McGeorge Law Review

Volume 24 | Issue 2 Article 8

1-1-1993

Gay Civil Rights: Are Homosexuals Adequately Protected from Discrimination in Housing and Employment

Thomas Weathers
University of the Pacific; McGeorge School of Law

Gay Civil Rights: Are Homosexuals Adequately Protected From Discrimination In Housing And Employment?

Injustice must be rooted out by strong, persistent and determined action—Martin Luther King, Jr.[1]

Society's condemnation of homosexuality has taken many forms; most notably, conspicuous discrimination based solely on one's sexual orientation.[2] Homosexuals[3] have long suffered the indignity of discrimination by both government and private society.[4] Even today, one suspected of being homosexual faces discrimination in housing, employment, education, and social acceptance.[5]

---

1. MARTIN LUTHER KING, JR., WHY WE CAN'T WAIT 89 (1964) (emphasis added).

2. *See* John Cary Sims, *Moving Toward Equal Treatment of Homosexuals*, 23 PAC. L.J. 1543, 1543-44 (1992); *see also* CAL. CIV. CODE § 51.7(b) (West Supp. 1992) (defining sexual orientation as heterosexuality, homosexuality, or bisexuality). The particular emphasis of "sexual orientation" within this Comment will be "homosexuality."

3. *See* WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 508 (1991) (noting that when used as a noun, "gay" is an expression for homosexual). As used in this Comment, the term "gay" and "homosexual" will refer to both male and female homosexuals.

4. *See* Sims, *supra* note 2, at 1543-44. Professor Sims' essay posits that homosexuals have little to no recourse to the United States Constitution for protection under either the privacy doctrine or the equal protection doctrine in light of the holding in Bowers v. Hardwick, 478 U.S. 186 (1986). Sims, *supra* note 2, at 1573. Professor Sims' ultimate conclusion is that homosexuals will not receive heightened scrutiny review, and therefore any progress in the struggle for equal rights for homosexuals will have to come at the hands of Congress, state legislatures, and state courts. *Id.*

5. *Id.* at 1544; *see also id.* at 1545 n.5 (describing the confusion surrounding the public's attitude toward homosexuality). For sources discussing the discrimination faced by gays, see Terry Friedman, *AB 2601-Sexual Orientation Job Discrimination: Fact Sheet* (Aug. 20, 1992) at 3 [hereinafter *AB 2601 Fact Sheet*]; James A. Douglas, *I Sit and Look Out: Employment Discrimination Against Homosexuals and the New Law of Unjust Dismissal*, 33 WASH. U. J. URB. & CONTEMP. L. 73 (1988); Joel W. Friedman, *Constitutional and Statutory Challenges to Discrimination in Employment Based on Sexual Orientation*, 64 IOWA L. REV. 527 (1979); Sylvia A. Law, *Homosexuality and the Social Meaning of Gender*, 1988 WIS. L. REV. (1988); Rhonda R. Rivera, *Our Straight-Laced Judges: The Legal Position of Homosexual Persons in the United States*, 30 HAST. L.J. 799 (1979); Rhonda R. Rivera, *Queer Law: Sexual Orientation Law in the Mid-Eighties Part I*, 10 U. DAYTON L. REV. 459 (1985); Rhonda R. Rivera, *Recent Developments in Sexual Preference Law*, 30 DRAKE L. REV. 311 (1980-81); Developments in the Law, *Sexual Orientation and the Law:*

There is little comprehensive statistical data documenting sexual orientation discrimination.[6] Assemblymember Terry Friedman, the author of several gay civil rights bills in California, has attempted to compile what information does exist in various memoranda prepared by his office.[7] According to Assemblymember Friedman, there is enough empirical data to demonstrate that discrimination against homosexuals in housing and employment is sufficient to warrant legislation to protect homosexuals.[8] For example, a national Teichner poll conducted in 1989 discovered that 17% of the respondents in the western United States had been subjected to sexual orientation discrimination while on the job.[9] A Wall Street Journal poll in 1987 found that 66% of the respondent chief executive officers of Fortune 500 companies would hesitate to promote a homosexual employee to a management position.[10] A study by Overlooked Opinions, a Chicago marketing research firm which focuses on gay social and workplace issues, not mentioned by Friedman, but found in the Los Angeles Times, indicated that of 6,500 gays and lesbians surveyed, nearly 15% had experienced job discrimination because of their sexual orientation.[11]

In light of such discrimination against gays, the California Legislature has passed several bills within the past couple of years

---

Employment Law Issues Affecting Gay Men and Lesbians, 102 HARV. L. REV. 1508, 1554 (1989); Peter M. Cicchino, et al., Comment, *Massachusetts Gay Civil Rights Bill*, 26 HARV. C.R.-C.L. L. REV. 549 (1991); Harris M. Miller, Comment, *An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality*, 57 S. CAL. L. REV. 797 (1984); Tracey Rich, Note, *Sexual Orientation Discrimination in the Wake of Bowers v. Hardwick*, 22 GA. L. REV. 773 (1988); Donna L. Wise, Comment, *Challenging Sexual Preference Discrimination in Private Employment*, 41 OHIO ST. L.J. 501 (1980).

6. Martha Groves, *Frequent Job Bias Leaves Little Recourse, Gays Say*, L.A. TIMES, Oct. 5, 1991, at A1.

7. Terry Friedman, *AB 101-Discrimination in Employment: Fact Sheet* (Jan. 28, 1991) [hereinafter *AB 101 Fact Sheet*]; Terry Friedman, *AB 101-Sexual Orientation Discrimination: Summary of Representative Employment Cases* (undated) [hereinafter *Summary*]; Terry Friedman, *AB 101-Employer Issues* (Mar. 26, 1991) [hereinafter *Employer Issues*]; *AB 2601 Fact Sheet*, *supra* note 5 (copies on file at the *Pacific Law Journal*).

8. *AB 2601 Fact Sheet*, *supra* note 5, at 3; *AB 101 Fact Sheet*, *supra* note 7, at 2.

9. *Summary*, *supra* note 7, at 1.

10. *Id.*

11. *See* Groves, *supra* note 6, at A1.

prohibiting sexual orientation discrimination.[12] These gay civil rights bills primarily focus on discrimination against homosexuals in housing and employment. By taking such action, the Legislature has acknowledged the existence of discrimination against homosexuals. However, all but one of these bills, AB 2601, were vetoed by California's Governor.[13]

Based upon the previously mentioned polls and studies, as well as the Legislature's response within the past year or so, it is clear that discrimination against homosexuals in housing and employment exists. AB 2601 is the Legislature's first success in limiting such discrimination.[14] AB 2601 prohibits employment discrimination based on sexual orientation.[15] However, unlike previous legislative attempts,[16] AB 2601 does not address discrimination against homo-

---

12. *See, e.g.*, A.B. 101, 1991-1992 Calif. Leg. Reg. Sess. (Dec. 4, 1990) [hereinafter AB 101]; A.B. 2601, 1991-1992 Calif. Leg. Reg. Sess. (Feb. 11, 1992) [hereinafter AB 2601]; A.B. 3019, 1991-1992 Calif. Leg. Reg. Sess. (Feb. 19, 1992) [hereinafter AB 3019]; A.B. 3825, 1991-1992 Calif. Leg. Reg. Sess. (Mar. 2, 1992) [hereinafter AB 3825]. One other bill to protect homosexuals from employment and housing discrimination, AB 1, was introduced back in 1982. A.B. 1, 1983-1984 Calif. Leg. Reg. Sess. (Dec. 6, 1982) [hereinafter AB 1].

