Workplace Discrimination on the Basis of Sexual Orientation or Gender Identity

by Mari Newman

This column is sponsored by the CBA Labor and Employment Law Section to present current issues and topics of interest to attorneys, judges, and legal and judicial administrators on all aspects of labor and employment law in Colorado.

This article provides an overview of legal theories that may be used when representing victims of workplace discrimination or harassment on the basis of sexual orientation or gender identity.

Legal practitioners advocating on behalf of victims of discrimination or harassment on the basis of their status as gay, lesbian, bisexual, or transgender (collectively referred to as "GLBT") often face an uphill battle. Presently, no law has been enacted by either the federal or Colorado legislature that explicitly protects against workplace discrimination or harassment on the basis of sexual orientation or gender identity.[1] Existing civil rights laws traditionally have been interpreted by the courts to exclude coverage for such groups.[2] Accordingly, attorneys for GLBT victims of discrimination and harassment have carved out creative and innovative legal theories to secure redress for their clients. This article provides an overview of these legal theories, and discusses relevant statutes and case law of interest to practitioners representing GLBT clients.[3]

Title VII of the Civil Rights Act of 1964

Title VII of the Civil Rights Act of 1964 ("Title VII")[4] prohibits employment discrimination on the basis of "sex" and other protected characteristics. The term "sex," as defined by Title VII, does not include sexual orientation or gender identity.[5] Indeed, the Tenth Circuit's most recent declaration on the subject makes clear that Title VII does not apply to a claim of discrimination on the basis of sexual orientation, even in the case of a heterosexual plaintiff claiming harassment at the hands of a same-sex supervisor.[6] Nonetheless, victims of discrimination based on their GLBT status recently have had increasing success bringing creatively pled claims under Title VII.

Gender Non-Conformance

Perhaps the most successful of these claims have been those pled pursuant to a theory of discrimination for gender non-conformance, as articulated by the Supreme Court in *Price Waterhouse v. Hopkins*.[7] There, the Court held that Title VII was violated when the employer denied the plaintiff a promotion because she was perceived negatively for lacking stereotypically feminine character traits. Specifically, her supervisor had advised her to "walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry."[8] This "gender non-conformance" legal theory has been successfully argued on behalf of gay and lesbian plaintiffs whose gender presentation is not defined by their biological sex.[9]

Notably, because Title VII condemns even those decisions based on a mixture of legitimate and illegitimate considerations, if a plaintiff can demonstrate that he or she was discriminated against "because of sex" as a result of sex stereotyping, evidence that the plaintiff also was discriminated against on the basis of sexual orientation has no legal significance under Title VII, even though sexual orientation itself is not a protected characteristic.[10] Courts have held as

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much even where the evidence of discriminatory animus includes overtly homophobic epithets, reasoning that these taunts disparage the plaintiff's masculinity or femininity.[11]

Relying on the Court's reasoning that "[d]iscrimination because one fails to act in the way expected of a man or woman is forbidden under Title VII," the Ninth Circuit extended this legal theory to include protection for transgender people in *Schwenk v. Hartford*,[12] which applied the Gender Motivated Violence Act[13] in the case of a prisoner who was sexually assaulted by a guard. The court in *Schwenk* rejected the defendant's argument that the plaintiff's transexuality was not an "element of gender" but rather a "psychiatric illness."[14]

The "gender non-conformance" theory has since been successfully argued on behalf of numerous transgender plaintiffs in the employment context as well.[15] Notably, these cases have not turned on whether the plaintiff has undergone sex reassignment surgery; both pre- and post-operative transsexuals have prevailed using this legal theory.[16] As one court held, "[t]ranssexuals are not gender-less, they are either male or female and are thus protected under Title VII to the extent that they are discriminated against on the basis of sex."[17]

In addition to the prison environment addressed in *Schwenk*, GLBT plaintiffs discriminated against for gender non-conforming behavior likewise have prevailed in other non-employment contexts. These include cases of discrimination in public accommodations[18] and harassment in schools.[19]

However, this application of *Price Waterhouse* does not provide a legal claim in cases where there is no evidence that the GLBT plaintiff was discriminated against specifically because of gender non-conforming behavior or appearance, as opposed to sexual orientation more generally.[20] At least one court noted, though, that:

> [c]onceivably, a plaintiff who is perceived by his harassers as stereotypically masculine in every way except for his actual or perceived sexual orientation could maintain a Title VII cause of action alleging sexual harassment because of his sex due to his failure to conform with sexual stereotypes about what "real" men do or don't do . . . real men don't date men.[21]

Nonetheless, this legal theory may not provide any legal recourse for a "feminine" lesbian or a "masculine" gay man, and in any event must be very carefully pled in a manner that makes clear that the discrimination or harassment was based on gender non-conformance, not sexual orientation or gender identity.

