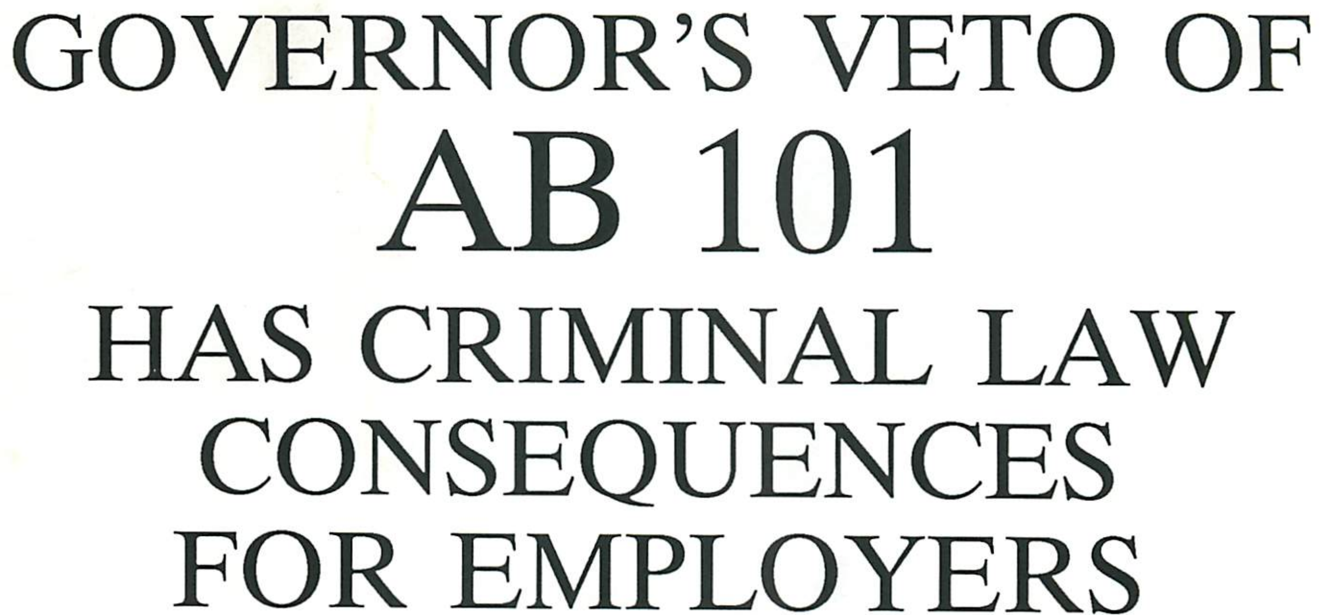

GOVERNOR'S VETO OF AB 101 HAS CRIMINAL LAW CONSEQUENCES FOR EMPLOYERS

by Thomas F. Coleman, Esq.

October 29, 1991

EEO Seminars
P.O. Box 65756
Los Angeles, CA 90065
(213) 258-8955 / ext. 104

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GOVERNOR'S VETO OF AB 101 HAS CRIMINAL LAW CONSEQUENCES

by Thomas F. Coleman, Esq.

The Legislature recently passed AB 101 and sent it to the Governor. The Governor soon exercised his constitutional prerogative and returned the measure to the Assembly with his veto and written objections.[1]

In his veto message, the Governor indicated that AB 101 had "received my close attention and the most careful weighing of arguments for and against its enactment"[2] The veto message also indicated that the Governor rejected AB 101 after "conscientious and thorough analysis."

The Governor cited several reasons for his veto. Among them was the Governor's declaration that several existing state laws already prohibit public and private employers from engaging in sexual orientation discrimination.

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[1]According to California Constitution, Art. IV, Sec. 10, the Governor may veto a bill by returning it with any objections to the house of origin.

[2]AB 101 Veto Message of the Governor to the Members of the Assembly, September 30, 1991 (see attachment at p. 14).

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As examples of the "protections afforded by existing law to eliminate discrimination on the basis of sexual orientation in both public and private employment," the Governor stated:

> "California *should and does presently* treat sexual orientation as a private matter, protected by the express right of privacy in the California Constitution, and entitled to legal protection in several specific areas: . . .
>
> "Under current case law, Labor Code sections 1101 and 1102 protect manifest homosexuals from employment discrimination based on gay or lesbian political activities or affiliations. (*Gay Law Students Association v. Pacific Telephone and Telegraph* (1979) 24 C.3d 458.)
>
> "Further, an Attorney General's opinion has concluded these provisions prohibit a private employer from discriminating on the basis of sexual orientation or affiliation, private as well as manifest. (69 Ops. Cal.Atty. Gen. 80 (1986))."

As a matter of policy, the Governor underscored his veto message by declaring that "No one can legitimately seek to protect or justify prejudice practiced by the employer who is in fact guilty of discrimination on the basis of sexual orientation." The Governor also acknowledged and declared "the right of employees to be free of such discrimination."