13. *See California Governor Signs Legislation Barring Employment Discrimination Against Gays*, DAILY LAB. REP., Sept. 29, 1992, at A11 (mentioning that AB 3019, a measure largely duplicative of AB 2601, was vetoed by Governor Wilson on September 25, 1992); former Governor George Deukmejian's veto message, *reprinted in* 97 L.A. DAILY J. 17 (Mar. 14, 1984); Stephen G. Hirsch, *Gay Rights Advocates Attack Wilson's Logic*, RECORDER, Oct. 1, 1991, at 1 (analyzing Governor Wilson's veto of AB 101); George Skelton, *Wilson Signs Bill on Gay Job Rights*, L.A. TIMES, Sept. 26, 1992, at A1 (discussing Governor Pete Wilson's signing of AB 2601); Doug Willis, *Wilson Vetoes Civil Rights Bill That He Contends Goes Too Far*, SACRAMENTO BEE, Sept. 27, 1992, at A3 (discussing Governor Wilson's veto of AB 3825). The enactment of AB 2601 may have stemmed from the public's disagreement with Governor Wilson's veto of AB 101, a bill which would have protected gays under the Fair Employment and Housing Act. A California poll released shortly after the veto of AB 101 indicated that 62 percent of the California population thought Governor Wilson should have signed AB 101, while only 29 percent believed Governor Wilson should have vetoed AB 101. Jerry Roberts & Vlae Kershner, *Move Timed to Beat Release of Poll Today*, S.F. CHRON., Sept. 30, 1991, at A1; *cf.* George Skelton, *The Times Poll; Gay-Rights Bill Veto Narrowly Opposed in State*, L.A. TIMES, Oct. 6, 1991, at A1 (citing a statewide L.A. Times poll which found that 46 percent of Californians disapproved of Governor Wilson's veto of AB 101, while 40 percent approved of the veto of the bill).

14. The enactment of AB 2601 represents a great step forward for the gay civil rights movement, and therefore warrants detailed discussion at a future point in this Comment. *See infra* notes 245-283 and accompanying text.

15. 1992 Cal. Legis. Serv. ch. 915, sec. 2, at 3771 (West) (enacting CAL. LAB. CODE § 1102.1).

16. *See, e.g.*, AB 3825 (which would have amended Government Code § 12955 to prohibit discrimination in housing based on sexual orientation).

sexuals in housing. The purpose of this Comment then is threefold: (1) To explore the remedies available to homosexuals to combat housing discrimination since AB 2601 has no application thereto; (2) to delineate the history and development of California's protection of gays from employment discrimination to aid the courts in their interpretation and application of AB 2601; and (3) to argue for amendments to the California Constitution and the Fair Employment and Housing Act designed to afford homosexuals the same protection and status enjoyed by other minorities subject to societal discrimination.

Part I of this Comment will analyze those protections afforded homosexuals against sexual orientation discrimination in housing.[17] Part II will discuss whether such protections are adequate.[18] Part III will focus on the history and development of protections against employment discrimination based on sexual orientation in both the public sector and private sector.[19] Part IV will address the inadequacy of these protections resulting in the enactment of AB 2601.[20] Part V will discuss AB 2601 and its deficiencies.[21] Part VI will argue that further legislation is needed to equate the protection accorded homosexuals with that conferred upon other minorities against whom society also discriminates.[22] Finally, Part VII will conclude that the current law is only partially adequate to protect gays from housing and employment discrimination.[23]

17. *See infra* notes 24-72 and accompanying text.
18. *See infra* notes 73-109 and accompanying text.
19. *See infra* notes 110-196 and accompanying text.
20. *See infra* notes 197-244 and accompanying text.
21. *See infra* notes 245-278 and accompanying text.
22. *See infra* notes 279-283 and accompanying text.
23. *See infra* notes 284-295 and accompanying text.

I. PROTECTIONS AFFORDED HOMOSEXUALS AGAINST DISCRIMINATION IN HOUSING

Protections against housing discrimination typically fall under the Fair Employment and Housing Act (FEHA),[24] which consists of laws and administrative procedures designed to address both employment and housing discrimination.[25] While the FEHA protects various minority groups, it has no application to homosexuals.[26] The

---

24. CAL. GOV'T CODE §§ 12900-12996 (West 1992). Under the FEHA, housing discrimination:

> [I]ncludes refusal to sell, rent, or lease housing accommodations; includes refusal to negotiate for the sale, rental or lease of housing accommodations; includes representation that a housing accommodation is not available for inspection, sale, or rental when such housing accommodation is in fact so available; includes any other denial or withholding of housing accommodations; includes provision of inferior terms, conditions privileges, facilities, or services in connection with such housing accommodations; includes the cancellation or termination of a sale or rental agreement; and includes the provision of segregated or separated housing accommodations. The term "discrimination" does not include refusal to rent or lease a portion of an owner-occupied single-family house to a person as a roomer or boarder living within the household, provided that no more than one roomer or boarder is to live within the household.

Id. § 12927(c) (West 1992).

25. *See* Rojo v. Kliger, 52 Cal. 3d 65, 72, 801 P.2d 373, 376, 276 Cal. Rptr. 130, 133 (1990), in which the court stated:

> The California Fair Employment Practices Act (FEPA) was enacted in 1959 and recodified in 1980 in conjunction with the Rumford Fair Housing Act to form the [Fair Employment and Housing Act] FEHA. The law establishes that freedom from job discrimination on specified grounds, including sex, is a civil right. It declares that such discrimination is against public policy and an unlawful employment practice. The statute creates two administrative bodies: the Department of Fair Employment and Housing (Department), whose function is to investigate, conciliate, and seek redress of claimed discrimination, and the Fair Employment and Housing Commission (Commission), which performs adjudicatory and rulemaking functions. An aggrieved person may file a complaint with the Department, which must promptly investigate. If the Department deems a claim valid, it seeks to resolve the matter in confidence by conference, conciliation, and persuasion. If that fails or seems inappropriate, the Department may issue an accusation to be heard by the Commission. The Department acts as prosecutor on the accusation and argues the complainant's case before the Commission. If no accusation is issued within 150 days after the filing of a complaint, or if the Department earlier determines not to prosecute the case and the matter is not otherwise resolved, the Department must give the complainant a "right to sue" letter. Only then may that person bring a civil suit [under the FEHA].

Id. (citations omitted). *See generally* 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law*, §§ 756-70 (9th ed. 1988).

26. *Rojo*, 52 Cal. 3d at 79-80, 801 P.2d at 381, 276 Cal. Rptr. at 138. The FEHA proscribes discrimination based on the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex of any person. *See* CAL. GOV'T CODE § 12940 (West 1992)

FEHA protects only those persons who fall within the categories specifically enumerated in the statute.[27] Since sexual orientation is not an enumerated category, the FEHA does not protect homosexuals against discrimination on the basis of sexual orientation.[28] As a result, homosexuals have had to turn to the Unruh Civil Rights Act,[29] a more general anti-discrimination law, for protection from housing discrimination.[30]

A. Are Homosexuals Protected Under the Unruh Act?

On its face, the Unruh Civil Rights Act does not safeguard persons who are discriminated against because of their sexual orientation. The Unruh Civil Rights Act states:

> All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, or blindness or other physical disability are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.[31]

(prohibiting discrimination based on these factors).

27. *Rojo*, 52 Cal. 3d at 79, 801 P.2d at 381, 276 Cal. Rptr. at 138; *see* CAL. GOV'T CODE § 12955 (West 1992) (proscribing housing discrimination based on race, color, religion, sex, marital status, national origin, or ancestry).

28. *Rojo*, 52 Cal. 3d at 80, 801 P.2d at 381, 276 Cal. Rptr. at 138.

29. CAL. CIV. CODE § 51 (West Supp. 1992).

30. Memorandum prepared by Lobby for Individual Freedom and Equality, *The Heart of AB 101: Prohibiting Employment Discrimination* (Sept. 6, 1991) [hereinafter *The Heart of AB 101*] (copy on file at the *Pacific Law Journal*). In reality there may be little difference between the FEHA and the Unruh Act, since the Unruh Act prohibits the same types of housing discrimination as does the FEHA. *Id.* at 1-2. However, the Unruh Act has been applied to include sexual orientation as a protected class whereas the FEHA has not. *Id.* at 1. Additionally, under the Unruh Act, a plaintiff need not exhaust his or her administrative remedies with the Department of Fair Employment and Housing, but instead may choose to go directly to a court which can impose greater penalties for discrimination under the Unruh Act than are available under the FEHA. *Id.* at 1-2. Even if a claimant does not wish to go to court, he or she may still complain to the Department of Fair Employment and Housing which can apply the same remedies available to claimants under the FEHA. *Id.* at 1.