Title VII Retaliation

Notwithstanding the many legal opinions holding that sexual orientation and gender identity classifications do not fall within the Title VII definition of "sex," there have been successful claims of retaliation under Title VII brought by plaintiffs complaining of discrimination or harassment based on their sexual orientation and gender identity.[22] The advantage to litigating retaliation claims is that the plaintiff need prove only that his or her objection to the treatment led to an adverse employment action; the plaintiff is not required to prove the underlying complaint itself (that he or she was harassed or discriminated against).

The difficulty in pleading retaliation claims for harassment of GLBT plaintiffs is that courts may determine that the plaintiff's belief that Title VII prohibits the harassment or discrimination to which he or she objected is not necessarily "reasonable."[23] The Tenth Circuit recently suggested as much in *dicta* (in a non-binding, unpublished decision), noting: "given that sexual orientation discrimination is not a recognized cause of action under Title VII . . . it is far from clear whether a retaliation claim may be predicated upon a non-cognizable cause of action."[24]

Other courts have reached a contrary result, however, reasoning that the retaliation provision of Title VII protects employee opposition to practices that the employee reasonably believes are unlawful, not just to practices that actually *are* unlawful under Title VII. Holding otherwise might deter an employee "from reporting possible discrimination if she risked being discharged if the allegations—though entirely true and made in good faith—were later found insufficient to constitute a violation of the statute."[25]

Same-Sex Harassment

The best-established application of Title VII to harassment based on sexual orientation derives from the U.S. Supreme Court's ruling in *Oncale v. Sundowner Offshore Servs*.[26] There, the Court concluded that sex discrimination consisting of same-sex sexual harassment is actionable under Title VII, and that although the harassing conduct must be sexual in nature, it need not be motivated by sexual desire to support an inference of discrimination on the basis of sex.[27]

The *Oncale* Court articulated three available avenues of proof for a plaintiff asserting a same-sex harassment claim: (1) a showing that the harasser was motivated by sexual desire; (2) evidence of harassment carried out in such sex-specific and derogatory terms that it is clear the harasser was motivated by general hostility toward the presence of that gender in the workplace; or (3) presentation of direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace.[28] Although the plaintiff in *Oncale* did not allege that he was homosexual or transgender, the decision often has been successfully applied in cases where the harassment apparently is predicated on the plaintiff's sexual orientation or gender identity, regardless of whether the court finds that the plaintiff's status was the reason for the harassment.[29]

Notably, many of these meritorious claims have involved harassment substantially less severe than that addressed by the Court in *Oncale*.[30] To overcome precedent holding that "sexual orientation" discrimination is not protected under Title VII, some courts have found that epithets directed at a plaintiff because he is homosexual do not evince that harassment was motivated by the plaintiff's sexual orientation.[31] As at least one court noted, "[it] is not uncommon for sexual harassment and other manifestations of sex discrimination to be accompanied by homophobic epithets."[32] The Tenth Circuit addressed the issue of same-sex sexual harassment in three cases in 2005, with mixed results.[33]

Local Non-Discrimination Ordinances

Some Colorado municipalities have enacted local ordinances that prohibit discrimination on the basis of sexual orientation and/or gender identity. Denver's Anti-Discrimination Ordinance[34] was first enacted in 1990,[35] and provided protection from discrimination on the basis of sexual orientation. The ordinance was amended in 2001 to include protection from discrimination on the basis of gender variance, and was amended again in 2002 to include a private right of action, providing that "the complainant may seek the relief by filing a civil action in county court or state district court for all appropriate remedies."[36]

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"In jurisdictions where the local anti-discrimination ordinance does not provide a private right of action, the ordinance may nonetheless serve as a declaration of a public policy mandate against discrimination on the basis of sexual orientation and/or gender identity."

