THEY SAY AND DO BOTH IN AND OUT OF CLASS.

In this context, their rights are governed by the First Amendment of the United States Constitution. In sweeping language, the United States Supreme Court has already ruled in *Tinker v. Des Moines Independent Community School District* [12], "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." Stated differently, teachers do not forfeit their basic constitutional rights when they accept a teaching job.

The question then becomes to what extent teachers may enjoy their First Amendment rights to freedom of speech, expression and association. The short answer is that First Amendment rights in schools are not as extensive as First Amendment rights in other settings. [13] The reasons have to do with the uniqueness of the school setting. On the one hand, schools exist to inculcate morals and values, thus permitting school officials control over the content of what is said. On the other hand, our constitutional scheme values the rights of both teachers and students to speak and act without content control by a governmental entity. School boards may not "cast a pall of orthodoxy" over the classroom. [14] Neither

the rights or interests of the school board or the teacher is absolute or paramount in every situation. Thus, in individual cases, courts balance the school's interests as educator and employer against the free speech interests of teachers and students. [15]

C. THE TEACHER'S RIGHT TO ASSOCIATE

It is not uncommon for a school board, for example, in its zeal to hire only teachers who are morally exemplary, to inquire into the company a teacher keeps. While our right to enjoy the company of other like-minded individuals by joining groups or organizations is often taken for granted, it may be only because that right is secure. A teacher's right of "associational privacy" generally forbids the government from forcing an individual to disclose to what groups or organizations he or she belongs. However, in cases where the government has a compelling interest in discovering those associations, it may do so. [16]

In *Shelton v. Tucker* [17], the Supreme Court ruled that school authorities may not require a teacher to disclose all of her memberships and affiliations as a condition of employment. However, historically at least, teachers have been in a classic "Catch-22" position. On the one hand, when asked, teachers are obligated to disclose those associations which may affect their effectiveness as a teacher. On the other hand, teachers may legitimately fear that if they are truthful about their membership in lesbian, gay or bisexual organizations, they may be denied or removed from a job, particularly in states without civil rights laws protecting sexual orientation.

This Catch 22 was painfully illustrated in the case of *Ancafora v. Board of Education* [18], decided by a federal appeals court in 1974. During the application process, Mr. Ancafora was asked both to state his membership in professional, service and fraternal organizations and to list his extracurricular activities. He intentionally

omitted his membership in an organization known as the "Homophiles of Penn State." He also certified that the information he submitted was accurate to the best of his knowledge. After he had secured his teaching job in Maryland, Pennsylvania officials inadvertently alerted the Maryland officials to Mr. Ancafora's sexual orientation. He was then transferred away from students to an administrative position pending further review.

The Court ruled that Ancafora's intentional misrepresentation was itself enough justify his transfer and dismissal. He was never allowed to address the constitutionality of the County's policy against hiring gay teachers.

Not every school board will react to the announcement of an applicant's same-sex sexual orientation as did Maryland officials in 1973. However, given the possibility of job rejection for merely coming out and the penalties for lying (which in some cases can result in criminal penalties and/or civil liability), caution dictates that a job applicants seek the advice of an attorney knowledgeable about the local community and laws.

D. THE TEACHER'S RIGHT TO PARTICIPATE IN THE POLITICAL PROCESS

Like other citizens in their communities, teachers may decide to become involved in political causes or the issues of the day. This sometimes attracts unfavorable notice from school officials, especially when the teachers activities are viewed as controversial. Despite the consternation of school officials however, teachers possess the right to express themselves as citizens about matters of public concern as long as they do it in a way that does not disturb the efficiency of the work place. The leading case outlining this right of teachers to speak out in their communities is Pickering v. Board of Education. [19]

In Pickering, a teacher was terminated after he wrote a letter to a local newspaper criticizing a tax increase in light of how the school board raised revenues and the allocation of those revenues as between academic and extra-curricular programs. Engaging in a balancing test of the teacher's rights as a citizen to comment upon matters of public concern and the school's right to regulate the speech of its employees, the Court found in favor of Mr. Pickering. In particular, the Court ruled that as long as Mr. Pickering's statements were not knowingly false or made with reckless disregard as to the truth, the school could restrict or punish his speech only if the speech harmed the school's ability to operate efficiently or inhibited the teacher's ability to carry out his duties.