31. CAL. CIV. CODE § 51 (West Supp. 1992).

There is no mention of sexual orientation. Nevertheless, California courts have held that certain persons not specifically listed in the Unruh Civil Rights Act are still subject to its protections.[32]

In *Stoumen v. Reilly*,[33] the California Supreme Court examined whether homosexuals, although not specifically enumerated within California's then-existing civil rights law (which would later become the Unruh Civil Rights Act), were nonetheless protected.[34] In *Stoumen*, the State Board of Equalization had suspended indefinitely the liquor license of a restaurant claiming that the "plaintiff permitted his premises to be used as a disorderly house for purposes injurious to public morals" in violation of section 58 of the Alcoholic Beverage Control Act.[35] The more apparent reason for loss of the liquor license was due to homosexual patronage.[36] The court in *Stoumen* rejected the notion that mere patronage of a bar and restaurant by homosexuals was illegal, and held that all persons of lawful age have a legal right to patronize a public restaurant and bar provided they act properly and do not commit illegal or immoral acts.[37] The court stated that if the proprietor of a bar or restaurant excludes a patron without good cause, the proprietor is liable in damages under California Civil Code sections 51 and 52.[38] Read broadly, *Stoumen* established that homosexuals are protected under what is now the

32. *See infra* notes 33-49 and accompanying text (describing the manner in which courts have expanded the Unruh Act to include sexual orientation).

33. 37 Cal. 2d 713, 234 P.2d 969 (1951).

34. *Id.* at 716, 234 P.2d at 971. The case was not decided under the Unruh Civil Rights Act because the Unruh Act had not yet been enacted; *see* 1959 Cal. Stat. ch. 1866, sec. 1, at 4424 (enacting the Unruh Civil Rights Act); *infra* notes 40-41 and accompanying text (discussing the application of the *Stoumen* holding to the Unruh Act).

35. *Stoumen*, 37 Cal. 2d at 714-15, 234 P.2d at 970. The State Board of Equalization also justified its license suspension on the grounds that plaintiff's employees had sold alcohol to a minor in violation of § 61(a) of the Alcohol Beverage Control Act. *Id.*

36. *Id.* at 715, 234 P.2d at 970.

37. *Id.* at 716, 234 P.2d at 971. The California Supreme Court took issue with the conclusion of the State Board of Equalization that homosexuality is "injurious to public morals" in and of itself. *Id.* The court reasoned that patronage of a public restaurant by homosexuals was not "injurious to public morals" without the additional showing of some kind of illegal or immoral act perpetrated by any of the homosexuals at the restaurant. *Id.*

38. *Id.*; *see* 1905 Cal. Stat. ch. 413, sec. 1-2, at 553 (enacting CAL. CIV. CODE §§ 51-52).

Unruh Civil Rights Act from arbitrary discrimination in public accommodations.[39]

Since *Stoumen* was decided in 1951, before the enactment of the Unruh Civil Rights Act, the decision was based on the then-existing civil rights law as codified in California Civil Code sections 51 and 52.[40] However, in reliance on the *Stoumen* holding that homosexuals are protected from arbitrary discrimination under Civil Code sections 51 and 52, subsequent decisions have interpreted the Unruh Civil Rights Act as extending protection to homosexuals.[41]

For example, in *Curran v. Mount Diablo Council of the Boy Scouts of America*,[42] a case in which the plaintiff claimed he was expelled from the Boy Scouts because of his sexual orientation, the court stated "[i]n *Stoumen v. Reilly* . . . our Supreme Court recognized that the Unruh Act prohibits the exclusion of a person on the basis of homosexual status."[43] In light of *Stoumen*, the court in *Curran* held that the Unruh Act prohibits arbitrary discrimination against homosexuals.[44] *Beaty v. Truck Insurance Exchange*[45] is the most recent case to affirm this proposition.

---

39. *In re* Cox, 3 Cal. 3d 205, 214, 474 P.2d 992, 997, 90 Cal. Rptr. 24, 29 (1970).

40. *Stoumen*, 37 Cal. 2d at 716, 234 P.2d at 971.

41. *See In re* Cox, 3 Cal. 3d at 215-16, 474 P.2d at 998, 90 Cal. Rptr. at 30 (including homosexuality within the Unruh Act). Subsequent cases have also advanced this interpretation; *see, e.g.*, Rolon v. Kulwitzky, 153 Cal. App. 3d 289, 291, 200 Cal. Rptr. 217, 218 (1984) (holding that the listing of discriminations in California Civil Code § 51 is not exclusive, and therefore a lesbian couple refused service in a semiprivate booth at a restaurant which had a policy of allowing seating in such booths only by two people of opposite sex was entitled, under municipal ordinance precluding discrimination in business practices, to preliminary injunction enjoining the restaurant from continuing its seating policy).

42. 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983). Timothy Curran was a member of the Boy Scouts of America for over five years and had attained the rank of Eagle Scout. *Id.* at 718, 195 Cal. Rptr. at 328. He applied for the position of "Scouter" in November of 1980, but was informed shortly thereafter that his application to be a Scouter was rejected, and furthermore that he was expelled from the Boy Scouts for being homosexual. *Id.* The court held that the Boy Scouts of America is a "business establishment" within the meaning of the Unruh Act, that the Unruh Act prohibits arbitrary discrimination against homosexuals, and that therefore Timothy Curran had a cause of action for violation of the Unruh Act. *Id.* at 733-34, 195 Cal. Rptr. at 338-39.

43. *Id.* at 734, 195 Cal. Rptr. at 338.

44. *Id.* at 734, 195 Cal. Rptr. at 339 (relying on Stoumen v. Reilly, 37 Cal. 2d 713, 234 P.2d 969 (1951) and Gay Law Students Ass'n. v. Pacific Telephone & Telegraph Co., 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979)).

45. 6 Cal. App. 4th 1455, 8 Cal. Rptr. 2d 593 (1992).

In *Beaty*, the court held that an insurer did not violate the Unruh Act when it refused to offer a cohabitating homosexual couple the same insurance policy at the same premium that the company offered to married couples.[46] The court stated that the issue was plaintiffs' marital status, not their homosexuality.[47] The court refused to expand the Unruh Act to include unmarried couples, and therefore held that an insurance company may discriminate against unmarried couples.[48] In so holding, however, the court also stated that an insurer may not discriminate based on one's homosexuality since the Unruh Act forbids discrimination against a person on the basis of sexual orientation.[49] Therefore, homosexuals, although not ex-pressly mentioned in the Unruh Act, are likely protected thereunder. The issue then remains whether the Unruh Act applies to housing discrimination.

B. Housing and the Unruh Act

The Unruh Civil Rights Act applies to "all business establishments of every kind whatsoever."[50] In light of this broad language, courts have interpreted the Unruh Act as including businesses dealing with housing.[51] Such an interpretation therefore allows the Unruh Act to be used to prohibit housing discrimination against homosexuals. The history of the Act sheds better light on this construction.

The Unruh Act's predecessor[52] proscribed the denial of access to places such as "inns, restaurants, hotels, eating-houses, barber shops, bath houses, theaters, skating-rinks and other places of public

---

46. *Id.* at 1459, 8 Cal. Rptr. 2d at 595.

47. *Id.* at 1461, 8 Cal. Rptr. 2d at 596.

48. *Id.* at 1462, 8 Cal. Rptr. 2d at 597.

49. *Id.* at 1460, 8 Cal. Rptr. 2d at 596.

50. CAL. CIV. CODE § 51 (West Supp. 1992).

51. Courts have held that the "business establishments" clause includes the development, construction, rental, and sale of real estate and apartment complexes. Steven B. Arbuss, *The Unruh Civil Rights Act: An Uncertain Guarantee*, 31 UCLA L. REV. 443 nn.52, 55 (1983).