The substance of the Governor's pronouncements have significant ramifications, especially with respect to the enforcement

of the criminal laws of the State of California.[3]

The Governor cited Labor Code Sections 1101 and 1102 as two examples of existing protections against sexual orientation discrimination. Those statutes prohibit employers from taking adverse action against employees on account of their political activities. In the *Gay Law Students Association* case cited by the Governor, the Supreme Court observed:

> "[T]he struggle of the homosexual community for equal rights, particularly in the field of employment, must be recognized as a political activity."[4]

The Supreme Court ruled that an employer violates Labor Code Sections 1101 and 1102 if the employer discriminates against persons who identify themselves as homosexual, who defend homosexuality, or who are identified with activist homosexual organizations. The court concluded that applicants as well as employees are protected under Sections 1101 and 1102.

The Governor also cited with approval an Attorney General opinion concluding that all sexual orientation discrimination is

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[3]The significance of these pronouncements is also magnified by the fact that it was the *Governor*, who made them. Article 5, Section 1 of the California Constitution vests the supreme executive power of the state in the Governor. Under Article V, Section 13 of the Constitution, the legal power of the Attorney General is subordinate to that of the Governor. When he vetoed AB 101, the Governor was acting in a legislative, not an executive capacity. *Lukens v. Nye* (1909) 156 Cal. 498, 105 P. 593. However, it would strain the imagination to conceive that the Governor would someday announce that he had a split personality and that the executive side of his official personality did not agree with the legal reasoning of his legislative side. In any event, courts can take judicial notice of legislative records and statements of concerned agencies in determining legislative intent. *Palmer v. Agee* (1978) 87 Cal.App.3d 377, 384. The Governor's veto message would appear to qualify as such a public record.

[4]*Gay Law Students Assocation* at 488 (see attachment at p. 20).

prohibited by Sections 1101 and 1102, regardless of whether the employee or applicant is openly gay or lesbian or private about his or her sexual orientation.[5]

Thus, as the law has been interpreted over the past 11 years by the Supreme Court, the Attorney General, and the Governor, all employers in California are prohibited from engaging in sexual orientation discrimination. Citing these Labor Code Sections and the Attorney General opinion with approval, the Court of Appeal has agreed.[6]

An employee who has been discriminated against in violation of Labor Code Sections 1101 and 1102 may file a civil lawsuit to recover damages sustained by the employer's wrongful conduct.[7] However, there is more.

An employer who discriminates against an employee or applicant in violation of Sections 1101 or 1102 has committed a misdemeanor.[8] The penalty for the crime is up to one year in the county jail or fines up to $5,000.

The criminal process begins when a victim files a complaint with one of the 20 offices of the state Labor Commissioner. Those offices have been instructed to process complaints involving sexual orientation discrimination under Sections 1101 and 1102.

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[5] (See attachment of Attorney General's Opinion at p. 21) Although an Attorney General's interpretation of a statute is not controlling, it is entitled to great weight and respect by the courts. *Tafoya v. Hastings College of Law* (1987) 191 Cal.App.3d 437. That the Governor cited such an opinion with approval would seem to give it even greater persuasive force.

[6]Sibi Soroka v. Dayton Hudson Co. (1991) __ Cal.App.3d __, Case No. A052157, filed October 25, 1991 (certified for publication).

[7]Labor Code Section 1105 specifically provides for civil remedies.

[8]Labor Code Section 1103 authorizes criminal prosecution.

In a memo sent to all district offices soon after the *Gay Law Students Association* case was issued by the Supreme Court, the Labor Commissioner stated:[9]

> "With the widespread publicity this case has received, we may have claims filed in our offices under the theory advanced by the court. I am therefore furnishing the Senior Deputy in each office that part of the Supreme Court's decision dealing with Labor Code Sections 1101 and 1102. Note that the remedy for violation is criminal prosecution."

In November 1990, the Attorney General published a "Civil Rihts" handbook which stated:[10]

> "The Attorney General of California has concluded that these sections prohibit all employment discrimination based on sexual orientation. An employer who violates either Labor Code Section 1101 or 1102 is guilty of a misdemeanor and is subject to a fine and/or jail time. Violators of these statutes may be

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[9]On June 13, 1979, this memo was sent to all district offices by then Labor Commissioner James Quillan (see attachment at p. 19). A copy of the memo was sent to me by Assistant Labor Commissioner Albert Reyff on January 10, 1980 in response to inquiries by former American Civil Liberties Union Staff Attorney Susan McGrievy and myself (see attachments at pp. 31-36). Four days after Governor Wilson vetoed AB 101 I contacted Acting Labor Commissioner James Curry. We had a lengthy telephone conversation in which he acknowledged the continuing force and effect of the 1979 directive by Mr. Quillan. He mentioned that several cases had been processed by the Labor Commissioner's office subsequent to that directive. He further indicated that his office would continue to enforce Sections 1101 and 1102.

[10]"Unlawful Discrimination: Your Rights and Remedies," November 1990, Second Edition, California Attorney General's Office (see attachment at p. 26).

prosecuted by your local district and/or city attorney."

What does all of this mean for employers and employees in California? It means that in vetoing AB 101, the Governor has required employees or applicants who are victims of sexual orientation discrimination to resort to the use of *existing legal protections*. Those protections are both civil and criminal.