The Pickering rule largely has been followed in cases involving a teacher's advocacy of civil rights for lesbians, gay men and bisexuals. For example, in Ancafora, the Court determined that the press interviews Ancafora gave after his transfer urging acceptance of homosexuals were protected by the First Amendment and thus could not be used to justify either his transfer or his dismissal. In reaching that conclusion, the Ancafora court observed that the interviews neither disrupted the school nor substantially impaired his capacity as a teacher. [20]

A similar result was obtained in National Gay Task Force v. Board of Education of City of Oklahoma City. [21] This case, brought on behalf of gay and lesbian teachers in the Oklahoma City school system targeted a state law permitting punishment for "public homosexual conduct." It defined conduct as advocating, soliciting, imposing, encouraging or promoting public or private homosexual activity in a manner that creates a substantial risk that such conduct will come to the attention of school children or school employees.

The Court ruled that "advocacy" is squarely within the protection of the First Amendment, and that this law's punishment of advocacy rendered it unconstitutional. The Court observed that the advocacy prohibition would extend to a teacher urging a mere change in the law, whether it be enactment of basic civil rights or the repeal of sodomy laws. Articulating a now familiar rule, the Court opined that the state's right in regulating the speech of its employees overcomes the teacher's free speech rights only when the free speech results in a substantial or material interference or disruption in school activities, neither of which was demonstrated here. [22]

E. THE RIGHT TO RAISE HOMOSEXUALITY AS A TOPIC IN CLASS

No United States Supreme Court opinion has directly addressed the First Amendment rights of teachers in the classroom. Teachers share the province of the classroom with school boards which have enormous discretion to make curriculum related decisions.

While the case law on this subject is sketchy, there is some indication that classroom activity is protected by the First Amendment. [23] In *Keyishian v. Board of Regents of the State of New York*, a case overturning New York laws which forbade teachers from engaging in subversive activities and barring from employment teachers who belonged to subversive organizations, the United States Supreme Court observed that "academic freedom is of transcendent value . . . and . . . a special concern of the First Amendment."

While principles of academic freedom should apply to classroom discussions of homosexuality, a common sense approach is advisable. Talking about the struggle for gay and lesbian civil rights, for example, is more appropriate to civics class than math class. [24] It is doubtful that a school could flatly

prohibit discussion of a topic relevant to a subject being taught. [25]

It is important to note that academic freedom, like other rights grounded in the First Amendment, may be limited if its impact causes a material and substantial disruption to the school. In a Maine case [26], a high school teacher organized a "Tolerance Day" program in response to the death by drowning of a young gay man named Charlie Howard who had been thrown off of a bridge by three high school students despite Mr. Howard's entreaties that he could not swim. The program was to consist of a mandatory assembly and two optional periods with representatives from twelve groups which had experienced prejudice, including an open lesbian. After the school received threats of pickets, bomb threats and threatened sabotage of the school furnace, all in response to the lesbian's presence at the school, the school canceled the program.

The teacher and others sued after the program was canceled, claiming First Amendment violations, including infringements on academic freedom. The state's highest court concluded that the cancellation effected no violation of the teacher's academic freedom because the threatened disruptions would have resulted in the loss of an entire educational day. However, the Court was also careful to note that the school board did not prohibit this teacher from discussing "tolerance [of] or prejudice against homosexuals, whether in Solmitz's classes or otherwise within [the school]." [27]

Since there is no Supreme Court precedent directly addressing the scope of First Amendment rights in the classroom, it is entirely possible a different standard will apply than the balancing test used in an academic freedom analysis. Two 1980's United States Supreme Court opinions constricting student free speech rights, *Hazelwood School District v. Kuhlmeier* [28], and *Bethel School District No. 403 v. Fraser* [29], may be ominous for teachers as well.

In *Hazelwood*, the Court allowed school officials to eliminate from a student newspaper articles about pregnancy and divorce. The Court ruled that the school could censor curricular speech which was "inconsistent with its basic educational mission", "so long as their actions are reasonably related to legitimate pedagogical concerns." [30]

In *Fraser*, a student was disciplined for his sexual imagery in a speech endorsing a classmate for school office. Among other things, he referred to the student as "firm in his convictions", as someone who "takes his point and pounds it in" and "who will go to the end—even the climax—for . . . you." The Court agreed with the school that the disruption caused by these remarks justified a brief suspension and denial of certain privileges. Ominously, the Court added that school boards can punish vulgar and sexually offensive speech. [31]

There is hope that the United States Supreme Court will permit teacher's broad rights in the classroom when squarely confronted with such a case. This is particularly appropriate since, as the Court itself has observed,

"The classroom is peculiarly the 'marketplace of ideas'. The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" [32]