52. 1897 Cal. Stat. ch. 108, sec. 1-2, at 137 (creating civil rights protections which through subsequent amendments became the Unruh Civil Rights Act).

accommodation or amusement" on the basis of color or race.[53] This provision was codified in 1905 as California Civil Code sections 51 and 52, which remained substantially unchanged until 1959.[54]

In 1959, Civil Code sections 51 and 52 were altered, forming what is now the Unruh Civil Rights Act.[55] A key amendment concerned the replacement of the list of places enumerated in section 51, which included inns, restaurants, hotels, eating houses, barber shops, bath houses, theaters, skating rinks, public conveyances, and places where ice cream or soft drinks of any kind were sold for consumption on the premises, with the phrase "all business establishments of any kind whatsoever."[56] The purpose of this amendment was to reverse the restrictive interpretation courts had employed in the mid 1950's in determining what places were covered within inns, restaurants, hotels, eating houses, barber shops, bath houses, theaters, skating rinks, public conveyances, and places where ice cream or soft drinks of any kind were sold for consumption on the premises.[57] This history demonstrates that the California Legislature intended a more expansive reading than courts were utilizing so as to increase the number of places covered by the Unruh Act.[58]

In light of this history, the California Supreme Court applied a more expansive interpretation in defining what places were covered

---

53. Harris v. Capital Growth Investors XIV, 52 Cal. 3d 1142, 1150-51, 805 P.2d 873, 875-76, 278 Cal. Rptr. 614, 616-17 (1991).

54. 1905 Cal. Stat. ch. 413, sec. 1-2, at 553 (enacting CAL. CIV. CODE §§ 51-52); *Harris*, 52 Cal. 3d at 1151, 805 P.2d at 876, 278 Cal. Rptr. at 617. Section 51 was amended in 1919 and 1923 adding additional places to those listed. 1919 Cal. Stat. ch. 210, sec. 1, at 309; 1923 Cal. Stat. ch. 235, sec. 1, at 485 (adding "public conveyances" and "places where ice cream or soft drinks of any kind are sold for consumption on the premises" to "inns, restaurants, hotels, eating houses, barber shops, bath houses, theaters, skating rinks, and all other places of public accommodation or amusement").

55. 1959 Cal. Stat. ch. 1866, sec. 1, at 4424 (enacting the Unruh Civil Rights Act).

56. *Id.*

57. *In re* Cox, 3 Cal. 3d 205, 214, 474 P.2d 992, 997, 90 Cal. Rptr. 24, 29 (1970). Several cases limited the application of Civil Code §§ 51 and 52. *See, e.g.*, Reed v. Hollywood Professional Sch., 169 Cal. App. 2d Supp. 887, 890, 338 P.2d 633, 636 (1959) (private school not a place of public accommodation or amusement); Coleman v. Middlestaff, 147 Cal. App. 2d Supp. 833, 836, 305 P.2d 1020, 1022 (1957) (dentist's office not a place of public accommodation or amusement); Long v. Mountain View Cemetery Ass'n, 130 Cal. App. 2d 328, 329, 27 P.2d 945, 946 (1955) (cemetery not a place of public accommodation or amusement); *see also* Arbuss, *supra* note 51, at 443, 450 n.37 (listing the cases which limited the application of §§ 51 and 52).

58. Arbuss, *supra* note 51, at 445.

by the Unruh Civil Rights Act in its decision in *Marina Point, Ltd. v. Wolfson.*[59] In *Marina Point*, an apartment complex refused to rent any of its apartments to people with minor children.[60] A family with minor children contended that the landlord's discrimination against families with children was an arbitrary form of discrimination and violated the Unruh Act.[61] The *Marina Point* court agreed.[62]

Relying on prior appellate cases, the court in *Marina Point* explained that for nearly two decades the provisions of the Unruh Act, in light of its broad application to all business establishments, had been applicable with full force to the business of renting housing accommodations.[63] The court also stated that even though the landlord would normally be subject to California's Fair Housing Law, the Unruh Act was also applicable.[64] Thus, the effect of *Marina Point* was to include housing within the definition of "business establishment" under the Unruh Act. This in turn allowed application of the Unruh Act to bar housing discrimination.

As previously mentioned, homosexuals are probably included within the Unruh Civil Rights Act.[65] Since the Act applies to housing discrimination, it follows that homosexuals may invoke the Unruh Act to combat housing discrimination. This reasoning was affirmed and solidified in *Hubert v. Williams.*[66]

C. Hubert v. Williams: *Judicial Recognition of the Prohibition Against Sexual Orientation Housing Discrimination*

In *Hubert*, the plaintiff, a quadriplegic, hired a lesbian nurse as his 24-hour attendant.[67] The plaintiff was then evicted from his

---

59. 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (1982).
60. *Id.* at 727, 640 P.2d at 118, 180 Cal. Rptr. at 498-99.
61. *Id.* at 730, 640 P.2d at 120, 180 Cal. Rptr. at 501.
62. *Id.* at 726, 640 P.2d at 117, 180 Cal. Rptr. at 498.
63. *Id.* at 731, 640 P.2d at 120, 180 Cal. Rptr. at 501 (citing Swann v. Burkett, 209 Cal. App. 2d 685, 694-95, 26 Cal. Rptr. 286, 291-92 (1962), and Abstract Inv. Co. v. Hutchinson, 204 Cal. App. 2d 242, 254-55, 22 Cal. Rptr. 309, 317 (1962)).
64. *Id.* at 731 n.5., 640 P.2d at 121 n.5, 180 Cal. Rptr. at 502 n.5.
65. *See supra* notes 33-49 and accompanying text.
66. 133 Cal. App. 3d Supp. 1, 184 Cal. Rptr. 161 (1982).
67. *Id.* at 3, 184 Cal. Rptr. at 162.

apartment for having a live-in lesbian nurse, and for associating with homosexual persons.[68] The Appellate Department of the Superior Court of Los Angeles County held that, under the Unruh Act, landlords may not refuse to rent an apartment to a homosexual solely because of the potential tenant's sexual preference.[69] In its analysis, the court first determined that the definition of "business establishment" under the Unruh Act included rental housing.[70] Next, the *Hubert* court concluded, based on several cases interpreting the Unruh Act, that homosexuals are a class protected by the Unruh Act.[71] Therefore, the court reasoned, homosexuals are protected from arbitrary discrimination in rental housing by the Unruh Act.[72] To date, *Hubert* is the only appellate case which directly deals with housing discrimination on the basis of sexual orientation under the Unruh Act.

It remains to be seen whether other courts will adopt the reasoning and holding of *Hubert* and validate the protection against housing discrimination. Nonetheless, *Hubert* illustrates that some protection against housing discrimination does exist for homosexuals in at least one California court.

II. ADEQUACY OF PROTECTIONS AGAINST HOUSING DISCRIMINATION

The leading cases dealing with housing discrimination against homosexuals have been decided at the intermediate appellate level.[73] As a result, these cases do not provide the necessary protection from housing discrimination that a supreme court decision

68. *Id.*

69. *Id.*

70. *Id.* (citing Marina Point, Ltd. v. Wolfson, 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (1982), and Burks v. Poppy Const. Co., 57 Cal. 2d 463, 370 P.2d 313, 20 Cal. Rptr. 609 (1962)).

71. *Id.* at 5, 184 Cal. Rptr. at 163 (citing Marina Point, Ltd. v. Wolfson, 30 Cal. 3d 721, 640 P.2d 115, 180 Cal. Rptr. 496 (1982), Gay Law Students Ass'n. v. Pacific Telephone & Telegraph Co., 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979), *In re* Cox, 3 Cal. 3d 205, 474 P.2d 992, 90 Cal. Rptr. 24 (1970), Stoumen v. Reilly, 37 Cal. 2d 713, 234 P.2d 969 (1951), and Orloff v. Los Angeles Turf Club, 36 Cal. 2d 734, 227 P.2d 449 (1951)).

72. *Id.*, 184 Cal. Rptr. at 164. Pertaining to the second ground for the plaintiff's eviction, the court stated that the right to associate with homosexuals is also protected under the Unruh Act. *Id.*

73. *See infra* notes 80-83 and accompanying text (listing those cases).

would provide. However, in *Harris v. Capital Growth Investors XIV*,[74] a recent case interpreting the Unruh Act, the California Supreme Court seemed to imply that homosexuals were within the scope of the Unruh Act and subject to its protections.[75] Therefore, a broad reading of *Harris* may fortify certain appellate decisions suggesting that homosexuals may have some protection from housing discrimination under the Unruh Act.