This remedial language was specifically drafted to mirror that used by the U.S. Supreme Court in *Franklin v. Gwinnett County Pub. Sch.*,[37] explaining that when a statute includes a right of action, the Court presumes the availability of all appropriate remedies absent an express indication of legislative intent to the contrary. Thus, although it has not yet been litigated, a plaintiff bringing a claim under this statute could (and should) seek all remedies available at law and in equity.

In this regard, the remedial scheme of the Denver Anti-Discrimination Ordinance provides for remedies in addition to those available under the Colorado nondiscrimination statute[38] and the Colorado statute prohibiting termination for legal, off-duty conduct,[39] which is described in more detail below. Denver's Anti-Discrimination Office issued its first "probable cause" determination in March 2005 on behalf of a transgender complainant in *Dower v. King Soopers, Inc.*[40] Other Colorado municipalities with local anti-discrimination ordinances prohibiting discrimination on the basis of sexual orientation and/or gender identity include Aspen, Boulder, Breckenridge, Crested Butte, Telluride and, in very limited cases, Arvada.[41]

Wrongful Discharge in Violation of Public Policy

Although Colorado common law includes a presumption that an employee hired for an indefinite period of time is an "at-will" employee who may be terminated for no cause at any time, Colorado courts have acknowledged that this presumption is not absolute and may be rebutted under certain circumstances.[42] One such circumstance is the "public-policy exception," under which an employee has a cognizable claim for wrongful discharge "if the discharge of the employee contravenes a clear mandate of public policy."[43]

Colorado's Local Non-Discrimination Ordinances as Statements of Public Policy

In jurisdictions where the local anti-discrimination ordinance does not provide a private right of action, the ordinance may nonetheless serve as a declaration of a public policy mandate against discrimination on the basis of sexual orientation and/or gender identity. This statement of public policy could serve as the predicate for a common law claim of wrongful discharge in violation of public policy.

The Lawrence v. Texas *Case*

The U.S. Supreme Court's decision in *Lawrence v. Texas*[44] may support a claim of wrongful discharge in violation of public policy even in jurisdictions lacking a local anti-discrimination ordinance protecting GLBT workers. In *Lawrence*, the U.S. Supreme Court held that a Texas statute making it a crime for two persons of the same sex to engage in certain intimate sexual conduct violated the Due Process Clause of the U.S. Constitution.[45] In reaching this decision, the Court spoke at length regarding the constitutional protection of personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education, and explicitly extended this protection to homosexual relations.[46]

Notably, while striking down the Texas statute prohibiting homosexual relations, the Court went out of its way to address the issue of discrimination:

> When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres.[47]

By its holding, and this statement in particular, the Court expressed a public policy mandate against discrimination on the basis of sexual orientation that also may be used as a predicate for a common law claim of wrongful discharge in violation of public policy.

Common Law Tort of Invasion of Privacy

Claims of discrimination on the basis of sexual orientation and gender identity also may be litigated under the common law tort of invasion of privacy. Although this concept is not new,[48] its potency certainly is enhanced by the U.S. Supreme Court's holding in the *Lawrence* case. The Court's decision to strike down statutes criminalizing homosexual acts was based on principles of the fundamental privacy rights accorded by the Constitution. As the Court explained:

> The statutes do seek to control a personal relationship that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals. . . . [A]dults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.[49]

Additionally, the Court stated that "the petitioners are entitled to respect for

their private lives."[50] This language advances the viability of claims brought under the common law tort of invasion of privacy.

Legal Off-Duty Conduct

Discrimination on the basis of sexual orientation and even gender identity presents unique challenges and opportunities for litigation because the discrimination is not based simply on the "status" of being homosexual or transgender, but also the "conduct" associated with being homosexual or transgender. Thus, victims of such discrimination also may bring claims under Colorado's statute prohibiting termination for legal, off-duty conduct.[51] To the extent that there may have been any lingering question, the legality of "homosexual conduct" now has been conclusively resolved by *Lawrence*.[52]

This Colorado statute has the advantage of lending itself to application in a variety of contexts, including sexual orientation and transgender claims,[53] as well as the benefit of not requiring the exhaustion of any administrative remedies.[54] It also has three significant limitations, however: (1) it applies only to termination (providing no protection for workplace harassment or discrimination in hiring, promotions, demotions, or other terms and conditions of employment); (2) remedies are limited to backpay; and (3) the prevailing party (not just the prevailing plaintiff) is entitled to an award of costs and a reasonable attorney fee.[55] Notwithstanding these significant shortcomings, courts have noted the availability of the statute as a legal avenue for cases of discrimination on the basis of sexual orientation.[56]