Of course, there is also no more effective way to teach the importance of constitutional freedoms than by example. The Supreme Court in *Fraser* re-affirmed this principle,

"Schools must teach by example the shared values of a civilized social order. Consciously or otherwise, teachers—and indeed the older students—demonstrate the appropriate form of civil discourse and

political expression by their conduct and deportment in and out of class." [33]

However, if the Court resorts to a *Hazelwood*/*Fraser* formulation of teacher's rights, then school boards will be able to regulate class content, particularly "vulgar" and "sexually explicit" speech, as long as the school's actions are reasonably related to legitimate pedagogical concerns. Thus, it is best to tread carefully in this area by making sure that any classroom discussion can be defended, if necessary, on legitimate pedagogical grounds.

F. THE RIGHT TO COME OUT AT SCHOOL

While coming out, that is, a simple statement of identity, should be protected speech in schools and elsewhere, that is not yet the law. [34] At present, speech by government employees in the workplace must touch on a matter of "public concern" in order to merit First Amendment protection. [35] Whether the speech constitutes a matter of public concern depends on the content, form and context of the statement.

In *Van Ooteghem v. Gray* [36], a federal appeals court overturned the discharge of an Assistant County Treasurer who had informed his supervisor both that he was gay and intended to testify as a citizen before the county commissioners on the subject of civil rights for lesbians and gay men. In bold language, the Court stated,

"It may be true that some treasury workers, or [the Treasurer] himself, found the prospect of an employee addressing the Commissioners Court on homosexual rights to be distressing. However, the ability of a member of a disfavored class to express his views on civil rights publicly and without hesitation—no matter how personally offensive to his employer or majority of his coemployees—lies at the core of the Free Speech Clause of the First Amendment." [37]

Even in Ancafora, discussed above, the teacher's statements to the press, which explicitly included his acknowledging his own sexual orientation, were held by a federal court not to be sufficient reasons for firing him. [38]

The nadir in coming out cases involved a high school guidance counsellor in an Ohio town. [39] Marjorie Rowland, on a one year contract, confided to a school secretary that she was bisexual and had a female partner. Later, she disclosed her bisexuality to the school principal as well as several teacher friends. After being suspended and then re-assigned into a position with no student contact, her contract was not renewed at the end of the year. Relying on the public concern rule, the Court swiftly dispatched Rowland's First Amendment claim on the grounds that her speech was only personal, even though there was no evidence that her speech interfered with the performance of anyone's duties or the operation of the school. [40]

In conclusion, Rowland is reality in some communities, but not all. It is best to think strategically and consult with an attorney before coming out if you are in a more repressive community. The outlook is likely more bright in communities with specific gay civil rights laws, but it is still important to think strategically.

III. STATE LAWS WHICH AFFECT EMPLOYMENT RIGHTS

State laws, whether crafted by a legislature or created through judicial decisions generally apply to both public and private employers. Thus, this discussion is equally relevant to public school employees and teachers at private institutions.

The "at-will" rule generally governs employment relationships in the private sector. [41] Crudely stated, it provides that an employer may terminate an employee for a good reason, a bad reason, or no reason at all. There are several critical exceptions to

this law, with federal and state anti-discrimination laws being the most prominent example. Nor can an employer terminate an employee in violation of a contract. In some areas of the country, terminations which are "wrongful" or contrary to "public policy" are also forbidden. Finally, labor laws and union contracts, discussed in more detail in section IV, also limit an employer's discretion to hire and fire at will.

A. ANTI-DISCRIMINATION LAWS

Anti-discrimination laws provide that an employee may not be terminated or treated differently from other similarly situated employees solely because of a characteristic like race, religion or sexual orientation. No person is entitled to a job simply because she is African American, or Catholic or lesbian, or all three. Nor can an individual be deprived of a job solely for these reasons.

The federal Civil Rights Act of 1964 [42] prohibits discrimination in employment on the basis of race, color, religion, sex and national origin. Other federal laws forbid age [43] and disability [44] discrimination. No federal law prohibits sexual orientation discrimination in federal employment. [45]

In contrast to federal laws, eight states and over 100 cities and counties include sexual orientation as a prohibited basis for discrimination in their employment laws. [46] These laws also vary tremendously in their scope, procedure and remedies, so it is imperative to speak with an attorney knowledgeable about local law. These laws do not provide "special rights" to gay people, but rather forbid employers from making employment decisions solely on the basis of an individual's sexual orientation. Merit, the ability to follow rules, and other job-related criteria remain legitimate bases for evaluating all employees, including lesbians, gay men and bisexuals.