Existing civil protections generally require a victim to hire an attorney to file a lawsuit in Superior Court against the employer.[11] Most labor law attorneys require a substantial retainer. Most employment discrimination victims cannot raise the money for such a retainer. These victims are therefore left to pursue existing criminal remedies.[12]

What would happen if a victim of sexual orientation discrimination were to file a complaint with the Labor Commissioner?[13] The employee would file charges with the Labor

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[11]Although 13 cities and one county have adopted ordinances prohibiting sexual orientation discrimination by private employers, most of these local laws do not have administrative remedies. (See attachment at p. 43 for a list of municipalities in California that prohibit sexual orientation discrimination.) Therefore, most victims of discrimination must file a lawsuit to obtain relief. There is no local agency in most of these jurisdictions to investigate such complaints and pursue the case for the victim. One exception is in San Francisco where the Human Rights Commission can process such cases. Otherwise, in most cities such as Los Angeles, Long Beach, and San Diego, the remedy is a civil lawsuit.

[12]The fact that the Labor Commissioner has processed very few cases under Sections 1101 and 1102 is probably because most victims do not know this remedy exists. The *Los Angeles Times* printed one article which discussed the remedies outlined in the Attorney General's Opinion, as did *The Advocate*, a national Lesbian and Gay news magazine (see attachments at pp. 30, 31).

[13]The procedures outlined here were followed in a case that I personally monitored in Bakersfield several years ago. When the Labor Commissioner's investigation determined that probable causes existed to believe that the employer violated the law, the employee

(continued...)

Commissioner who would then conduct an investigation.[14] If the investigation were to show probable cause to believe that the employer has engaged in sexual orientation discrimination, the case would be referred to a city attorney or district attorney for prosecution.

What would happen if such a referral were to be received by a city attorney or district attorney -- today? The prosecutor basically would have three options: (1) file a criminal complaint in the Municipal Court; (2) refer the case for an office hearing in an attempt to resolve the matter; or (3) reject the case for insufficient evidence.

What would happen if the prosecutor were to file a criminal complaint with the Municipal Court? Either a warrant would be issued for the employer's arrest or the employer would be be notified to appear in court for an arraignment. At the arraignment, the employer would be required to enter a plea of guilty or not guilty.[15] If the employer were to plead not guilty, the case would be set for trial. Of course, the employer would be entitled to a jury trial.

What would happen if the employer were to be convicted by a jury?[16] The court could place the employer on probation, order the employer to pay a fine up to $5,000 for a corporation or $1,000

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[13](...continued)
was reinstated with back pay by the employer before the Labor Commissioner referred the case to the Kern County District Attorney for prosecution.

[14]The Department of Industrial Relations has Bureau of Field Enforcement Offices and District Offices throughout the state (see attachment at p. 37).

[15]The court proceedings and the court records would be, of course, open to the public.

[16]In order to convict the employer, the prosecutor would be required to convince all 12 jurors, beyond a reasonable doubt, that the employer discriminated against the victim on the basis of sexual orientation.

for an individual, and/or sentence the employer to serve up to one year in the county jail.

In all criminal prosecutions of this nature, "the employer is responsible for acts of his managers, officers, agents, and employees."[17] For a wide variety of reasons, it would seem that most employers would be granted probation for a first offense.

What would happen if an employer were to be placed on probation? The court could order the employer to participate in an educational program designed to eliminate sexual orientation discrimination in the future. Also, a court would most likely order the employer to pay restitution as a condition of probation.[18] Restitution would include lost wages.[19]

The purpose of a restitution order is to "make the victim whole." *People v. Walmsley* (1985) 168 Cal.App.3d 636, 639. It is therefore likely a court would order an employer to hire a victim-applicant or to reinstate a victim-employee.[20]

What is the bottom line? The Governor's veto of AB 101 has forced employers and employees into an extremely adversarial situation of criminal and victim. Most victims of discrimination most likely will be middle-class or working-class employees who won't have the option of initiating high-priced civil lawsuits to gain redress. If these victims want any remedy at all, they will be forced into the

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[17]Labor Code Section 1104.

[18]Article I, Section 28(b) also known as the "Victim's Bill of Rights" declares that crime victims have a right to restitution for losses they suffer as a result of criminal activity.

[19]Penal Code Section 1203.04.

[20]The purposes of a restitution order are rehabilitating the offender and deterring future criminal conduct. *In re Brian S.* (1982) 130 Cal.App.3d 523, 529; *People v. Hodgkin* (1987) 194 Cal.App.3d 795, 802; *Walmsley, supra,* at p. 639.

heavy-handed and high-stakes criminal process described above.