Protections Provided By Employer's Policies

An increasing number of private employers include protections against harassment and discrimination on the basis of sexual orientation (and, occasionally, gender identity) in their employment handbooks or other written employment policies. These written guarantees of a workplace free from harassment and discrimination can be enforceable under principles of breach of contract and/or promissory estoppel under the Colorado common law.[57]

Public Employment

Additional legal protections are available for state employees claiming discrimination or harassment on the basis of sexual orientation or gender identity. The state of Colorado is prohibited from discriminating against its employees on the basis of their sexual orientation by the State Personnel Board Rules.[58] Some other public employees are protected from such discrimination by municipal ordinances.[59]

Additionally, for employees who face discrimination or harassment by an employer acting under the color of law, constitutional protections also can be asserted. Some such claims have been asserted by way of the Equal Protection Clause.[60] As one court held, "the United States Constitution and the provisions of 42 U.S.C. § 1983, combined with logic, common sense and fairness dictate [that] individuals have a constitutional right under the Equal Protection Clause to be free from sexual orientation discrimination causing a hostile work environment in public employment."[61] Constitutional claims may be brought pursuant to the First Amend-

ment based on free speech[62] and privacy/associational rights.[63]

Conclusion

Although neither the federal nor Colorado legislature has enacted any laws specifically designed to protect GLBT employees from discrimination or harassment in the workplace,[64] creative and aggressive advocates have developed innovative legal approaches to ensure that their GLBT clients may seek recourse for the legal wrongs committed against them by employers because of their GLBT status. With ultimate passage of legislation prohibiting discrimination on the basis of sexual orientation and gender identity, both the prosecution and defense of such claims will become substantially more clear-cut and straightforward.

NOTES

1. Seventeen states and the District of Colombia have laws protecting against discrimination based on sexual orientation. Thirteen states and the District of Colombia have laws protecting against discrimination based on gender identity; seven states have laws explicitly providing such protections, and state courts, commissions, or agencies have interpreted the existing state law to include some protection for transgender individuals in several others. *See also* notes 55 and 64, *infra.*

2. *See* discussion of Title VII of the Civil Rights Act of 1964, *infra.* Sexual orientation and transgender classifications also are specifically excluded from coverage under the American with Disabilities Act, 42 U.S.C. § 12211. This section states that homosexuality and bisexuality are not impairments, but categorizes gender identity classifications alongside conditions that manifest in criminal conduct, such as pedophilia and pyromania. *See also Doe v. United Consumer Fin. Servs.*, Case No. 1:01 CV 1112, 2001 U.S. Dist. LEXIS 25509 (D.Ohio 2001) (holding that ADA did not provide legal protection for transsexual employee).

3. This article builds on materials presented by the author to the Colorado Trial Lawyers Association in Aug. 2005, entitled "Emerging Issues in Employment Law"; and to the Colorado Plaintiffs Employment Lawyers Association in Sept. 2005, entitled "Litigating Cases of Employment Discrimination on the Basis of Sexual Orientation and Transgender Status."

4. 42 U.S.C. §§ 2000e *et seq.* (prohibiting employment discrimination based on race, color, religion, sex, and national origin).

5. *See Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257 (3rd Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252 (1st Cir. 1999); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138 (4th Cir. 1996); *Williamson v. A.G. Edwards and Sons, Inc.,* 876 F.2d 69 (8th Cir. 1989), *cert. denied*, 493 U.S. 1089 (1990); *Ulane v. Eastern Airlines*, 742 F.2d 1081 (7th Cir. 1984); *Sommers v. Budget Marketing, Inc.*, 667 F.2d 748 (8th Cir. 1982); *DeSantis v. Pacific Telephone & Telegraph Co., Inc.*, 608 F.2d 327, 328 (9th Cir. 1979); *Smith v. Liberty Mutual Insurance Co.*, 569 F.2d 325 (5th Cir. 1978).

6. *Medina v. Income Support Div.*, 413 F.3d 1131 (10th Cir. 2005) (holding that heterosexual woman claiming discrimination and harassment by lesbian supervisor did not survive motion for summary judgment, because "Title VII's protections . . . do not extend to harassment due to a person's sexuality.").

7. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

8. *Id.*

9. *See, e.g., Nichols v. Azteca Rest. Enters, Inc.*, 256 F.3d 864 (9th Cir. 2001) (holding that harassment "based upon the perception that [the plaintiff] is effeminate" was discrimination because of sex, in violation of Title VII); *Doe by Doe v. City of Belleville*, 119 F.3d 563 (7th Cir. 1997), *vacated and remanded on other grounds* 523 U.S. 1001 (1998) (holding that where coworkers verbally and physically harassed a young man because he wore an earring, repeatedly asked him whether he was a girl or a

boy, and threatened to assault him sexually, plaintiff presented sufficient evidence to support a conclusion that the harassment amounted to discrimination because of sex); *EEOC v. Grief Bros. Corp.*, No. 02-CV-468S, 2004 U.S. Dist. LEXIS 29071 (W.D.N.Y. 2004); *Centola v. Potter*, 183 F.Supp.2d 403, 410 (D.Mass 2002); *Heller v. Columbia Edgewater Country Club*, 195 F.Supp. 2d 1212, 1222-23, *adopted, summary judgment denied, Heller v. Columbia Edgewater Country Club*, 2002 U.S. Dist. LEXIS 4860 (D.Or. 2002); *Ianetta v. Putnam Investments, Inc.*, 142 F.Supp.2d 131 (D.Mass. 2001). *See also Simonton, supra* note 5 at 38; *Higgins, supra* note 5 at 261 n.4; *Samborski v. West Valley Nuclear Servs.*, 99-CV-0213E(M), 1999 U.S. Dist. LEXIS 20263 (W.D.N.Y. 1999).

10. *See Centola, supra* note 9; *Heller, supra* note 9.

11. *See Grief Bros. Corp., supra* note 9.

12. *Schwenk v. James Hartford*, 204 F.3d 1187, 1202 (9th Cir. 2000).

13. 42 U.S.C.S. § 13981(d)(1).

14. *Schwenk, supra* note 12 at 1200.

15. *See Barnes v. City of Cincinnati*, 401 F.3d 729 (6th Cir. 2005); *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Sturchio v. Ridge*, No. CV-03-0025-RHW, 2004 U.S. Dist. LEXIS 27345 (D.Wash. 2004); *Tronetti v. TLC Healthnet Lakeshore Hosp.*, No. 03-CV-0375E(Sc), 2003 U.S. Dist. LEXIS 23757 (W.D.N.Y. 2003); *Doe, supra* note 2.

16. *See e.g., Barnes, supra* note 19 (holding that plaintiff police officer who was a pre-operative male-to-female transsexual, living as a female off duty, was a member of a protected class by virtue of non-conforming gender behavior); *Sturchio, supra* note 19 (denying motion to dismiss Title VII claim brought by transgender plaintiff who was born biologically male and underwent sex reassignment, where "[p]laintiff is asserting that she is being harassed and discriminated against because her co-workers considered her as a biological male, and wanted her to act like one").

17. *Tronetti, supra* note 19.

18. *See, e.g., Rosa v. Park W. Bank & Trust Co.*, 214 F.3d 213 (1st Cir. 2000) (holding that under Equal Credit Opportunity Act, 15 U.S.C. § 1691, bank cannot refuse credit to an applicant merely because his crossdressing did not meet bank employee's gender stereotypes).

19. *See Theno v. Tonganoxie Unified Sch. Dist. No. 464*, 377 F.Supp.2d 952 (D.Kan. 2005); *Snelling v. Fall Mt. Regional Sch. Dist.*, Civil No. 99-448-JD, 2001 U.S. Dist. LEXIS 3591 (D.N.H. 2001); *Montgomery v. Indep. Sch. Dist. No. 709,* 109 F.Supp.2d 1081 (D.Minn. 2000); *Miles v. New York Univ.*, 979 F.Supp. 248 (S.D.N.Y. 1997).

20. *Dawson v. Bumble & Bumble*, 398 F.3d 211 (2d Cir. 2005); *Hamm v. Weyauwega Milk Prods.*, 332 F.3d 1058 (7th Cir. 2003); *Spearman v. Ford Motor Co.,* 231 F.3d 1080 (7th Cir. 2000).

