

## Law

## Legal Perspectives: Employment Discrimination

*Ed. Note: The following article is the second in a three-part series based on information presented in the "Legal Perspectives on Lesbian and Gay Concerns in the 1990's" seminar held on March 14 at the Vermont Law School. Next month's synopsis will focus on AIDS-related issues.*

by Nora Landon

Mary Bonauto is a staff attorney with GLAAD, Gay and Lesbian Advocates and Defenders, in Boston. In addition to employment discrimination, she has tried family law, military discrimination and anti-gay violence cases. She litigates these cases under the new Massachusetts law prohibiting discrimination on the basis of sexual orientation. Although such discrimination is not prohibited under Vermont law (more reason to get the civil rights bill passed!), discrimination on the basis of HIV status is illegal, and some cases may be considered as sex discrimination cases. In her talk Bonauto outlined the approach she takes to employment discrimination cases in Massachusetts.

Proving employment discrimination depends on establishing three things: 1) that the employee is a member of a protected class, 2) that the employee received adverse treatment, and 3) that the adverse treatment was a result of membership in the protected class. In Massachusetts, gay men and lesbians are a protected class; in Vermont they are not. In determining protected status on the basis of sexual orientation, it is important to know whether the employee was out at work, and if not, whether he or she was generally perceived to be gay.

Sometimes this is not difficult. In one Massachusetts company, wearing an earring, signing up pledges for an AIDS walk-a-thon, and bringing a male relative to a company function were enough to brand an

employee as gay; in another, a fondness for lavender post-it notes was suspicious.

It is often difficult to establish direct evidence of discrimination. Usually, Bonauto looks for evidence of disparate treatment. For example, three employees are hired at the same time; two are perceived to be heterosexual, and one is perceived to be gay. All have similar work records, but at the end of six months, the two heterosexual employees have been promoted, and the gay employee has not.

Once adverse treatment has been established, the employer has to articulate (not necessarily prove) a reason other than the employee's sexual orientation: for example, poor work performance or absenteeism. The burden of proof then shifts back to the employee, who must show that the employer's stated explanation is just a

smokescreen for the real reason.

This can be difficult because it requires getting into the employer's head. Bonauto looks for factors such as expedient timing. For example, in her first AIDS case, a five-year employee with a great work record was tested for HIV and fired the next day. She also looks for inconsistencies and shifting explanations over time. Generally, the employer's first explanation is closest to the truth, and becomes refined as time passes.

The most common complaints she receives are for workplace harassment. In the absence of state laws prohibiting discrimination on the basis of sexual orientation, sexual harassment of gay and lesbian employees may still be actionable under Federal laws, notably Title VII.

## Middlebury College Revises Non-Discrimination Policy

Changes are happening at Middlebury College. This past December, after a fall semester filled with a number of gay and lesbian-oriented events, the faculty, Student Government Association, and the Staff Council all voted unanimously in separate votes to recommend changing the wording of the College's non-discrimination clause to include "sexual orientation."

All three groups sent their resolutions to Middlebury's new president, Timothy Light, before Christmas. They were then forwarded to the Board of Trustees for consideration. Light, who said he supported the measure, explained that including sexual orientation did not and would not grant "minority status" nor affect affirmative action. The measure was voted on by

the Board in March and passed with little discussion.

The statement will be included in Middlebury's official handbooks beginning next fall. It remains to be seen how the exact wording of the clause will change. Some members of Middlebury's gay and lesbian community fear that simply adding the words "sexual orientation" to the current non-discrimination clause will do little to change the atmosphere on the Middlebury campus. Others feel that this is a step forward in recognizing the struggles of gay, lesbian and bisexual faculty, students and staff at Middlebury College.



**ROBERT W. ZEUNER**  
ATTORNEY AT LAW

Member National  
Lesbian and  
Gay Law  
Association

**Bauer, Gravel and Watson**  
362 Main Street  
Burlington, VT 05401  
863-5538

**David W. Curtis**  
ATTORNEY AT LAW

**Hoff, Agel, Curtis, Pacht & Cassidy, P.C.**  
100 MAIN STREET  
P.O. BOX 247  
BURLINGTON, VT 05402-0247

802-864-4531