The availability of criminal remedies to victims of sexual orientation discrimination has been affirmed by San Francisco District Attorney Arlo Smith and Los Angeles City Attorney James Hahn. Both prosecutors held press conferences on October 29, 1991, to announce a statewide law enforcement program -- including the imposition of criminal penalties -- to protect gays and lesbians in employment.[21]

In contrast, AB 101 and its purely civil remedies -- administrative or judicial -- may begin to look more attractive to employers and employees alike.[22]

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[21]Arlo Smith's press advisory stresses that Governor Wilson's veto of AB 101 "has left D.A.'s no choice but to prosecute employers as criminals." (See attachment at p. 38) Jim Hahn's press advisory announces an enforcement campaign using state and city laws to eradicate sexual orientation discrimination in employment. (See attachment at p. 39) Furthermore, Arlo Smith and Jim Hahn each have sent a letter to state Labor Commissioner Victoria L. Bradshaw reminding her that the Governor and the Attorney General have concluded that complaints of discrimination against homosexuals are within the Labor Commissioner's jurisdiction under Labor Code Sections 1101 and 1102. Mr. Smith emphasized that his office "is prepared to prosecute any employer who violates those sections." Both prosecutors requested the Commissioner to investigate all proper complaints and refer to them to their respective offices for prosecution. (See attachment at pp. 40-42)

[22]Employers may prefer AB 101 for several reasons: (1) administrative investigations are civil and not criminal in nature; (2) the administrative process is private unlike a criminal prosecution which is public and necessarily exposes an employer to publicity; (3) the costs of AB 101's administrative procedures are minimal compared to months or years of litigation involving expensive legal fees under current remedies. Employees may also prefer AB 101 for several reasons: (1) an administrative process would not require the employee to be public about his or her sexual orientation unlike a criminal trial which is open to the public; (2) a civil jury can return a verdict if 9 out of 12 jurors agree, unlike a criminal trial which requires unanimity; (3) criminal restitution is limited to out of pocket costs whereby civil damages can include emotional distress and punitive damages. These are only a few of the reasons that AB 101 may be more attractive to employers and employees rather than existing civil and criminal protections.

About the Author

Thomas F. Coleman has been practicing law in California since 1973. During the past 18 years, Mr. Coleman has become one of the nation's leading experts on public policy and the law governing sexual orientation and marital status discrimination.

Mr. Coleman is currently the president of *EEO Seminars*. *EEO Seminars* provides consulting services and seminars for businesses on issues concerning employment discrimination based on sexual orientation and marital status.

From 1975 to 1979, Mr. Coleman was publisher and managing editor of the *Sexual Law Reporter*, a legal periodical analyzing and reporting on national developments with respect to sexual privacy, sexual orientation discrimination, and marital status discrimination. Major universities, law schools, professors, students, lawyers, and judges subscribed to the publication.

In 1979, Mr. Coleman was asked by the Governor's Office for suggestions on the wording of a proposed executive order to be issued by the Governor. Mr. Coleman's suggestions were adopted and on April 4, 1979, Governor Edmund G. Brown Jr. signed an executive order prohibiting sexual orientation discrimination in state employment. For two years, Mr. Coleman worked with the Governor's Office and the State Personnel Board to implement the executive order. This work resulted in the creation of a Sexual Orientation Discrimination Project within the State Personnel Board. The Project assisted the Board in developing policies and guidelines governing such discrimination in the state workforce.

In 1979, Mr. Coleman participated as a friend of the court in the landmark case of *Gay Law Students Association v. Pacific Telephone* (1979) 24 Cal.3d 458. In its decision, the court ruled that sexual orientation discrimination is illegal in both public and private employment throughout California.

In 1981, Mr. Coleman was appointed to serve as Executive Director of the Governor's Commission on Personal Privacy. After two years of public hearings and research, the Commission issued its final report to the Governor and the Legislature. Over 100 pages of the report focused on sexual orientation discrimination, particularly in the areas of employment and housing. Mr. Coleman was the author of the final report of the Privacy Commission.

In 1981, Mr. Coleman conducted a seminar for Affirmative Action Officers within the California state civil service. The seminar was entitled "Sexual Orientation Discrimination in State Employment"

In 1983, Mr. Coleman testified before the Board of Regents of the University of California. He presented the regents with a legal basis for adopting a nondiscrimination policy.

In 1984, Mr. Coleman participated in a seminar in Los Angeles on sexual orientation discrimination in employment. His presentation focused on "Constitutional Rights in the Workplace."

In 1984, Mr. Coleman was appointed to serve as a member of the California Attorney General's Commission on Racial, Ethnic, Religious, and Minority Violence. Mr. Coleman assisted the commission's staff and consultants in gathering information about hate crimes against lesbians and gay men and in formulating recommendations designed to prevent and combat such violence. The commission held hearings and issued reports in 1986, 1988, and 1990.

In 1985, Mr. Coleman participated as a friend of the court in the case of *N.G.T.F. v. Board of Education* (1985) 470 U.S. 903. In that case, the United States Supreme Court upheld a decision of the U.S. Court of Appeals protecting Oklahoma teachers from sexual orientation discrimination.

In 1985, Mr. Coleman became an adjunct professor at the University of Southern California Law Center. For several years he has taught a class on "Rights of Domestic Partners." Major portions of the class focus on employment discrimination on the basis of sexual orientation and marital status.

