

Confusion Reigns in Wake of Gay-Bias Rulings

By Hallye Jordan
Daily Journal Staff Writer

SACRAMENTO — Contradictory court rulings on sexual-orientation discrimination — handed down after the governor's veto of a gay anti-discrimination bill — have left civil rights and employment discrimination attorneys baffled.

The quandary underscores the need for new legislation or a ballot initiative, they say.

In the meantime, plaintiffs attorneys are referring many complaints to the state labor commissioner, who pledged to enforce sections of the labor code prohibiting employers from discriminating against workers based on their sexual orientation. Others are using a dozen or so local ordinances banning such bias as the basis for lawsuits.

But both of those remedies are in jeopardy. An appellate court decision viewed as bolstering the labor code's ban on bias has been appealed to the state Supreme Court. And a superior court ruling striking down a Los Angeles city ordinance prohibiting sexual-orientation discrimination is also being appealed.

Wilson Veto

In vetoing AB101, which would have protected gays against workplace discrimination under the Fair Employment and Housing Act, Gov. Pete Wilson said last fall that gays already are protected under the California Constitution's right to privacy. He also cited Labor Code Sections 1101 and 1102 as protecting manifest gays from employment discrimination based on homosexual political activities or affiliations and noted a 1986 Attorney General's Opinion expanded that protection to gays who have not disclosed their sexual orientation.

In October, the 1st District Court of Appeal cited the Attorney General's Opinion, 69 Ops. Cal. Atty. Gen. 80, in a ruling striking down Target stores' pre-employment psychiatric tests involving questions about, among other things, sexual preference, *Soroka v. Dayton Hudson Corp.*, 91 Daily Journal D.A.R. 13204.

That case opened the door for Labor Commissioner Victoria Bradshaw to begin enforcing Labor Code Sections 1101 and 1102 and Labor Code Section 98.7(c), which authorizes the commissioner to order the employer to cease such action, reinstate or rehire the victim and pay back wages and reasonable attorney's fees or other reimbursement.

Los Angeles City Attorney Kenneth Hahn and San Francisco District Attorney Arlo Smith immediately pledged to enforce Labor Code Section 1103, which provides for misdemeanor criminal sanctions against employers who discriminate against gays.

Dayton Hudson's Surprise

Attorneys for Dayton Hudson, who have petitioned the high court for review and expect a decision by early March on whether the court will grant their request, downplay the case's impact on sexual-orientation discrimination.

"I was surprised the press seized on the angle of sexual orientation discrimination because there were no such allegations in the case," said Nancy L. Ober, attorney with Littler Mendelson Fastiff & Tichy in San Francisco, which represented the respondents.

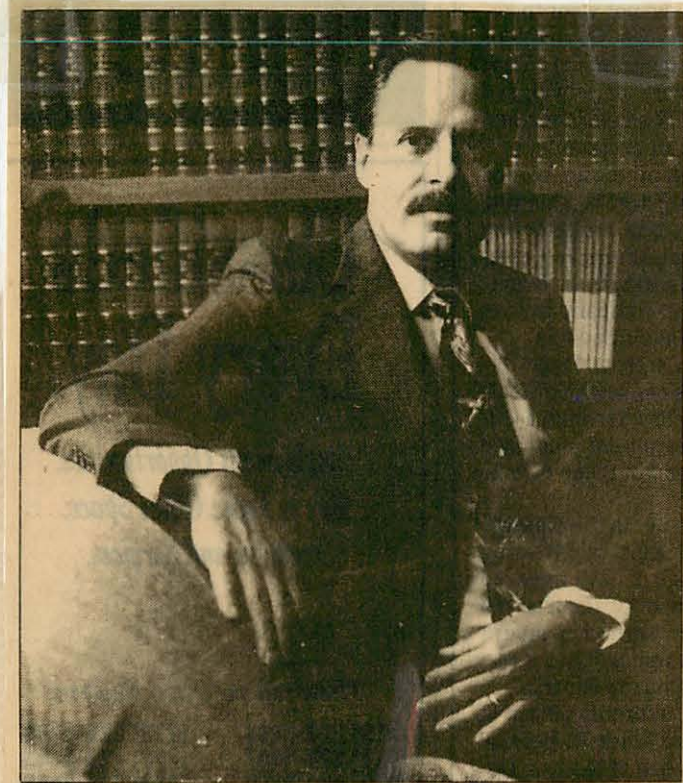
"That the case provided an opening to say flat out that under the Labor Code, no sexual-orientation discrimination is permitted is a misreading about what the case is all about," Ober said.

Still, plaintiffs' attorneys are clinging to the *Soroka* case, as well as local ordinances in other communities, to protect their gay clients.

"It's a temporary protection that would become permanent if the Supreme Court puts its stamp of approval on the Target case and the labor code," said Thomas Coleman, a Los Angeles attorney specializing in sexual orientation and marital status discrimination who is handling the appeal. "But that could be 1½ years from now."