21. *Centola, supra* note 9 at 410.

22. *Id.*; *Bianchi v. City of Phila.*, 183 F.Supp.2d 726 (D.Pa. 2002); *Centola, supra* note 9 at 413; *Ianetta v. Putnam Investments, Inc.*, 142 F.Supp.2d 131 (D.Mass. 2001); *Dandan v. Radisson Hotel Lisle*, No. 97 C 8342, 2000 U.S. Dist. LEXIS 5876 (N.D.Ill. 2000); *Price v. Dolphin Servs.*, No. 99-3888 SECTION: E/4, 2000 U.S. Dist. LEXIS 19515 (E.D.La. 2000). *But see Medina, supra* note 6.

23. *Hamm, supra* note 17 (complaints of harassment based on perceived sexual orientation did not concern an employment practice that violated Title VII).

24. *Essary v. Fed. Express Corp.*, No. 05-2091, 2006 U.S. App. LEXIS 383, *13 (10th Cir. Jan. 6, 2006) (unpublished) (affirming summary judgment in favor of employer where plaintiff failed to preserve argument).

25. *Heller v. Columbia Edgewater Country Club*, 195 F.Supp.2d 1212, 1227, n.15, *adopted, summary judgment denied, Heller v. Columbia Edgewater Country Club*, 2002 U.S. Dist. LEXIS 4860 (D.Or. 2002).

26. *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75 (1998).

27. *Id.*

28. *Id.* at 80-81.

29. *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061 (9th Cir. 2002) (reversing summary judgment of Title VII claim brought by gay male employee subjected to sexually demeaning treatment by other male employees, but holding that plaintiff's sexual orientation was "irrelevant" to his Title VII claim); *Schmedding v. Tnemec Co.*, 187 F.3d 862 (8th Cir. 1999); *Price, supra* note 22.

30. *See e.g. Schmedding, supra* note 29 (holding that district court erred in dismissing complaint of harassment where plaintiff alleged he had been patted on the buttocks, asked to perform sexual acts, and that he had been subject to the exhibition of sexually inappropriate behavior by various male and one female coworker, even though the complaint apparently focused on discrimination based on plaintiff's perceived sexual orientation); *Price, supra* note 22 (upholding same-sex harassment claim in case with no allegations of physical contact whatsoever, just comments and one prank apparently directed at plaintiff based on his sexual orientation).

31. *See Grief Bros. Corp., supra* note 9.

32. *Lankford v. BorgWarner Diversified Transmission Prods., Inc.*, 02 CV 1876, 2004 U.S. Dist. LEXIS 4451, 2004 WL 540983, at *4 (S.D.Ind. 2004).

33. *See Medina, supra* note 6; *Dick v. Phone Directories Co.*, 397 F.3d 1256 (10th Cir. 2005) (holding that plaintiff need not show that harassers were homosexual to show that harassment was motivated by sexual desire); *Chavez v. Thomas & Betts Corp*, 396 F.3d 1088 (10th Cir. 2005) (upholding jury verdict for same-sex harassment under Title VII where supervisor treated male employees more "congenially" than female employees and employee was repeatedly humiliated and physically abused by supervisor because of her sex, creating a hostile workplace).

34. Denver City Code §§ 28-91 *et seq*.

35. This Ordinance became effective in February of the following year.

36. Denver City Code, *supra* note 34.

37. *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992).

38. CRS § 24-34-402.

39. CRS § 24-34-402.5.

40. *Dower v. King Soopers, Inc.*, Denver Anti-Discrimination Office Charge No. 04EM130 (probable cause finding stated that King Soopers subjected Dower to unlawful discrimination in violation of the Denver Anti-Discrimination Ordinance "by refusing to accept her need for gender transition in the workplace"). That case settled prior to the initiation of formal litigation.

41. Aspen Mun. Code. Ch. 13 § 13-98 (1977); Boulder City Charter, Title VII, Human Rights Law (1988); Breckenridge Town Code, Title 1, Chapter 20 (2004); Crested Butte Municipal Ordinance No 6. (1993); Telluride Ordinance No 1, 1993; Arvada Municipal Ordinance § 9-140, Ord. No. 3234, § 1, 12-18-95 (prohibiting discrimination in regard to those who operate community television stations).