In 1986, Mr. Coleman was appointed to serve as a special consultant to the Los Angeles City Task Force on Family Diversity. After two years of research and public hearings, the task force issued its final report in May 1988. Major portions of the report focused on sexual orientation and marital status discrimination, especially in the areas of employment, housing, and insurance. For the following three years, Mr. Coleman worked closely with city council members, the city administrative officer, the city attorney, the personnel department and several unions to develop a system granting sick leave and bereavement leave to a city employee if his or her unmarried partner were to become ill or die. In 1991, two city unions, representing more than 12,000 workers signed contracts with the city that included these domestic partnership benefits.

In 1987, Mr. Coleman was appointed to serve as a member of the California Legislature's Joint Select Task Force on the Changing Family. After many public hearings and ongoing research, the task force issued a series of reports to the Legislature. One aspect of the study involved work and family issues. Recommendations were made to eliminate discrimination on the basis of sexual orientation and marital status from employee benefits programs.

In 1989, Mr. Coleman was appointed to serve as chairperson of the Los Angeles City Attorney's Consumer Task Force on Marital Status Discrimination. The task force issued its final report in May 1990. The report documented widespread discrimination by businesses on the basis of sexual orientation and marital status. It made numerous recommendations to eliminate discriminatory practices. Many of the recommendations are currently in the process of implementation.

In 1989, Mr. Coleman participated as a friend of the court in the landmark case of *Braschi v. Stahl Associates* (1989) 74 N.Y. 201. In that case, New York's highest court ruled that the term "family" was not necessarily limited to relationships based on blood, marriage, or adoption. The court concluded that unmarried partners who live together on a longterm basis may be considered a family in some legal contexts. The *Braschi* decision is being cited as precedent in numerous lawsuits against employers by employees who have been denied employment benefits, such as sick and bereavement leave, health and dental insurance, and other benefits for their unmarried partners.

In 1989, Mr. Coleman was retained as a consultant by the City of West Hollywood as an expert on domestic partnership issues. He presented his findings to the city council on how the city could strengthen its ordinance protecting domestic partners from discrimination.

In 1989, Mr. Coleman conducted a seminar for faculty and staff at the University of Southern California on "Employee Benefits and the Changing Family."

Over the past 18 years, Mr. Coleman has conducted workshops and seminars and made numerous public presentations dealing with discrimination on the basis of sexual orientation and marital status. These have included presentations at: American Bar Association, California State Bar Association, Los Angeles County Bar Association, Los Angeles City Council, Annual Conference on Women and the Law, New York University Legal Symposium, and a variety of civil rights organziations.

Mr. Coleman is often quoted by the print media on issues pertaining to family diversity, domestic partnerships, sexual orientation discrimination, and marital status discrimination. For example, he has been quoted by Time Magazine, New York Times, Los Angeles Times, Boston Globe, Philadelphia Enquirer, Detroit News, Chicago Tribune, San Francisco Examiner, San Francisco Chronicle, Sacramento Union, Seattle Post Intelligencer, and the Orlando Sentinel.

Mr. Coleman has appeared frequently on radio and television shows, discussing issues pertaining to family diversity, domestic partnerships, sexual orientation discrimination, and marital status discrimination. For example, he has appeared on national shows such as ABC Nightline, NBC Today Show, and the CBS Evening News.

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State of California
GOVERNOR'S OFFICE
SACRAMENTO, CA 95814

PETE WILSON
GOVERNOR

TELEPHONE
(916) 445-2841

WILSON TO VETO AB101

FOR IMMEDIATE RELEASE
September 29, 1991

Contact: Bill Livingstone
Dan Schnur
Franz Wisner
James Lee
(916) 445-4571

SACRAMENTO -- Governor Pete Wilson today announced he is vetoing AB 101. Attached is a copy of the Governor's veto message, which will be delivered to the bill's sponsor, Assemblyman Terry Friedman (D-Los Angeles), tomorrow morning.

-30-

State of California
GOVERNOR'S OFFICE
SACRAMENTO 95814

PETE WILSON
GOVERNOR

TELEPHONE
(916) 445-2841

September 30, 1991

To the Members of the California Assembly:

Assembly Bill No. 101 is important legislation. It deserves and has received my close attention and the most careful weighing of arguments for and against its enactment. I have given AB 101 and these arguments conscientious and thorough analysis and I am returning this bill without my signature.

My decision to do so will cause profound disappointment to men and women of good faith whose goodwill I value, and I genuinely regret that. I regret even more any false comfort that may be derived from it by the tiny minority of mean-spirited, gay-bashing bigots. Their own need for tolerance ironically exceeds their capacity to extend it. The excesses of such bigots strongly tempt me to sign the bill. But their abhorrent conduct cannot be the basis for my decision, any more than the excesses of a minority of the bill's supporters.

It is important that Californians of goodwill on both sides of the issue understand the reasons for my veto.

Proponents argue that a single issue, and a simple one, is presented by AB 101: that simple fairness demands the elimination of discrimination in employment on the basis of sexual orientation. Were AB 101 not a complex statutory proposal of remedies and procedures but rather a simple resolution declaring that simple proposition, it could be easily accepted.