Increase in Complaints

John Duncan, spokesman for the Department of Industrial Relations, said the district offices — which usually deal with complaints involving wage-and-hour matters, equal pay disputes and whistleblower retaliation — had received more than 25 complaints of discrimination based on sexual orientation since the *Soroka* ruling. Although there were some problems at the beginning, such as trying to adapt complaint forms dealing with wage-and-hour disputes to fit the needs of sexual-orientation discrimination victims, new forms have since been printed, he said.



ROBERT LEVINS / Daily Journal

THOMAS COLEMAN — The Los Angeles attorney says "the very people [Gov. Pete] Wilson claimed he was trying to protect — small businesses and the religious right — by vetoing AB101 are the ones who are hurt the most by that veto."

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The department has assigned one hearing officer to hear cases in the southern part of the state and another officer for Northern California complaints. Each is assisted by two inspectors who investigate complaints and refer valid ones to the hearing officer for resolution.

Duncan said the commissioner's "principle emphasis is to get people back to work, get the back pay and their attorneys' fees reimbursed. But if there is an outrageous case, obviously there is legal recourse" by sending the matter to prosecutors.

Of the complaints received, "a handful" involve employers of five or less workers — a group that would have been exempted from sexual-orientation discrimination laws under AB101, Duncan said. No complaints have been filed against religious organizations, another group exempted in AB101.

'Ironic' Situation

Coleman said it was ironic that "the very people Wilson claimed he was trying to protect — small businesses and the religious right — by vetoing AB101 are the ones who are hurt the most by that veto."

"It's a mess," agreed John Duran, partner in Duran Loquvam & Kendricks, a West Hollywood gay law firm. "*Soroka*, instead of cleaning up the area, just made it murkier for both sides."

Not only does the labor code not provide exemptions, it also authorizes both civil and criminal penalties, whereas AB101 would have simply allowed civil and administrative remedies, noted Duran, co-chair of LIFE, the Lobby for Individual Freedom and Equality.

Duran, who said LIFE is drafting an omnibus civil rights bill that has attracted the interest of both Assemblyman Terry Friedman, D-Sherman Oaks, and Senate President pro Tempore David Roberti, D-Hollywood, said the confusion may help get clarifying legislation enacted.

"We think it's best, not only for gays and lesbians, but business groups as well to clear up this whole area," he said.

Surprise at Chamber of Commerce

"The point of AB101 was to make it clear it is the policy of the state and it is illegal to discriminate against someone based on their sexual orientation," said San Francisco attorney Paul Wotman.

The California Chamber of Commerce has not compared the labor code to provisions proposed in AB101, said Fred Main, chamber lobbyist. "Frankly, I believe a lot of people are just starting to realize there has been a change in the law. We had a huge focus on AB101, then all of a sudden, a law is being enforced that AB101 said didn't exist and was needed."

Main said the chamber hasn't received any complaints from employers, but cautioned the newness of the enforcement and the holiday season most likely have sheltered many employers from realizing a different law was being enforced.

Plaintiffs attorneys in cities and counties with anti-sexual-orientation discrimination ordinances also are relying on those codes — at least until they are given a definitive ruling on the Los Angeles judge's order.

L.A. Superior Court Ruling

"Right now, we're continuing to enforce it," said Greg Nelson, assistant to City Councilman Joel Wachs, whose office staffs a hotline for sexual orientation complaints. "As far as I'm concerned, it was a bad judge and a bad day."

In the case, *Delaney v. Superior Fast Freight*, C759189, Judge Diane Wayne ruled the city of Los Angeles ordinance prohibiting discrimination based on sexual orientation is pre-empted by the Fair Employment and Housing Act.

Coleman, who is handling the appeal of the *Delaney* case, noted the case also involves labor code issues because the judge refused to allow the plaintiffs to amend their plea to include allegations of violating the labor code.

"If it goes, we have nothing," Coleman said.

David Schulman, supervising attorney in the Los Angeles City Attorney's AIDS/HIV Discrimination Unit, said Wayne's ruling conflicts with a similar case last

April. In *Ertag v. Western Union*, 907720, recently retired San Francisco Superior Court Judge Ira Brown said local ordinances banning sexual-orientation bias are not pre-empted by the Fair Employment and Housing Act, which does not mention the words "sexual orientation."

The attorney for the plaintiff in *Ertag*, Melvin Honowitz, a sole practitioner in San Francisco, called Wayne's ruling "pretty outrageous. It throws everything up in the air."

Threat to Other Ordinances

"It's a very, very open issue right now," Honowitz said. "You've got a rather unique quandary, in my opinion, between whether or not there are going to be any protections for people based on their sexual orientation and how that's going to tie in based on the Target decision and with privacy rights."

Despite the *Delaney* ruling, the Los Angeles City Attorney's Office still is enforcing a city ordinance banning sexual-orientation discrimination, said Schulman, who will assist the lead counsel, Assistant City Attorney Linda Lefkowitz, in filing a brief in the *Delaney* case. "In Judge Wayne's courtroom, our law is not alive and well but because it was a trial court, her ruling has no effect on other courts," Schulman said.