42. *See Continental Air Lines, Inc. v. Keenan*, 731 P.2d 708, 711 (Colo. 1987) (employee hired under contract terminable at will may enforce termination procedures in employee manual under contractual principles of offer and acceptance or under doctrine of promissory estoppel); *accord Churchey v. Adolph Coors Co.*, 759 P.2d 1336, 1348 (Colo. 1988).

43. *Martin Marietta Corp. v. Lorenz*, 823 P.2d 100 (Colo. 1992).

44. *Lawrence v. Texas*, 539 U.S. 558 (2003), *overruling Bowers v. Hardwick*, 478 U.S. 186 (1986).

45. *Id.*

46. *Id.*

47. *Id.* at 575.

48. *See Robert C. Ozer, P.C. v. Borquez*, 940 P.2d 371 (Colo. 1997) (Colorado Supreme Court recognized invasion of privacy tort claim based on publicity given to private life of associate attorney who was terminated after managing partner of law firm disclosed that associate attorney was homosexual, that his partner was diagnosed with AIDS, and that he needed to be tested for HIV immediately, despite associate's request to keep the disclosure confidential). *See also Briggs v. N. Muskegon Police Dep't*, 563 F.Supp. 585 (D.Mich. 1983), *aff'd,* 746 F.2d 1475 (6th Cir. 1984), *cert. denied,* 473 U.S. 909 (1985).

49. *Lawrence, supra* note 44 at 567.

50. *Id.* at 578.

51. CRS § 24-34-402.5, provides, in pertinent part:

(1) It shall be a discriminatory or unfair employment practice for an employer to terminate the employment of any employee due to that employee's engaging in any lawful activity off the premises of the employer during nonworking hours unless such a restriction:

(a) Relates to a bona fide occupational requirement or is reasonably and rationally re-

lated to the employment activities and responsibilities of a particular employee or a particular group of employees, rather than to all employees of the employer; or

(b) Is necessary to avoid a conflict of interest with any responsibilities to the employer or the appearance of such a conflict of interest.

52. Colorado's sodomy law was repealed in 1972.

53. CRS § 24-34-402.5 has been successfully applied in a variety of contexts, including whistleblowing, *see Millard v. Jeppeson*, Case No. 99 CV 1590 (Arapahoe County Dist. Ct. 2001) (employer liable for retaliating against employee's legal off-duty report of safety violation in production of aeronautic maps); privacy, *see Gwin v. Chesrown Chevrolet*, 931 P.2d 466 (Colo.App. 1996) (affirming jury award under CRS § 24-34-402.5 for claim that defendant car dealership invaded employee's privacy rights by terminating him because of lawful activity he engaged in on his own time away from dealership), *Slater v. King Soopers*, 809 F.Supp. 809 (D.Colo. 1992) (noting that although plaintiff alleging that he was terminated for his membership in KKK did not state a claim under Title VII, he may have stated a c laim under CRS § 24-34-402.5, had he timely brought it).

54. *See Galieti v. State Farm Mut. Auto. Ins. Co*., 840 F.Supp. 104 (D.Colo. 1993); *Galvan v. Spanish Peaks Reg'l Health Ctr*., 98 P.3d 949 (Colo.App. 2004).

55. The Employment Non Discrimination Bill, S.B. 05-28, which was passed by the Colorado legislature in 2005 but vetoed by the Governor, did not contain these significant limitations. In his statement vetoing the bill, Governor Bill Owens said that "Colorado law already protects individuals from being fired because of their sexual orientation. . . ." *citing* CRS § 24-34-402.5, but did not address this point. *See* http://www.Colorado.gov/governor/press/may05/sb028.html. This Employment Non Discrimination Bill has been reintroduced in 2006 as S.B. 06-81.

56. *Robert C. Ozer, P.C., supra* note 48 (although Colorado Supreme Court ultimately determined that the case was not submitted to the jury under this theory, it noted that evidence may have supported a claim of wrongful discharge under CRS § 24-34-402.5, stating "[a]lthough the evidence presented at trial in the current case may have supported a finding that Borquez was discharged because he engaged in lawful activity away from the Ozer law firm's premises during nonworking hours, the jury was not instructed to make such a finding in deciding Borquez's wrongful discharge claim."); *Marsh v. Delta Air Lines*, 952 F.Supp. 1458 (D.Colo. 1997) (describing in *dicta* some applications of CRS § 24-34-402.5(1), noting that "[i]n application, this statute should protect the job security of homosexuals who would otherwise be fired by an employer who discriminates against gay people, members of Ross Perot's new political party who are employed by a fervent democrat, or even smokers who are employed by an employer with strong anti-tobacco feelings"); *Evans v. Romer*, 882 P.2d 1335 (Colo. 1994), *aff'd*, 517 U.S. 620 (1996) (noting that CRS § 24-34-402.5 prohibits employers from discriminating against anyone engaged in off-duty, legal conduct, such as smoking tobacco).