Indeed I have expressed that very view earlier this year in a meeting with a group of California newspaper editors. And in fact, California <u>should and does presently</u> treat sexual orientation as a private matter, protected by the express right of privacy contained in the California Constitution, and entitled to legal protection in several specific areas:

Members of the Assembly
Page two

September 30, 1991

Housing

Homosexuals are protected from discrimination in housing accommodations under the Unruh Act (See Rolon v. Kulwitzky (1984) 153 Cal. App. 3d 289; Hubert v. Williams (1982) 133 Cal. App. 3d Supp. 1.). In fact, in recognition of such existing protection, the sponsor has deleted the housing provisions of AB 101 as unnecessary.

Employment

The state constitution's equal protection clause prohibits discrimination by any governmental entity against any class of individuals in employment decisions (Art. I, sec. 7, subd. (a), Cal. Const.).

Government Code sec. 18500 requires all civil service applicants and employees be treated in an equitable manner without regard to sexual orientation.

Executive Order B-54-79 prohibits discrimination on the basis of sexual orientation in state employment.

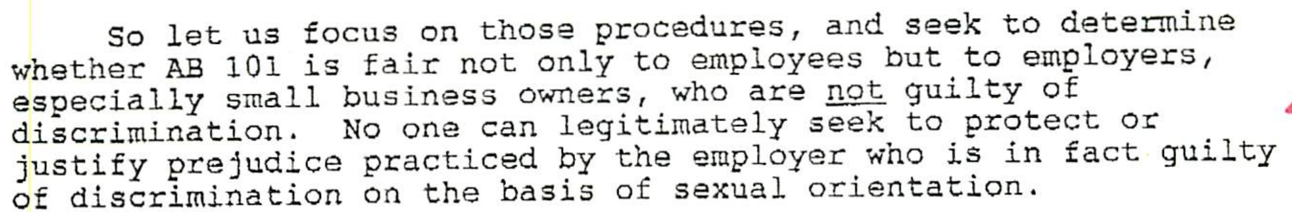
Under current case law, Labor Code sections 1101 and 1102 protect manifest homosexuals from employment discrimination based on gay or lesbian political activities or affiliations. (Gay Law Students Association v. Pacific Telephone and Telegraph (1979) 24 C. 3d 458.)

Further, an Attorney General's opinion has concluded these provisions prohibit a private employer from discriminating on the basis of homosexual orientation or affiliation, private as well as manifest (69 Ops. Cal. Atty. Gen. 80 (1986)).

Moreover, courts have been increasingly vigorous in protecting homosexual employees from wrongful termination. (Collins v. Shell Oil Company (1990) 56 Fair Empl. Prac. Cas. 440.)

Despite the protections afforded by existing law to eliminate discrimination on the basis of sexual orientation in both public and private employment, its proponents argue that the further protection of AB 101 is required.

What they are really contending is that alleged victims of such discrimination require the specific remedy of the fair employment procedures of the Department of Fair Employment and Housing, and the Fair Employment and Housing Commission.



So let us focus on those procedures, and seek to determine whether AB 101 is fair not only to employees but to employers, especially small business owners, who are not guilty of discrimination. No one can legitimately seek to protect or justify prejudice practiced by the employer who is in fact guilty of discrimination on the basis of sexual orientation.

While we acknowledge and declare the right of employees to be free of such discrimination, we are compelled to apply a test of fairness so as to avoid imposing an unfair result upon employers charged with but not guilty of discrimination, and upon the other employees of such employers.

The remedy proposed by AB 101 for those who believe themselves to be victims of employer discrimination based on their sexual orientation is to pursue procedures now available to those who believe themselves the victims of job discrimination because of race, gender, age, physical disability or membership in some other protected class.

Over 10,000 such complaints are filed each year with the Department of Fair Employment and Housing! Up to one-quarter may wind up in court, adding substantially to the flood-tide of litigation which increasingly and importantly threatens California's competitiveness as a place to do business.

The cost to employers of defending against these lawsuits is not readily quantifiable, but it is real and substantial, especially to small employers. Litigation in any form is expensive. The potential cost, however, is more than going to court. It includes a myriad of unknowns, such as the potential increase in business insurance. It also includes the cost of avoiding litigation. As has happened in other cases, businesses may find themselves implementing costly programs to avoid the protracted negative publicity that even groundless lawsuits sometimes cause.

As we all know, the simple filing of a lawsuit appears as an indictment in the morning newspaper. This is a powerful weapon even in the hands of the well meaning. In the hands of the malicious or litigious, it holds the potential for serious abuse.

Indeed, I am advised by state government and private attorneys that many employers--especially the small businesses that employ 85% of California's work force--simply do not contest charges that they dispute, choosing instead to settle to avoid the hassle, the expense, and the notoriety resulting from the defense of a lawsuit.

In short, AB 101 is not a simple resolution declaring an acknowledged right. It is a statute imposing, in addition to present protections, a specific remedy which does indeed create burdens upon employers, both guilty and innocent.

AB 101 has been routinely labeled by the news media as a "gay rights bill." Proponents of the legislation have rejected this characterization, protesting that they are seeking no special rights unavailable to others, but only freedom from discrimination. They ask, they say, only fairness.

Well, fair enough.

But they should understand, then, the need for fairness to innocent employers and their other employees.

