

LEGAL BRIEFS: Employment Discrimination on the Basis of Sexual Orientation: A Primer

by Susan Murray and Beth Robinson

We have the good fortune of living in one of a handful of states which affirmatively prohibit employment discrimination on the basis of sexual orientation. However, that doesn't mean workplace discrimination on the basis of sexual orientation doesn't occur in Vermont.

Nationwide, surveys indicate that about one quarter of gay men and lesbians report that they have actually experienced discrimination in the workplace. The most blatant form, perfected to a fine art by the Cracker Barrel restaurant chain several years ago, is the outright firing of gays and lesbians because of their sexual orientation. More often, an employer claims that it fired a gay, lesbian, bisexual, or transgendered employee — or even an employee perceived to fall in one of those categories — for other reasons altogether. Phrases such as "your work just isn't up to par" and "due to financial constraints, we're eliminating your position" often accompany this type of discriminatory treatment.

Not all discrimination results in actual termination. In a 1987 nationwide survey, a full two thirds (66%) of 351 top executives responded that they would hesitate to promote a gay or lesbian to the management level. Openly gay and lesbian employees report that employers have limited work assignments available to them based upon the employers' assumptions about customer expectations, or based upon the wishes of fellow employees. Refusing to give a promotion or a work assignment to an otherwise qualified and eligible employee just because of his or her sexual orientation can be every bit as unlawful as firing that employee for being gay.

Some types of physical and verbal harassment — both from fellow employees and from supervisors — may also be unlawful. Although the Vermont Supreme Court has yet to address the issue, the same principles that led courts to acknowledge that sexual harassment is a form of sexual discrimination would probably lead the Court to conclude that sexual orientation harassment is also a form of unlawful discrimination.

Repeated homophobic remarks from a supervisor; a work environment characterized by anti-gay hostility that substantially interferes with an individual's work performance or creates an intimidating, hostile, or offensive work environment; or taunting by coworkers that persists unchecked — even after complaints to the appropriate supervisor or sexual harassment officer — may all constitute unlawful discrimination on the basis of sexual orientation. Of course, a come-on from a supervisor of the same sex may also qualify as plain old-fashioned sex discrimination.

If you believe you have been or are being subjected to unlawful workplace discrimination, we strongly urge that you first talk with a lawyer. Many lawyers who do employment law will offer you an initial consultation without charge. The lawyer can advise you on how to respond at work, as well as help you determine whether to pursue legal action.

Second, if you are subjected to a homophobic slur or similar hostile action by a coworker, supervisor, or even a client or customer, you should report that fact to the appropriate person each time it happens. Every workplace in Vermont is required to have and to post a sexual harassment policy, along with the names of the individuals to whom you should report complaints. If you do not know who this person is, ask. They're probably the most appropriate people to approach with your complaints.

Third, you need to be an excellent employee, beyond reproach. If your employer is inclined to discriminate on the basis of sexual orientation, he or she is not likely to tell you that's why you're not getting the promotion or are losing your job. More likely, the employer will say that you don't get along well with coworkers or clients, that you are perpetually late or unreliable, or that your job performance isn't as good as it should be. In order to prevent the employer from building a case against you, you need to get along well with your coworkers and supervisors (remembering that they may be potential witnesses for or against you down the road), comply with all of the employer's policies, and do excellent work.

Fourth, you should generally use any grievance procedure available to you at work. It's not a bad idea to try to get an attorney involved, at least through private, informal consultations, at this stage of the game. If you're still employed by the company, it can be tricky to decide how far to take your complaint. Although the law generally prohibits an employer from retaliation against someone who has filed a grievance, the practical realities don't always line up with the law.

Fifth, you should consider filing a complaint with the civil rights division of the Vermont Attorney General's office (828-3657), or, if you work for the State of Vermont, with the Human Rights Commission (828-2480).

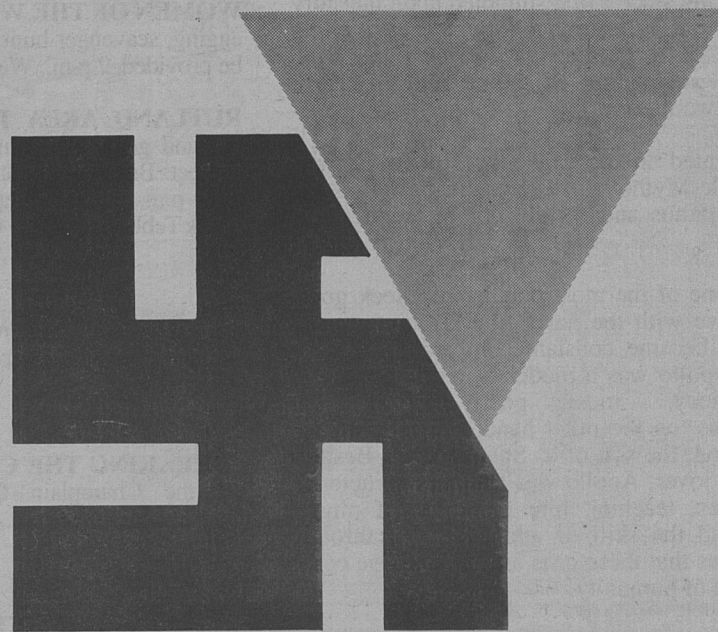
Finally, you should consider pursuing a civil lawsuit in court. Although you are not required to have an attorney to file a lawsuit, we strongly recommend that you at least consult with legal counsel before handling the case on your own.

Susan Murray and Beth Robinson are attorneys at Langrock, Sperry, & Wool in Middlebury, Vermont, whose practices include employment issues, family matters, estate planning, personal injury and workers' compensation cases, and general civil litigation. If you'd like to see them cover a specific topic in future columns, please feel free to write to them c/o OITM or call them directly at 388-6356. ▼

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