While the scope of employment non-discrimination laws varies, they generally

forbid an employer, because of the . . . sexual orientation . . . of an individual to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment . . ."

Massachusetts General Laws, chapter 151B, section 4(1).

This means, for example, that an individual cannot be denied a job, terminated from a job, denied a promotion, be paid differently [47], receive a demotion, receive different discipline, be harassed or otherwise treated differently on a job simply because of sexual orientation. Some local laws also prohibit employers from "retaliating" against employees who invoke the law to complain of discrimination to their employers. [48]

Typically, anti-discrimination laws apply to both public and private employers. Usually the employer must be of a certain size: federal law requires a work place with 15 or more employees while state laws require fewer employees. Some laws contain explicit exclusions for certain types of employers, particularly religious employers. [49]

Virtually all of the anti-discrimination laws require the individual aggrieved to file a complaint with a state or local administrative agency within a very short time of the last act of discrimination. These deadlines are strict and failure to follow through in time often forfeits any kind of legal claim. A person uncomfortable filing a complaint in his or her own name may request to file as "John Doe" or "Jane Doe" to protect his or her identity from the public. While the procedures at the agencies vary, the agencies are typically required to investigate the alleged discrimination, which includes speaking to the parties and examining relevant documents. The powers of the agencies also vary tremendously from state to state. It will always be the teacher's burden to demonstrate than the action complained about (e.g., firing, denial of

promotion, harassment, unfair discipline) occurred because of sexual orientation. Upon a finding of unlawful discrimination, some can order any variety of reinstatement, back pay, emotional distress damages, interest, punitive damages (rare) and changes in employer policy and practice.

B. COMMON LAW CLAIMS

Much of the law is created by judges relying on past precedents. This "common law" varies widely from state to state. It is important because such claims are another exception to the at-will rule, thereby permitting a teacher to challenge the legality of a harassing work environment or an unjust employment decision. Any potential claims should be evaluated with an attorney knowledgeable about local law.

A critical common law exception to the at-will rule is the fact that an employer may not lawfully terminate an employee in violation of a valid contract. Some contracts designate the term of employment or the permissible bases for discipline or discharge, either of which provisions an employer could violate. Some states permit contracts to be created orally rather than just in writing. Still other states allow handbooks, personnel manuals and the like to form the basis of a contract. These may be especially helpful when they contain a clause forbidding discrimination on the basis of sexual orientation. Still others require the employer to deal fairly and act in good faith toward their employees.

In addition to possible contract claims, employees in some states and in some circumstances may be able to overcome the at-will rule and claim that their termination or other unjust treatment violated an important public policy of the state and thus should be redressed. These claims, too, vary widely from state to state. Some require the state legislature to have articulated the public policy which the employer allegedly violated. Others examine the totality of the circumstances on a case by case basis,

creating new law along the way. In some states, this is a potent charge for teachers treated unjustly but who are not specifically included within the scope of anti-discrimination laws.

In sum, any number of claims are available to public and private school teachers depending on the law in your jurisdiction. See a lawyer about the feasibility of discrimination claims, contract or tort claims, wrongful termination, and any other claims which may be viable in your state.

IV. THE ROLE OF UNIONS

Employees who are unionized, whether in the public or private sector, have an additional tool to use in combatting unfair treatment on the job. Federal (and often state) laws regulate the collective bargaining process between and employer and the union as the employees' representative. ^[50]

A collective bargaining agreement, or union contract, may contain a non-discrimination clause ^[51] or other standards defining when discipline and termination are permissible. Some provide that an employee may only be terminated for "just cause." It is difficult to imagine that one's mere status as a gay, lesbian or bisexual person, without more, could be construed as just cause for termination.

What is more likely than a termination is the possibility that a teacher will be harassed or sexually harassed in violation of rule against such treatment. Incidents should be reported to the administration, or to whomever is designated in the contract or anti-harassment policy. Once the incidents are reported, the administration has the duty to investigate, and if warranted, take appropriate remedial action. Administrative failure to investigate and/or remedy the situation may give rise to further contractual violations.

If an employer violates the contract standards, the employee may (and in many

circumstances must) seek assistance from the union in "grieving" the personnel action as violative of a specific provision of the contract. Often the time lines for filing a grievance are short so the union should be consulted as soon as a problem arises. Typically the grievance procedure is a several part process and can culminate in arbitration, at which an arbitrator makes a final decision in the matter, and usually awards back pay, reinstatement and other appropriate relief.