While there is no question that bigots exist and engage in abhorrent, utterly repugnant gay-bashing, the real test of whether AB 101 should become law is a test of the fairness of the remedy it proposes.

And there is clearly a question in each of the more than 10,000 cases filed annually with the Department of Fair Employment and Housing as to whether the complaint of discrimination is meritorious or simply the product of employer disgruntlement urged on by a litigious lawyer.

The test of fairness to be applied to AB 101 is whether there is evidence of discrimination so pervasive as to warrant state government imposing so widely a burden so oppressive to potentially numerous innocent employers.

Should we increase the already heavy caseload at the Department of Fair Employment and Housing and in the courts?

Fairness demands that where other protections exist in the law, anecdotal evidence of even invidious discrimination--if it has not been shown to be pervasive--does not warrant imposing that burden.

Cordially,

PETE WILSON

State of California

Memorandum

To : All Professionals

Date : June 13, 1979

Subject : Supreme Court Decision - LC Secs. 1101 and 1102

From : **Department of Industrial Relations**
Division of Labor Standards Enforcement
James L. Quillin, Labor Commissioner

In a recent Supreme Court decision, Gay Law Students Association et al vs. Pacific Telephone and Telegraph Company et al (S.F. 23625, Super. Ct. No. 691-750), the court decided that homosexuals may assert a cause of action against an employer for violation of Labor Code Sections 1101 or 1102, alleging they were discriminated against because of their being "manifest" homosexuals or persons making "an issue of their homosexuality." In its opinion, the court states, "The struggle of the homosexual community for equal rights, particularly in the field of employment, must be recognized as a political activity."

With the widespread publicity this case has received, we may have claims filed in our offices under the theory advanced by the court. I am therefore furnishing the Senior Deputy in each office that part of the Supreme Court's decision dealing with Labor Code Sections 1101 and 1102. Note that the remedy for violation is criminal prosecution.

Should you have questions regarding this matter, you may wish to contact our Legal Section.

JLQ:ba

SURNAME

FORM A 5-1001 (3-69)

Portion of Opinion on Labor Code Violations Imposing Criminal Penalties for Discrimination Against Gay and Lesbian Employees

8. ***Plaintiffs' complaint additionally states a cause of action against PT&T for interfering with plaintiffs' political freedom in violation of Labor Code sections 1101 and 1102.***

[18] Over 60 years ago the California Legislature, recognizing that employers could misuse their economic power to interfere with the political activities of their employees, enacted Labor Code sections 1101 and 1102 to protect the employees' rights. Labor Code section 1101 provides that "No employer shall make, adopt, or enforce any rule, regulation, or policy: (a) Forbidding or preventing employees from engaging or participating in politics . . . (b) Controlling or directing, or tending to control or direct the political activities of affiliations of employees." Similarly, section 1102 states that "No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity."[16] These sections serve to protect "the fundamental right of employees in general to engage in political activity without interference by employers." (*Fort v. Civil Service Commission* (1964) 61 Cal.2d 331, 335, 38 Cal.Rptr. 625, 627, 392 P.2d 385, 387; see *Lockheed Aircraft Corp. v. Superior Court* (1946) 28 Cal.2d 481, 486, 171 P.2d 21.)

[19] These statutes cannot be narrowly confined to partisan activity. As explained in *Mallard v. Boring* (1960) 182 Cal.App.2d 390, 395, 6 Cal.Rptr. 171, 174: "The term 'political activity' connotes the espousal of a candidate *or a cause*, and some degree of action to promote the acceptance thereof by other persons." (Emphasis added.) The Supreme Court has recognized the political character of activities such as participation in litigation (*N.A.A.C.P. v. Button* (1963) 371 U.S. 415, 429, 83 S.Ct. 328, 9 L.Ed.2d 405), the wearing of symbolic armbands (*Tinker v. Des Moines School Dist.* (1969) 393 U.S. 503, 89 S.Ct. 733, 21 L.Ed.2d 731), and the association with others for the advancement of beliefs and ideas (*N.A.A.C.P. v. Alabama* (1958) 357 U.S. 449, 78 S.Ct. 1163, 2 L.Ed.2d 1488.)[17]

[20] Measured by these standards, the struggle of the homosexual community for equal rights, particularly in the field of employment, must be recognized as a political activity. Indeed the subject of the rights of homosexuals incites heated political debate today, and the "gay liberation movement" encourages its homosexual members to attempt to convince other members of society that homosexuals should be accorded the same fundamental rights as heterosexuals. The aims of the struggle for homosexual rights, and the tactics employed, bear a close analogy to the continuing struggle for civil rights waged by blacks, women, and other minorities. (See, e. g., *Gay Students Org. of Univ. of New Hampshire v. Banner* (1st Cir. 1974) 509 F.2d 652, 657; *Acanfora v. Board of Education* (4th Cir. 1974) 491 F.2d 498, cert. den. 419 U.S. 836, 95 S.Ct. 64, 42 L.Ed.2d 63; *Aumiller v. University of Delaware* (D.Del. 1977) 434 F.Supp. 1273, 1292–1302.)