57. *See, e.g., Gerd v. United Parcel Serv., Inc.*, 934 F.Supp. 357 (D.Colo. 1996) (same-sex harassment case holding that where an employer states that an employee would be allowed to work in an environment free from abusive conduct and employee continues to work as consideration for that express condition, a cause of action for breach of contract is stated under Colorado law); *Keenan, supra* note 42; *Tuttle v. ANR Freight Systems, Inc.*, 797 P.2d 825 (Colo.App. 1990). A searchable database including some of the larger employers with such policies can be found on the website of the Human Rights Campaign at http://www.hrc.org.

58. 4 Colo. Code Regs. § 801, R-9-3.

59. *See* note 41 *supra.*

60. *Smith v. City of Salem*, 378 F.3d 566 (6th Cir. 2004); *Fischer v. City of Portland*, No. CV 02-1728, 2003 U.S. Dist. LEXIS 25613 (D.Or. 2003); *Quinn v. Nassau County Police Dep't.*, 53 F.Supp.2d 347 (E.D.N.Y. 1999). *See also Doerr v. Colo. Div. of Youth Servs*., No. 03-1096, 2004 U.S. App. LEXIS 7633 (10th Cir. 2004) (unpublished) (failing to reach question of whether it was clearly established that anti-homosexual harassment violated the Equal Protection Clause for purposes of qualified immunity, because plaintiff failed to present sufficient evidence).

61. *Quinn, supra* note 60.

62. *Weaver v. Nebo Sch. Dist.*, 29 F.Supp.2d 1279 (D.Utah 1998). *But see Doerr, supra* note 60 (First Amendment claim failed because plaintiff's complaints about anti-homosexual harassment he experienced did not constitute speech that touched on a matter of public concern).

63. *See discussion of Lawrence v. Texas* in text.

64. Such bills have been unsuccessfully introduced in both the federal and Colorado legislatures annually over the past several years. As discussed in note 55, *supra*, a bill prohibiting such discrimination passed through the Colorado legislature in 2005, but was vetoed by the Governor. n

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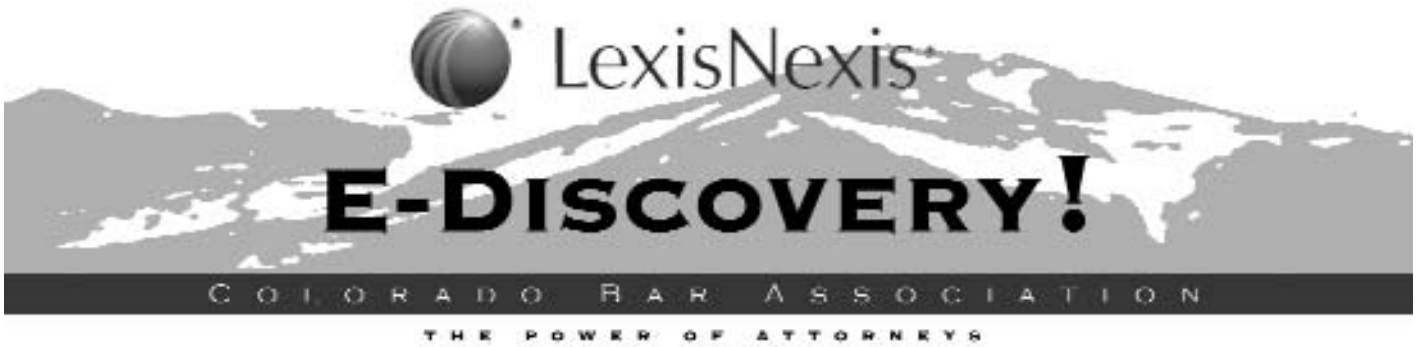

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