While some may fear that their union may be hostile to them, unions have a legal duty of fair representation to all of the employees they represent, including lesbian, gay and bisexual employees. A union that refuses to assist an employee solely because of his or her sexual orientation violates the law and gives the employee a claim against the union.

V. CONCLUSIONS AND PRACTICAL ADVICE

Sometimes courts are beacons of justice illuminating principles of basic fairness; other times courts lag behind even what public opinion can tolerate. Many of the cases discussed here--admittedly grim--do not accurately reflect what would actually happen in a particular situation. Despair is not appropriate; thinking strategically is. The best thing to do before coming out at school or otherwise enjoying the First Amendment rights guaranteed by law is to speak to an attorney knowledgeable about the local legal and political landscape. Even then, for the sake of our own integrity, sometimes we take risks although enforcement of our legal rights is uncertain.

If you believe you have been or are being discriminated against, contact a lawyer immediately. These steps may also help you in recovering from the discrimination and determining whether or not you have a legal claim.

1) If you were fired, apply for unemployment. Often, employers don't bother to contest unemployment, but if they do it will give you a clue about their defenses to a discrimination claim.

2) Get emotional support, not only from friends, but also through a professional. This will both make you a better client and serve to document your distress.

3) Gather together all of the paperwork you can about your job, including contracts, offer letters, handbooks, policy and procedure manuals, and communications between you and your employer.

4) If you can do so in your state, request a copy of your personnel file. Keep it intact and keep a copy of the letter in which you requested the file. If your state only permits inspection of the file, do so and make a list of its contents.

5) Prepare a written chronology of your employment, including such information as: how you became known as gay, lesbian or bisexual; how you feel you are being treated differently from others; and why you believe it is your sexual orientation that has caused the unjust treatment. Make sure to indicate negative comments as well as any peculiarities in the timing of the decision (a blatant example being that you come out and are

"laid off" two weeks later).

Keep track of where incident occurred, exactly what was said, who witnessed the incident, when, how and to whom you reported it, and the nature of the response. Never give a copy of your chronology or the only copy of a document (e.g., harassing letter) to the administration.

6) Avoid signing resignation letters, negative evaluations or written warnings until you have seen an attorney.

7) If you have been fired, look for a job. You have an obligation to reduce your back pay damages. Keep copies of letters you send out and responses received, and keep a log of telephone contacts and job interviews.

ENDNOTES

1 The author's comments are hers alone, and do not reflect the opinions of Gay & Lesbian Advocates & Defenders or The Gay, Lesbian and Straight Teachers Network. The author wishes to thank: the GLAD staff; Sarah Wunsch, Esq., of the Civil Liberties Union of Massachusetts, former GLAD intern Margaret Brightman, Kevin Jennings for his editing; and particularly Jennifer Wriggins, Esq. for invaluable assistance and support.

2 endnote omitted.

3 This section omits discussion of other important constitutional rights, such as the Fourth Amendment right to be free from unreasonable search and seizure. Moreover, it omits discussion of state constitutional guarantees, which in some cases are broader

than federal guarantees, and similarly prevent arbitrary and capricious action by state and local governments.

4 Although rare, a private school may be considered governmental in character so that constitutional principles do apply.

5 The prohibitions on arbitrary and capricious action as applied to the state and local governments are found in the Fourteenth Amendment to the United States Constitution which states in part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Constitution, Amend. XIV.

Equal protection of the laws is not discussed here at any length because thus far it has not been a successful litigation tool for gay teachers. The equal protection clause essentially guarantees that all persons similarly situated will be treated similarly. Stated differently, it provides that any governmental classifications or distinctions must be grounded in a rational basis.

As more gay men, lesbians and bisexuals come out, judges and courts will become more familiar with gay issues and anti-gay prejudice. Since prejudice is never a rational basis for a governmental decision, equal protection looms as a potent litigation tool for teachers and all governmental employees.

6 There is a pecking order of sorts in determining the scope of a court's decision. Cases decided by the United States Supreme Court [noted as --U.S.-- and --S.Ct.-- in these notes) are binding in every state across the country. Cases decided by federal courts of appeal (noted as --F.2d--) are binding in the federal courts within their jurisdiction. Cases decided by federal district courts (noted as --F.Supp. --) are binding only in their own districts. Cases decided by a state supreme court (noted variously depending on the state) are binding only within that

state. However, note that courts routinely refer to the decisions of other courts for guidance and may be persuaded by their reasoning.