A. Intermediate Appellate Decisions: Lack of Binding Authority

The decisions protecting homosexuals against housing discrimination are of diminished usefulness because of their status as appellate court decisions. They lack the more pervasive and permanent precedential authority of decisions by the state supreme court. *Stoumen v. Reilly*,[76] one of the few California Supreme Court cases dealing with discrimination against homosexuals, only concerned patronage at a bar and restaurant, not housing discrimination.[77] The *Stoumen* opinion never explicitly stated that homosexuals were incorporated into the Unruh Civil Rights Act, or protected from housing discrimination under the Unruh Act. Although the Unruh Act has subsequently been found to apply to housing,[78] the court in *Stoumen* never explicitly acknowledged such an interpretation. Applying a narrow interpretation, the court simply held that homosexuals could patronize a bar and restaurant provided that they act properly and do not commit illegal or immoral acts.[79] Thus, *Stoumen* provides little direct support for homosexuals faced with housing discrimination.

---

74. 52 Cal. 3d 1142, 805 P.2d 873, 278 Cal. Rptr. 614 (1991).

75. *See infra* notes 95-101 and accompanying text (postulating that homosexuality is a personal characteristic and therefore protected by the Unruh Act).

76. 37 Cal. 2d 713, 234 P.2d 969 (1951).

77. *See supra* notes 33-43 and accompanying text (discussing *Stoumen* in connection with the Unruh Act).

78. *See supra* notes 50-64 and accompanying text (discussing the Unruh Act's application to housing discrimination).

79. *Stoumen*, 37 Cal. 2d at 716, 234 P.2d at 971; *see supra* note 37 and accompanying text (stating that all persons of lawful age have a legal right to patronize a public restaurant and bar provided they act properly and do not commit illegal or immoral acts).

The decisions which have implied sexual orientation into the Unruh Civil Rights Act, *Hubert v. Williams*,[80] *Curran v. Mount Diablo Council of the Boy Scouts of America*,[81] *Rolon v. Kulwitzky*,[82] and *Beaty v. Truck Insurance Exchange*[83] are all intermediate appellate decisions of the Court of Appeal for the Second and/or Third District. The most important of the four cases, *Hubert*, which held that homosexuals are protected from arbitrary discrimination in housing, is actually a decision by the Appellate Department of the Superior Court of Los Angeles County which is an intermediate branch of the Court of Appeal for the Second District with little precedential authority.[84]

Under technical principles of stare decisis, no California appellate court is bound to follow these prior decisions.[85] The courts of appeal or the supreme court may look to the prior decisions of the Second District or Third District for guidance as to whether homosexuals are protected by the Unruh Act, but such courts are not compelled to follow any of the decisions.[86] In fact, a different panel of the Court of Appeal for the Second District or the Third District may choose not to follow its district's prior decisions, but instead may disapprove them.[87] Since there is no supreme court opinion binding all of the courts in California, the previously mentioned appellate opinions protecting homosexuals are subject to reversal or revision by the California Supreme Court or any one of the courts of appeal.[88] Consequently, the California Supreme Court or any of the courts of appeal could rule that homosexuals are not included within the Unruh

80. 133 Cal. App. 3d Supp. 1, 184 Cal. Rptr. 161 (1982); *see supra* notes 67-72 and accompanying text (discussing *Hubert*).

81. 147 Cal. App. 3d 712, 195 Cal. Rptr. 325 (1983); *see supra* notes 42-44 and accompanying text (discussing *Curran*).

82. 153 Cal. App. 3d 289, 200 Cal. Rptr. 217 (1984); *see supra* note 41 (discussing *Rolon*).

83. 6 Cal. App. 4th 1455, 8 Cal. Rptr. 2d 593 (1992); *see supra* notes 45-49 and accompanying text (discussing *Beaty*).

84. *See* 9 B.E. WITKIN, CALIFORNIA CIVIL PROCEDURE, *Appeal*, § 777 (3d ed. 1985) (discussing the authority of decisions by appellate departments).

85. *See id.* at § 772 (discussing the authority of decisions by courts of appeal).

86. *See id.*

87. *Id.*

88. *See id.* at §§ 768 (discussing the binding authority of the California Supreme Court).

Civil Rights Act, thereby negating any current protection homosexuals enjoy against housing discrimination.

The California Legislature could resolve any doubt as to whether homosexuals are protected from housing discrimination by amending either the Unruh Civil Rights Act or the Fair Employment and Housing Act to explicitly include sexual orientation. The Legislature has failed to so amend either act despite a recent amendment to the Unruh Civil Rights Act adding the category of "blindness or other physical disability" to the statute.[89] Cognizant of this unwillingness to amend either statute, it would certainly be helpful if the California Supreme Court would strengthen the protection for homosexuals against housing discrimination by expressly holding that sexual orientation is a protected category within the Unruh Act. This would at least prevent the intermediate courts of appeal from disagreeing with prior holdings protecting homosexuals. As of yet, the California Supreme Court has declined to explicitly include homosexuals within the Unruh Act,[90] but the court may have implicitly included homosexuals within the Unruh Act in *Harris v. Capital Growth Investors XIV*.[91]

B. Harris v. Capital Growth Investors XIV: *Implicit Protection for Homosexuals*

In *Harris*, the court held that a landlord's minimum income policy did not violate the Unruh Act, although that policy arbitrarily discriminated on the basis of economic factors.[92] The court refused to extend the protections of the Unruh Act to include economic criteria.[93] The *Harris* court also limited the application of the Unruh

89. 1987 Cal. Stat. ch. 159, sec. 1, at 1094 (amending CAL. CIV. CODE § 51).

90. In the most recent case dealing with sexual orientation and the Unruh Act, the California Supreme Court denied review on August 27, 1992. Beaty v. Truck Ins. Exch., 6 Cal. App. 4th 1455, 8 Cal. Rptr. 2d 593 (1992).

91. 52 Cal. 3d 1142, 805 P.2d 873, 278 Cal. Rptr. 614 (1991).

92. *Id.* at 1169, 805 P.2d at 889, 278 Cal. Rptr. at 630.

93. *Id.* at 1148, 805 P.2d at 874, 278 Cal. Rptr. at 615.

Act by holding that a plaintiff must show *intentional* discrimination to sustain an action under the Unruh Act.[94]

The plaintiffs in *Harris*, who were prospective tenants in defendant's apartment complex, filed suit complaining that the defendant's policy requiring a prospective tenant to earn at least three times the apartment's monthly rent (the minimum income policy) violated the Unruh Act.[95] In deciding whether discrimination based on economic characteristics was prohibited by the Unruh Act, the court looked to prior decisions interpreting the Unruh Act, and the language of the statute, to distill the common thread that all the protected categories involve personal characteristics.[96] As a result, the *Harris* court concluded that only classifications based on personal characteristics are protected by the Unruh Act, and those which involve economic characteristics are not protected by the Unruh Act.[97] Since a minimum income policy discriminates on the basis of economic characteristics rather than personal characteristics, the plaintiffs were not in a class protected by the Unruh Act.[98]

In light of the above reasoning, the question arises whether homosexuality is a personal characteristic, and thus is included within the Unruh Act. If homosexuality is a personal characteristic, then under the reasoning of *Harris*, courts should conclude that homosexuality is included within the Unruh Civil Rights Act.[99] *Harris* describes a personal characteristic as "a person's geographical origin, physical attributes, and personal beliefs."[100] If homosexuality is genetic,

---

94. *Id.* at 1175, 805 P.2d at 893, 278 Cal. Rptr. at 634.

95. *Id.* at 1149-50, 805 P.2d at 875, 278 Cal. Rptr. at 616.

96. *Id.* at 1160, 805 P.2d at 883, 278 Cal. Rptr. at 624.

97. *Id.* at 1161-62, 805 P.2d at 884, 278 Cal. Rptr. at 625.

98. *Id.* at 1169, 805 P.2d at 889, 278 Cal. Rptr. at 630. The plaintiffs in *Harris* also attempted to rely on the stated category of "sex" within the Unruh Act as a basis on which to challenge the minimum income policy. *Id.* at 1170, 805 P.2d at 889, 278 Cal. Rptr. at 630. The court, however, held that there is no sex discrimination despite the policy's disparate impact on women because the Unruh Act only applies to intentional discrimination. *Id.* at 1175, 805 P.2d at 893, 278 Cal. Rptr. at 634.