A principal barrier to homosexual equality is the common feeling that homosexuality is an affliction which the homosexual worker must conceal from his employer and his fellow workers. Consequently one important aspect of the struggle for equal rights is to induce homosexual individuals to "come out of the closet," acknowledge their sexual preferences, and to associate with others in working for equal rights.

[21] In light of this factor in the movement for homosexual rights, the allegations of plaintiffs' complaint assume a special significance. Plaintiffs allege that PT&T discriminates against "manifest" homosexuals and against persons who make "an issue of their homosexuality." The complaint asserts also that PT&T will not hire anyone referred to them by plaintiff Society for Individual Rights, an organization active in promoting the rights of homosexuals to equal employment opportunities. These allegations can reasonably be construed as charging that PT&T discriminates in particular against persons who identify themselves as homosexual, who defend homosexuality, or who are identified with activist homosexual organizations. So construed, the allegations charge that PT&T has adopted a "policy . . . tending to control or direct the political activities or affiliations of employees" in violation of section 1101, and has "attempt[ed] to coerce or influence . . . employees . . . to . . . refrain from adopting [a] particular course or line of political . . . activity" in violation of section 1102.

In *Lockheed Aircraft Corp. v. Superior Court* (1946) 28 Cal.2d 481, 171 P.2d 21, our court established the principle that an employee who has been discriminated against in violation of sections 1101 or 1102 may maintain a cause of action against his employer to recover damages sustained as a result of the employer's unlawful conduct. (See also Lab. Code, § 1105.) Thus, since the allegations of the complaint do allege that PT&T has engaged in conduct which violates these statutory provisions, the complaint also states a cause of action against PT&T on this ground.

16. Although sections 1101 and 1102 refer only to "employees," identical terminology in the federal Labor Management Relations Act has been held to protect *applicants* for employment as well as on the job employees. (See, e. g., *Phelps Dodge Corp. v. N.L.R.B.* (1941) 313 U.S. 177, 191–192, 61 S.Ct. 845, 85 L.Ed. 1271; and *N.L.R.B. v. Mason & Hanger-Silas Co.* (8th Cir. 1971) 449 F.2d 425, 427.)

We cannot view the statutes as permitting employers to hire only members of the Republican Party, but forbidding them from firing members of the Democratic Party. Such an anomalous interpretation of these statutes would allow employers to thwart the legislative purpose of protecting citizens by merely advancing their discriminatory practices to an earlier stage in employee-employer relations. "Employers cannot be permitted to evade the salutary objectives of [a] statute by indirection." (*Cal. State Restaurant Assn. v. Whitlow* (1976) 58 Cal.App.3d 340, 347, 129 Cal.Rptr. 824, 828.)

17. Compare *Rosenfield v. Malcolm* (1967) 65 Cal.2d 559, 561, 55 Cal.Rptr. 505, 506, 421 P.2d 697, 698, in which we held that Alameda County could not discharge an employee who refused to resign from an organization called the "'Ad Hoc Committee to End Discrimination.'"

GAY LAW STUDENTS ASSOCIATION et al., Plaintiffs and Appellants,

v.

PACIFIC TELEPHONE AND TELEGRAPH COMPANY et al., Defendants and Respondents.

S.F. 23625.

Supreme Court of California.

May 31, 1979.

Rehearing Denied July 25, 1979.

595 P.2d 592

24 Cal.3d 458

Quote from 24 Cal.3d at pp. 466-468

Opinion No. 85-404—April 30, 1986

SUBJECT: JOB DISCRIMINATION ON THE BASIS OF SEXUAL ORIENTATION—Labor Code sections 1101 and 1102 prohibit a private employer from discriminating on the basis of homosexual orientation or affiliation.

Requested by: MEMBER, CALIFORNIA STATE ASSEMBLY

Opinion by: JOHN K. VAN DE KAMP, Attorney General
Nelson Kempsky, Chief Deputy

The Honorable Art Agnos, Member, California State Assembly, has requested an opinion on the following question:

Do Labor Code sections 1101 and 1102 prohibit a private employer from discriminating on the basis of homosexual orientation or affiliation?

CONCLUSION

Labor Code sections 1101 and 1102 prohibit a private employer from discriminating on the basis of homosexual orientation or affiliation.

ANALYSIS

For more than a decade, the homosexual community in California has strove by litigation and legislation for equality of treatment and equality of rights with the heterosexual community. The California Supreme Court has ruled that Labor Code sections 1101 and 1102 protect employees who identify themselves as homosexual from reprisal by their employers. We are now asked whether those sections would be interpreted to prohibit a private employer from discriminating on the basis of homosexual orientation or affiliation.

Section 1101 provides:

> "No employer shall make, adopt, or enforce any rule, regulation, or policy:
>
> "(a) Forbidding or preventing employees from engaging or participating in politics or from becoming candidates for public office.
>
> "(b) Controlling or directing, or tending to control or direct the political activities or affiliations of employees."

Section 1102 provides:

> "No employer shall coerce or influence or attempt to coerce or influence his employees through or by means of threat of discharge or loss of employment to adopt or follow or refrain from adopting or following any particular course or line of political action or political activity."

The prohibitions were originally enacted as a single section in 1915 and were