7 Norton v. Macy, 417 F.2d 1161 (D.C. Cir. 1969).

8 Morrison v. State Board of Education, 82 Cal. Rptr. 175, 461 P. 2d 375 (Cal. 1969). A secondary school teacher, Mr. Morrison's teaching qualifications were revoked because of "moral unfitness" arising from limited non-criminal same-sex conduct.

9 The Morrison court set out the following factors to determine "unfitness to teach":

[T]he likelihood that the conduct may have adversely affected students or fellow teachers, the degree of such adversity anticipated, the proximity or remoteness in time of the conduct, the type of teaching certificate held by the party involved, the extenuating or aggravating circumstances, if any, surrounding the conduct, the praiseworthiness or blameworthiness of the motives resulting in the conduct, and the extent to which disciplinary action may inflict an adverse impact or chilling effect upon constitutional rights of the teacher involved or other teachers. 461 P.2d at 386.

10 Gaylord v. Tacoma School Dist. No. 10, 559 P. 2d 1340 (Wa. 1977), cert. denied 434 U.S. 879 (1977).

11 Not every court is as eager as the Gaylord court to equate homosexuality per se with immorality. In Ross v. Springfield School District, 716 P.2d 724 (Or. 1986), the Supreme Court of Oregon rejected a teacher's discharge for immorality where the determination of immorality was based solely on a bald assertion of "community moral standards." See also, Rowland v. Mad River Local School Dist., 730 F.2d 444 (6th Cir. 1984), cert denied, 470 U.S. 1099 (1985)(upholding the termination of an Ohio school guidance counsellor who told school

personnel she was a bisexual, discussed in section II, F below).

Moreover, in 1983, the West Virginia Attorney General issued a formal written opinion that a school board may dismiss for lesbians and gay teachers for "immorality". Opinions of the Attorney General of West Virginia, February 24, 1983.

Of course, conviction of serious crimes, especially sexual crimes, is a basis for a teacher's discharge. In the same vein, engaging in sexual overtures at the school can justify a termination. But see, Board of Education v. M., 139 Cal. Rptr. 700, 566 P.2d 602, 603 (Cal. 1977)(court held that mere arrest for public homosexual conduct did not render tenured teacher unfit to teach elementary school students).

12 Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 89 S.Ct. 733, 736 (1969).

13 See, Bethel School District No. 403 v. Fraser, 478 U.S. 675, 682, 106 S.Ct. 3159, 3164 (1986).

14 Keyishian v. Board of Regents, 385 U.S. 589, 603, 87 S.Ct. 675, 683 (1967).

15 See, Tinker, 393 U.S. at 513, 89 S.Ct. at 740 (in case where students had been suspended for wearing armbands to protest the Vietnam war, Court ruled that students may express opinions, even controversial opinions, as long as they do not materially and substantially interfere with the discipline in or operation of the school, and do not collide with the rights of others). Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731 (1969)(discussed in section II, D, below).

16 NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462-63 (1958) (right of associational privacy); Barenblatt v. United States, 360 U.S. 109, 127, 79 S.Ct. 1081, 1093 (1959)(in HUAC era case, individual may be forced to disclose her private associations, i.e.,

membership in the Communist party, when there is a compelling state interest).

17 Shelton v. Tucker, 364 U.S. 479, 81 S.Ct. 247, 251 (1960).

18 Ancafora v. Board of Education, 491 F.2d 498 (4th Cir. 1974).

19 Pickering v. Board of Education, 391 U.S. 563, 88 S.Ct. 1731, 1738 (1969).

20 Ancafora, 491 F.2d at 500-501.

21 National Gay Task Force v. Board of Education of City of Oklahoma City, 729 F.2d 1270 (10th Cir. 1984), aff'd by an equally divided court, 470 U.S. 903 (1985). This case has the distinction of being upheld by the United States Supreme Court in a 4-4 vote.

22 National Gay Task Force, 729 F.2d at 1274-1275. Another part of the law which provided for suspension or dismissal of teachers who engaged in public homosexual conduct (as opposed to advocacy) was upheld as valid.

23 Keyishian, 385 U.S. at 603, 87 S.Ct. at 683.

24 Several courts have determined that classroom activity is protected by the First Amendment, even when the activity stirs strong parental opposition. Kingsville Independent School District v. Cooper, 611 F.2d 1109, 1113 (5th Cir. 1980)(teacher's use of reenactments to teach about post-Civil War United States history which sparked numerous student and parental protests was protected activity for which teacher could not be discharged unless "the classroom discussions `clearly . . . overbalance (his) usefulness as an instructor.'" Keefe v. Geanakos, 418 F.2d 359 (1st Cir. 1969)(teacher's discussion of word, "motherf-----" in class and in context of discussion of Atlantic Monthly article on protest did not justify dismissal, despite parental protest).