99. Classifications based on personal characteristics, as opposed to economic characteristics, are protected by the Unruh Act. *Id.* at 1161, 805 P.2d at 884, 278 Cal. Rptr. at 625.

100. *Id.* at 1160, 805 P.2d at 883, 278 Cal. Rptr. at 624.

then it is surely a physical attribute.[101] If homosexuality is a social choice, then it is surely a personal belief. Whether one concludes that homosexuality is genetic or a product of choice, homosexuality is probably a personal characteristic and therefore, per *Harris*, a protected category under the Unruh Civil Rights Act.

In addition, although *Harris* did not involve discrimination against homosexuals, and was more restrictive than past decisions construing the Unruh Act, the decision may have implicitly conceded that homosexuality is protected by the Unruh Act. The court stated that beginning with *In re Cox*[102] in 1970, the Unruh Act had been construed to apply to several classifications not expressly enumerated in the statute.[103] In making this contention, the court referred to

---

101. Traditional psychology has held that homosexuality is a social phenomenon triggered by a troubled parent-child relationship where the mother is overly protective or the father is distant or perhaps even hostile. Christine Gorman, *Are Gay Men Born That Way?*, TIME, Sept. 9, 1991, at 60. However, recent studies seem to indicate that homosexuality may have a genetic cause instead. Jean L. Griffin, *Twins Study Suggests Sex Preference Genetic*, CHI. TRIB., Dec. 16, 1991, Du Page, at 1. In 1990, researchers from the Netherlands discovered that the portion of the hypothalamus (a component of the brain) which controls daily rhythms was twice as large in homosexual men relative to heterosexual men. *Id.* In August of 1991, Simon Levay, a researcher at the Salk Institute in San Diego, found that another region of the hypothalamus, an area which regulates sexual activity, was nearly three times smaller in homosexual men than in heterosexual men. Curt Suplee, *Brain May Determine Sexuality*, WASH. POST, Aug. 30, 1991, at A1. Additionally, the research discovered that the size of this region was nearly exact in both homosexual men and heterosexual women. *Id.* In a report published in December of 1991, Michael Bailey and Richard Pillard added strong support to the idea that homosexuality is genetically based in concluding that 30 percent to 70 percent of male homosexuality is caused by genetic factors. Richard A. Knox, *New Study of Twins Finds Genetic Basis for Homosexuality*, BOSTON GLOBE, Dec. 15, 1991, at 20. In interviewing identical twins, fraternal twins, and adoptive brothers, the researchers discovered that if one of the genetically exact identical twin brothers was gay, there was a 52 percent chance that the other would be gay. *Id.* If one of the fraternal twins was gay, there was a 22 percent chance that the other would be gay. *Id.* As for the genetically unrelated adoptive brothers, if one of the adoptive brothers was homosexual, there was only an 11 percent chance that the other would be homosexual as well, which is usually the normal rate of homosexuality in a given population. *Id.*; *see also* Gregory M. Herek, *Myths About Sexual Orientation: A Lawyer's Guide to Social Science Research*, 1 LAW & SEXUALITY 133, 140 n.23 (1991) (stating that about 10% of the United States population is homosexual). Consequently, science is rapidly approaching the conclusion that sexual orientation is, in reality, a genetic trait, as opposed to a social phenomenon. Michael Bailey & Richard Pillard, *Are Some People Born Gay?*, N.Y. TIMES, Dec. 17, 1991, at A21; *see also* Michael Bailey & Richard Pillard, *A Genetic Study of Male Sexual Orientation*, 48 ARCH. GEN. PSYCHIATRY 1089 (1991) (scientifically describing the method and results of the twins study).

102. 3 Cal. 3d 205, 90 Cal. Rptr. 24 (1970).

103. *Harris*, 52 Cal. 3d at 1155, 805 P.2d at 879, 278 Cal. Rptr. at 620.

Rolon,[104] *Curran*,[105] and *Hubert*,[106] all of which stated that homosexuality was protected by the Unruh Act.[107] By expressing no disagreement with prior interpretations incorporating homosexuality into the Unruh Act, the *Harris* court presumably agreed with such inclusion.[108] However, such a contention offers less comfort than an express holding by the California Supreme Court that sexual orientation is included within the Unruh Act.

Consequently, homosexuals may have some protection against housing discrimination under the Unruh Act. Intermediate appellate court decisions establish such protection, and a broad reading of *Harris* appears to affirm these decisions. *Harris* at least provides the argument that homosexuality is included within the Unruh Act because homosexuality is a personal characteristic.[109]

III. PROTECTIONS AFFORDED HOMOSEXUALS AGAINST DISCRIMINATION IN THE WORKPLACE

The fact that homosexuals may be implicitly protected by the Unruh Civil Rights Act regarding housing discrimination furnishes no protection in the area of employment discrimination.[110] Since the Fair Employment Housing Act (FEHA) supposedly has exclusive jurisdiction over employment discrimination, the Unruh Civil Rights Act has no application to, nor offers any protection against, such discrimination.[111] The FEHA bars discrimination only on the

---

104. *See supra* note 41 (discussing *Rolon*).

105. *See supra* notes 442-44 and accompanying text (discussing *Curran*).

106. *See supra* notes 67-72 and accompanying text (discussing *Hubert*).

107. *Harris*, 52 Cal. 3d at 1155, 805 P.2d at 879, 278 Cal. Rptr. 620.

108. *See* Beaty v. Truck Ins. Exch., 6 Cal. App. 4th 1455, 1462, 8 Cal. Rptr. 2d. 593, 600 (1992) (stating that the *Harris* court refused to overrule prior case law which extended the Unruh Act to classifications not expressed in the statute).

109. *See supra* notes 96-98 and accompanying text (discussing the Unruh Act's limitation to categories based on personal characteristics).

110. According to the Fair Employment and Housing Act, employment discrimination against a person occurs when an employer: (1) Refuses to hire or employ a person; (2) refuses to select the person for a training program leading to employment; (3) bars or discharges the person from employment; (4) bars or discharges the person from a training program leading to employment; or (5) discriminates against the person in compensation or in terms, conditions, or privileges of employment. CAL. GOV'T CODE § 12940 (West 1992).

111. Rojo v. Kliger, 52 Cal. 3d 65, 77, 801 P.2d 373, 380, 276 Cal. Rptr. 130, 137 (1990).

grounds specified in the statute, which does not include sexual orientation.[112] Unlike the Unruh Act which may incorporate classes not specifically enumerated therein, the scope of the FEHA is limited to those categories expressly listed in the statute.[113] As a result, under the FEHA, a homosexual does not enjoy the same civil right from employment discrimination as does a handicapped person or a divorced person who is expressly included within the statute.[114]

Consequently, courts have had to look elsewhere to find protections for homosexuals from job discrimination; most notably the Labor Code. Codifying the courts' interpretation of the Labor Code, the California Legislature, with the signature of the Governor, recently enacted AB 2601 which markedly improved the protection afforded homosexuals against employment discrimination.[115] It would be helpful to explore the history preceding AB 2601 in order to appreciate its importance as well as to facilitate its interpretation and application by the courts.

A. Public Sector Employment

In the public sector, homosexuals were protected to some extent against discrimination in employment by the California Constitution, California Labor Code sections 1101 and 1102, Executive Order B-54-79, and California Government Code section 18500, which independently provide a legal basis upon which to sue for such dis-

---

112. *Id.* at 79-80, 801 P.2d at 381, 276 Cal. Rptr. at 138; *see supra* notes 24-26 and accompanying text (discussing the FEHA and stating that the FEHA prohibits discrimination based on race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, or sex).

113. *Rojo*, 52 Cal. 3d at 79-80, 801 P.2d at 381, 276 Cal. Rptr. at 138.

114. *See* CAL. GOV'T CODE § 12921 (West 1992).