Larry Brinkin, an attorney with the San Francisco Human Rights Commission, said he's concerned about the Los Angeles court ruling and what appellate courts may do with it. If it is upheld by higher courts, it would threaten local ordinances in other cities, such as Berkeley, Oakland, Palo Alto, Sacramento, Santa Cruz, West Hollywood and San Diego, he said.

The Need to Act Quickly

In addition, Brinkin said the labor code is flawed because it has only a 30-day statute of limitations, compared to the Fair Employment and Housing Act's year.

"That's tough, because by the time people realize what their protections are and decide to fight back, it's often too late," Brinkin said. However, he added, the code does include language allowing the commissioner to extend the statute of limitations under special circumstances.

Friedman, who carried AB101, said he attempted to contact Wilson's office immediately after the *Soroka* case to suggest new legislation consistent with the governor's veto message, "but we've gotten no response."

Still, Friedman said he plans to reintroduce AB101 and "look at ways of making it codify with *Soroka*, as well as consider some exemptions [for small employers and religious organizations]."

Friedman said while AB101 would have provided for only a civil penalty, employers who violate the labor code bias ban face both civil and criminal sanctions.

"I am, by nature, an eternal optimist," Friedman said, "so I believe the governor may have a desire to get himself out of the terrible corner he has placed himself. *Soroka* just makes it all the more compelling for him to do so."

Split in Gay Rights Groups

In the meantime, gay rights groups are split over whether to place an initiative providing for workplace protection on the November 1992 ballot. Duran said the issue has mostly split "the gay establishment and the so-called AB101 babies" who became active after the bill was vetoed, Duran said.

Duran said he opposes placing the initiative on the ballot for political and financial reasons, and instead prefers seeing LIFE's omnibus bill civil rights bill address the issue.

"It seems ludicrous to take minority protections and subject them to a vote by the majority from whom they are seeking protection. . . . Besides all that, the money it takes to get an initiative takes away from the money we need for HIV and fighting gay bashing and all those other things," he said.

However, he acknowledged, an initiative battle is shaping up regardless: "Even if the Legislature passes [a bill protecting gay workers], the right wing is going to try to repeal it," Duran said.

Brinkin said he is aware of what a defeat at the polls would mean to gay rights activists, "but I'm in favor of doing it in November 1992 because the election will have a higher electorate numberwise." He said races for the president and both Senate seats will draw more voters. "And a huge turnout means more liberals and that will help us."

Michael Adams of the Employment Law Center in San Francisco, agreed. "I personally believe an initiative is a good idea. The state of the law is in so much flux and in this day and age, gays can't rely on the courts to protect them.

"And until we have laws on the books, those guarantees will never be firm," Adams said.

KEY RULINGS

Several court rulings dealing with the rights of gays have spurred calls for legislation and ballot measures to protect Californians against discrimination based on sexual orientation. Among the rulings and Attorney General's Opinions on the issue are:

■ *Gay Law Students Association v. Pacific Telephone and Telegraph*, 24 Cal.3d 458 (1979). The court found employers are prohibited from discriminating against workers based on their political activities or associations, and extended that protection to include manifest homosexuals involved in gay or lesbian political activities or affiliations.

■ A 1987 Attorney General's Opinion issued by former Attorney General John Van De Kamp, 69 Ops. Cal. Atty. Gen. 80, extended that protection to prohibit employers from discriminating against an employee based on his or her sexual orientation.

■ *Ertag v. Western Union*, 907720. San Francisco Superior Court Judge Ira Brown in April upheld a city ordinance prohibiting sexual orientation discrimination when he rejected arguments that the city does not have the right to provide a civil remedy for a cause of action. The defendants in the case unsuccessfully argued only the state Legislature can create a cause of action.

■ *Delany v. Superior Fast Freight*, C759189. Los Angeles Superior Court Judge Diane Wayne ruled in October that Los Angeles' ordinance prohibiting employment discrimination based on sexual orientation is pre-empted by the Fair Employment and Housing Act.

■ *Soroka v. Dayton Hudson Corp.*, 1 Cal. Rptr. 2d 77 (1991). In this October case dealing with Target Stores' pre-employment psychiatric testing, the 1st District Court of Appeal ruled employers are prohibited from requiring job applicants to take psychological tests because tests that ask questions about religion and sexual orientation violate the applicant's privacy. Citing the Attorney General's Opinion, the court also held that Labor Code Sections 1101 and 1102 prohibit employers from discriminating against workers or job applicants based on their sexual orientation, whether they express their homosexual orientation or not.

■ *Donahue v. Fair Employment and Housing Commission*, 91 Daily Journal D.A.R. 14633. The 2nd District in November ruled that a Los Angeles County couple's religious views that fornication and its facilitation are sins exempt them from Government Code Section 12955, which prohibits landlords from discriminating against tenants based on their marital status.

■ *Citizens for Responsible Behavior v. Superior Court*, 91 Daily Journal D.A.R. 15844. In this appeal of a Riverside Superior Court ruling, the 4th District in December upheld the trial court's ruling that an initiative seeking to overturn Riverside's gay rights ordinance was constitutionally defective and represented an impermissible effort to amend the city's charter by ordinance.

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