Compare, *United States v. Coffeerville Consolidated School District*, 513 F.2d 244, 251 (5th Cir. 1975)(Court found that "single instance of bad judgment" in which teacher allowed herself to discuss "her personal encounters with queers with her eighth grade class" was not just cause for her dismissal.)

25 *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1305-06 (7th Cir. 1980)(nor can school board fire a teacher for every random comment in the classroom).

26 *Solmitz v. Maine Administrative School District No. 59*, 495 A.2d 812, 817-18 (Me. 1985). A post-script exemplifies how court cases do not necessarily mirror the times. The same lesbian whose scheduled presence sparked such controversy in *Solmitz*, was elected to the Maine state legislature in 1990, and spoke at another high school in Maine in 1992.

27 *Solmitz*, 495 A.2d at 818.

28 *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 108 S.Ct. 562 (1988).

29 *Bethel School District No. 403 v. Fraser*, 478 U.S. 675, 106 S.Ct. 3159 (1986).

30 *Hazelwood*, 484 U.S. at 273, 108 S.Ct at 571.

31 *Bethel School District No. 403*, 478 U.S. at 685, 106 S.Ct. at 3165.

32 *Keyishian*, 385 U.S. at 603, 87 S.Ct at 683.

33 *Bethel School District No. 403*, 478 U.S. at 683, 106 S.Ct. at 3164.

34 The California State Labor Code, which protects against state interference with political activities of employees, has been interpreted to include within its reach coming out at work as gay, lesbian or bisexual. *Gay Law Students Ass'n v. Pacific Telephone and Telegraph Co.*, 156 Cal. Rptr.

14, 595 P.2d 592, 610 (Cal. 1979). See also, No. 85-404, 69 Ops. Atty. Gen. Cal. 80 (1986).

35 This rule was articulated in *Connick v. Myers*, 461 U.S. 138, 103 S.Ct 1684, 1690 (1983)(where employee dismissed for circulating a questionnaire soliciting complaints against her employer, no first amendment violation found).

36 *Van Ooteghem v. Gray*, 628 F.2d 488, 493 (5th Cir. 1980), aff'd en banc, 654 F.2d 304 (1981), cert. denied, 455 U.S.909 (1982).

37 *Van Ooteghem*, 628 F.2d at 492-493.

38 *Ancafora*, 491 F.2d at 501.

39 *Rowland*, 730 F.2d at 449.

Although the United States Supreme Court decided not to hear this case on appeal, Justice Brennan, who did vote to hear the case, wrote, "[D]iscrimination against homosexuals or bisexuals based solely on their sexual preference raises significant constitutional questions under both prongs of our settled equal protection analysis. . . . [H]omosexuals 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.'" 470 U.S. at 1014.

40 *Rowland* represents the ultimate double standard. It is unimaginable that a school would discharge an employee for stating his or her intentions to marry, for example, or disclosing a heterosexual dating relationship.

41 Bear in mind that employment at-will does not apply to governmental employers.

42 Title VII of the 1964 Act governs employment. 42 United States Code, sec. 2000e et seq.

43 The Age Discrimination in Employment Act is found at 29 United States Code sec. 621.

44 The employment provisions of the Americans With Disabilities Act are found at 42 United States Code sec. 12111. The Rehabilitation Act of 1973, which applies to programs which receive federal funding, is found at 29 United States Code section 791.

45 The federal civil service guidelines have been interpreted to prohibit sexual orientation discrimination. Several federal executive agencies, including the Departments of Justice and Health and Human Services, have issued executive orders forbidding sexual orientation discrimination in employment.

46 An invaluable publication entitled "Gay and Lesbian Rights in the U.S." lists the jurisdictions with anti-discrimination laws. It is available free of charge from the National Gay & Lesbian Task Force Policy Institute, 1734 14th Street, N.W., Washington, D.C. 20009, or by calling (202) 332-6483.