115. This new legislation appears to be in accord with society's wish that homosexuals have equal rights in the workplace. For example, a Newsweek Poll conducted in September of 1992 "found that an overwhelming 78% of the public believes gay men and women should enjoy the same access to job opportunities as heterosexuals." Bill Turque et al., *Gays Under Fire*, NEWSWEEK, Sept. 14, 1992, at 35-36. In a recent Gallup Poll, 75% of those polled said that they thought gays should have equal employment opportunities. Elaine Herscher, *"Family Values" Rhetoric: Gays Under Fire in Presidential Race*, S.F. CHRON., June 26, 1992, at A1. In addition, a nationwide poll found that 80% of Americans favored equal rights for homosexuals in the workplace. Jorge Casuso, *Gays, Lesbians Shift Focus to Civil Rights–and Win*, CHI. TRIB., Apr. 30, 1991, at 1.

crimination.[116] The two most important protections, the California Constitution and Labor Code sections 1101 and 1102, emanated from the seminal case in the area of employment discrimination against homosexuals, *Gay Law Students Association v. Pacific Telephone and Telegraph Company.*[117]

1. Gay Law Students Association v. Pacific Telephone and Telegraph Company: *Origins of Protection for Homosexuals from Job Discrimination*

In *Gay Law Students*, the plaintiffs, four individuals and two associations, organized to promote equal rights for homosexuals, filed a class action against Pacific Telephone and Telegraph (PT&T), challenging its arbitrary discrimination in the hiring, firing, and promotion of homosexual employees.[118] The California Supreme Court sustained a cause of action to a demurrer based on three separate areas of the law: The equal protection clause of the California Constitution; section 453(a) of the Public Utilities Code; and Labor Code sections 1101 and 1102.[119]

a. Equal Protection Clause

The equal protection clause of California is contained in Article I, section 7, subdivision (a) of the California Constitution. It states, "[a] person may not be deprived of life, liberty, or property without due process of law or denied equal protection of the laws."[120] In

116. *See infra* notes 118-144 and accompanying text.

117. 24 Cal. 3d 458, 595 P.2d 592, 156 Cal. Rptr. 14 (1979).

118. *Id.* at 463, 595 P.2d at 595, 156 Cal. Rptr. at 17. The complaint also challenged the Fair Employment Practices Commission's assertion that it had no jurisdiction over claims involving discrimination based on sexual orientation. *Id.* at 464, 595 P.2d at 595, 156 Cal. Rptr. at 17.

119. *Id.* at 466-67, 486-87, 595 P.2d at 597, 609-10, 156 Cal. Rptr. at 19, 31-32; *see also* Lee A. Johnson, Note, Gay Law Students Association v. Pacific Telephone & Telegraph Co: *Constitutional and Statutory Restraints on Employment Discrimination Against Homosexuals by Public Utilities*, 68 CAL. L. REV. 680 (1980) (discussing and analyzing the decision in *Gay Law Students*). Of the three areas of the law discussed by the court, the equal protection clause and the Labor Code are the most relevant to this Comment since they can be applied generally, whereas § 453 of the Public Utilities Code is limited to public utilities.

120. CAL. CONST. art. I, § 7.

Gay Law Students, the court held that the equal protection clause prohibits a public entity from engaging in arbitrary employment discrimination.[121] The court reasoned that the equal protection clause of the state constitution prohibits a state or governmental entity from arbitrarily discriminating against any class of persons, including homosexuals, in employment.[122] The court then stated that although the breadth of California's equal protection clause was not intended to include all purely private conduct, since PT&T was technically a privately owned enterprise, PT&T would nonetheless fall within the equal protection clause because a "public utility is in many respects more akin to a governmental entity than to a purely private employer."[123] The court based this conclusion on the extensive regulatory scheme and the state-sanctioned monopoly status of a public utility.[124] Consequently, the court held that a state-protected public utility, a quasi-public employer, cannot arbitrarily or invidiously discriminate in its employment decisions under Article I, section 7, subdivision (a) of the California Constitution.[125] The holding of *Gay Law Students* was important since it provided homosexuals a constitutional basis upon which to state a cause of action for discrimination by a public or quasi-public employer.

b. Labor Code Sections 1101 and 1102: Sexual Orientation as a Political Activity

The court in *Gay Law Students* also permitted a cause of action for employment discrimination based on sexual orientation under

---

121. *Gay Law Students Ass'n*, 24 Cal. 3d at 467, 595 P.2d at 597, 156 Cal. Rptr. at 19 (citing Purdy & Fitzpatrick v. California, 71 Cal. 2d 566, 456 P.2d 645, 79 Cal. Rptr. 77 (1969); Morrison v. Board of Educ., 1 Cal. 3d 214, 461 P.2d 375, 82 Cal. Rptr. 175 (1969); Kotch v. Pilot Comm'rs, 330 U.S. 552 (1947)).

122. *Id.* at 467, 595 P.2d at 597, 156 Cal. Rptr. at 19.

123. *Id.* at 468-69, 595 P.2d at 598-99, 156 Cal. Rptr. at 20-21 (citing Kruger v. Wells Fargo Bank, 11 Cal. 3d 352, 521 P.2d 441, 113 Cal. Rptr. 449 (1974)).

124. *Id.* at 469-71, 595 P.2d at 599-600, 156 Cal. Rptr. at 21-22.

125. *Id.* at 474, 595 P.2d at 602, 156 Cal. Rptr. at 24.

California Labor Code sections 1101 and 1102.[126] The court indicated that the two sections were designed to defend the fundamental right of employees to engage in political activity without interference by employers.[127] The court noted that an employer cannot coerce an employee on threat of discharge to adopt, follow, or refrain from adopting a political activity, nor can an employer foster a policy forbidding employees to engage in political activities or attempting to control those activities.[128] The court also stated that the concept of "employee" includes job applicants since otherwise employers could circumvent the Legislature's goal of protecting citizens by merely advancing the discriminatory practices to an earlier stage in the employment relationship if job applicants were not protected.[129] Thus, one result of *Gay Law Students* was that employees as well as applicants were able to use Labor Code sections 1101 and 1102 as a defense to discriminatory hiring practices by an employer.

Adopting the reasoning of the appellate court in *Mallard v. Boring*,[130] the California Supreme Court in *Gay Law Students*

---

126. *Id.* at 486-87, 595 P.2d at 609-10, 156 Cal. Rptr. at 31-32. Labor Code § 1101 states: "[n]o 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." CAL. LAB. CODE § 1101 (West 1989). Labor Code § 1102 states: "[n]o 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." *Id.* § 1102 (West 1989).

127. *Gay Law Students Ass'n*, 24 Cal. 3d at 487, 595 P.2d at 610, 156 Cal. Rptr. at 32 (quoting Fort v. Civil Serv. Comm'n, 61 Cal. 2d 331, 335, 392 P.2d 385, 387, 38 Cal. Rptr. 625, 627 (1964)).

128. *Id.* at 487, 595 P.2d at 610, 156 Cal. Rptr. at 32 (citing CAL. LAB. CODE §§ 1101, 1102).

129. *Id.* at 487 n.16, 595 P.2d at 610 n.16, 156 Cal. Rptr. at 32 n.16 (citing California State Restaurant Ass'n v. Whitlow, 58 Cal. App. 3d 340, 347, 129 Cal. Rptr. 824, 828 (1976); Phelps Dodge Corp. v. Labor Bd., 313 U.S. 177 (1941).