47 It is doubtful that a Court interpreting a gay civil rights law would permit an employer to pay a heterosexual employee a greater salary than a gay, lesbian or bisexual employee who was otherwise equal to the heterosexual employee. However, in the area of employee benefits, which are technically part of an employee's compensation, such discrimination is rampant. Typically, this discrimination arises with health insurance, where an employer may pay for or otherwise provide a "family" health plan to married heterosexual employees but not to the families of gay, lesbian and bisexual employees. Since lesbians and gay men are not permitted to marry, this is sexual orientation and/or marital status discrimination. For an analysis of the discriminatory impact of public retirement systems, see J. Wriggins, "Kinship and Marriage in the Massachusetts Public

Employee Retirement Law: An Analysis of the Beneficiary Provisions and Proposals for Change", to be published in 28 New England Law Review (May, 1994). See also the federal law known as ERISA, 29 U.S.C. sec. 1132.

While a full discussion of domestic partnership is beyond the scope of this article, many public and private employers alike are beginning to extend benefits to the partners of gay and lesbian employees. See, e.g., "Gay Employees Win Benefits for Partners at More Corporations", Wall Street Journal, March 18, 1994, at 1, col. 5.

Some of the most prominent litigation of this issue involves teachers. A case against a public employer using a city human rights ordinance was *Gay Teachers v. City of New York*, No. 46094, handled by Lambda Legal Defense and Education Fund. The case was successfully settled to allow health benefits for partners of gay and lesbian teachers. A case against a private employer using a state law (Massachusetts) to obtain equal terms and conditions of employment, is *Christine Huff v. Chapel Hill/Chauncy Hall, MCAD* No. 93-BEM-1041, pending at the Massachusetts Commission Against Discrimination. This case, handled by Gay & Lesbian Advocates & Defenders, asserts that Ms. Huff, a teacher, coach and house parent required to live in dorm housing as part of her job was forced to leave her job when her employer would not permit her to live with her same sex partner in dorm housing.

Numerous resources exist on domestic partnership. See, e.g.: *Recognizing Lesbian and Gay Families: Strategies for Obtaining Domestic Partnership Benefits*, available from the National Center for Lesbian Rights, 870 Market Street, Suite 570, San Francisco, CA 94102; *Domestic Partnership: Issues and Legislation*, available from Lambda at 666 Broadway, New York, NY 10012; *Legislative Briefing Series: Domestic Partnership*, available from the ACLU Lesbian and Gay Rights Project, 132 W. 43rd Street, New York, NY 10036; and M. Frank and D.

Holcomb, *Pride at Work: Organizing for Lesbian and Gay Rights in Unions*, available from the Lesbian and Gay Labor Network, P. O. Box 1159, Peter Stuyvesant Station, New York, NY 10009.

48 For example, Massachusetts has an anti-retaliation provision which extends both to the individual who invokes the law and to any other person who "aided or encouraged" the complaining individual. Massachusetts General Laws chapter 151B, sec. 4A.

49 See, e.g., *Madsen v. Erwin*, 395 Mass. 715, 481 N.E.2d 1160 (1985) (lesbian reporter for *Christian Science Monitor*, deemed to be an organ of the Church, could not maintain wrongful discharge and civil rights related claims in part because of First Amendment rights of employer to free exercise of religion).

50 The federal law governing organized labor relations for teachers (among others) is the National Labor Relations Act, as amended by the Labor Management Relations Act, and the Labor-Management Reporting and Disclosure Act. See 29 United States Code sec. 151 - 168 (1982).

51 The National Education Association is a leader in promoting teachers' civil rights and encourages its affiliates to bargain for

contracts with comprehensive non-discrimination clauses. See, e.g., NEA Resolution F-22 (July, 1990). The NEA Gay & Lesbian Caucus may be reached through the national office at 1201 Sixteenth Street, N.W., Washington, D.C. 20036.

APPENDIX A

Other resources addressing the rights of teachers and of gay people:

Rubin & S. Greenhouse, *THE RIGHTS OF TEACHERS: A COMPREHENSIVE GUIDE TO TEACHERS' RIGHTS UNDER TODAY'S LAWS* (Bantam Books Revised ed. 1984).

Editors of the *HARVARD LAW REVIEW*, *Sexual Orientation and the Law* (Harvard Univ. Press 1990).

Hunter N., Michaelson S. and Stoddard T., *THE RIGHTS OF LESBIANS AND GAY MEN: THE BASIC ACLU GUIDE TO A GAY PERSON'S RIGHTS*, 3d. ed. (Southern Ill. Univ. Press 1992).

Leonard, A., *SEXUALITY AND THE LAW, AN ENCYCLOPEDIA OF MAJOR LEGAL CASES* (Garland Publishing, 1993).

Rubenstein W., ed., *LESBIANS, GAY MEN AND THE LAW* (New Press 1993).