130. 182 Cal. App. 2d 390, 6 Cal. Rptr. 171 (1960). In *Mallard*, the plaintiff, a stenographer, sued for wrongful inducement of breach of contract and for wrongful discharge from employment. *Id.* at 392, 6 Cal. Rptr. at 172. The plaintiff responded to a court questionnaire by indicating that she was available for jury duty despite her employer's order not to so indicate. *Id.* at 392, 6 Cal. Rptr. at 173. Plaintiff was subsequently discharged from her employment. *Id.* at 393, 6 Cal. Rptr. at 173. The court held that there was no cause of action for wrongfully inducing a breach of contract. *Id.* at 394, 6 Cal. Rptr. at 174. In her second cause of action, plaintiff argued that service as a trial juror was a political activity protected by Labor Code § 1101 and that violation of this section by her employer was grounds for a claim of wrongful discharge. *Id.* at 394-95, 6 Cal. Rptr. 174. The court stated that political activity connoted the espousal of a candidate or cause, and some degree of action to promote the acceptance thereof by other persons. *Id.* at 395, 6 Cal. Rptr. at 174. The court then

defined political activity as "the espousal of a candidate or a cause, and some degree of action to promote the acceptance thereof by other persons."[131] Using this standard, the court concluded that the struggle for equal rights by homosexuals in such areas as employment must be a "political activity" because homosexuals attempt to persuade others in society that gays deserve the same fundamental rights as everyone else.[132] To so convince others in society, a homosexual must manifest his or her homosexuality since such open conduct is a necessary step in encouraging other homosexuals to associate in the struggle for equal rights.[133] The court then stated that by discriminating against manifest homosexual persons, employers tend to dissuade such political activity in violation of the prohibitions of sections 1101 and 1102 of the Labor Code.[134] According to the *Gay Law Students* court, PT&T's policy of discriminating against manifest homosexuals was a policy tending to control or direct the political activities or affiliations of employees in violation of Labor Code section 1101.[135] Furthermore, in violation of section 1102, PT&T also had attempted to coerce and influence its employees to refrain from adopting a particular course or line of political activity, namely manifesting homosexuality.[136] Consequently, the court found that a cause of action against PT&T was justified under both Labor Code sections 1101 and 1102.[137]

As a result of *Gay Law Students*, state agencies, departments, boards and commissions were prohibited from discriminating against homosexuals because of (1) California's equal protection clause and

---

stated that jury service was not a political activity because jury service is a judicial function which is repugnant to the concept of political activity. *Id.*, 6 Cal. Rptr. at 174-75. Consequently, the court held that there also was no cause of action for wrongful discharge from employment. *Id.* at 396, 6 Cal. Rptr. at 175.

131. *Gay Law Students Ass'n*, 24 Cal. 3d at 487, 595 P.2d at 610, 156 Cal. Rptr. at 32 (quoting *Mallard*, 182 Cal. App. 2d at 395, 6 Cal. Rptr. at 174).

132. *Id.* at 488, 595 P.2d at 610, 156 Cal. Rptr. at 32.

133. *Id.* at 488, 595 P.2d at 610-11, 156 Cal. Rptr. at 32-33.

134. *Id.* at 488, 595 P.2d at 611, 156 Cal. Rptr. at 33.

135. *Id.*

136. *Id.*

137. *Id.* at 489, 595 P.2d at 611, 156 Cal. Rptr. at 33.

(2) California Labor Code sections 1101 and 1102.[138] These two protections were of immense importance for they were the foundation for all subsequent protection accorded homosexuals against job discrimination. However, there were other protections against public sector employment discrimination which deserve mentioning.

2. *Executive Order B-54-79: The Governor's Attempt to Ban Sexual Orientation Discrimination*

Executive Order B-54-79, signed by former Governor Jerry Brown on April 4, 1979, proscribed sexual orientation employment discrimination in the public sector.[139] The order forbade the agencies, departments, boards and commissions within the executive branch of state government from discriminating in state employment against any individual based solely upon the individual's sexual preference.[140] Former Attorney General George Deukmejian endorsed the legality of this order, concluding that such an executive order was not an improper infringement upon legislative authority in regard to the state civil service.[141] The Legislature subsequently codified Governor Brown's executive order in 1988.

3. *California Government Code Section 18500: The Legislature's Codification of the Governor's Ban*

California Government Code section 18500 was amended in 1988 to include sexual orientation, along with other categories, as a basis

---

138. *See* 63 Cal. Op. Att'y Gen. 583 (1980); *see also* 66 Cal. Op. Att'y Gen. 486 (1983) (reinforcing this result by concluding that in addition to state agencies, local public agencies also could not discriminate in their employment practices on the basis of sexual orientation).

139. Exec. Order No. B-54-79 (1979) (copy on file at the *Pacific Law Journal*). Ten states have proscribed sexual orientation discrimination in the public sector based on an Executive Order: California, Minnesota, New Mexico, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Washington and Colorado. Peter M. Cicchino, et al., Comment, *Massachusetts Gay Civil Rights Bill*, 26 HARV. C.R.-C.L. L. REV. 549, 557 n.40 (1991); *see also* Robert L. Eblin, *Domestic Partnership Recognition in the Workplace: Equitable Employee Benefits for Gay Couples (and others)*, 51 OHIO ST. L.J. 1067, 1068 n.5 (1990) (listing the same states except Colorado).

140. Executive Order B-54-79 (1979).

141. 63 Cal. Op. Att'y Gen. 583, 583-84 (1980).

on which the state civil service could not discriminate.[142] Section 18500(c)(5) states that applicants and employees are to be treated equally without regard to sexual orientation.[143] As a result, homosexuals are statutorily protected from employment discrimination in the civil service.

Notwithstanding the above protections, public employment was only half the problem. Neither *Gay Law Students*, Labor Code sections 1101 and 1102, Governor Brown's executive order, nor Government Code section 18500 applied to homosexual employment discrimination in the private sector. The California Supreme Court, the California Governor, and the California Legislature each acted to protect gays from job discrimination in the public sector.[144] However, such efforts were not forthcoming in regard to job discrimination by private employers. Compared to those protections against public sector employment discrimination, the safeguards in the private sector were non-existent.

B. Private Sector Employment

Within California, the only acknowledgement of any protection against employment discrimination based on sexual orientation in the private sector prior to 1991 was contained in an Attorney General Opinion written by John Van De Kamp.[145] In 1986, former Attorney General Van De Kamp was called upon to decide whether Labor Code sections 1101 and 1102 would prohibit a private employer from discriminating on the basis of sexual orientation.[146] Until that point, use of the Labor Code to protect homosexuals only applied to public or quasi-public employers such as Pacific Telephone & Telegraph.[147] *Gay Law Students* was not concerned with

---

142. 1988 Cal. Stat. ch. 1193, sec. 1, at 2896.

143. CAL. GOV'T CODE § 18500(c)(5) (West 1980 & Supp. 1992).

144. *See supra* notes 118-144 and accompanying text (discussing each's attempt to protect homosexuals from job discrimination in the public sector).

145. 69 Cal. Op. Att'y Gen. 80 (1986).

146. *Id.*

147. *See supra* notes 126-137 and accompanying text (discussing the reasoning and application of the Labor Code to public employers in *Gay Law Students*).

whether such protection could also be used against a private employer.[148]

1. Attorney General Opinion by John Van De Kamp: The First Recognition of the Prohibition Against Sexual Orientation Job Discrimination in the Private Sector

Former Attorney General Van De Kamp concluded that Labor Code sections 1101 and 1102 prohibited a private employer from discriminating on the basis of sexual orientation.[149] However, the former attorney general did not directly respond to the question presented in reaching the foregoing conclusion. Van De Kamp was supposed to decide whether Labor Code sections 1101 and 1102 prohibited a *private employer* from discriminating on the basis of sexual orientation, not whether non-manifest[150] homosexuals were also protected by sections 1101 and 1102. He primarily focused his opinion on whether non-manifest homosexuals were protected by the Labor Code since the court in *Gay Law Students* limited its holding, and thus the protections afforded by sections 1101 and 1102, to manifest homosexuals.[151] Van De Kamp apparently *assumed* that a private employer is prevented from discriminating against homosexuals under Labor Code sections 1101 and 1102 so he could then analyze whether non-manifest homosexuals were protected.

In former Attorney General Van De Kamp's analysis regarding the application of sections 1101 and 1102 to private employers, he concluded that Labor Code sections 1101 and 1102 pertain to private employers in light of the California Supreme Court's interpretation of these sections in *Fort v. Civil Service Commission.*[152] The court in *Fort* had stated that sections 1101 and 1102 serve to protect "the

148. *See supra* notes 121-125 and accompanying text.

149. 69 Cal. Op. Att'y Gen. 80 (1986).

150. A non-manifested homosexual is one who does not identify himself as homosexual, who does not defend homosexuality, or who is not identified with activist homosexual organizations. *Id.* at 82.

151. *Id.* at 82.

152. *Id.*; Fort v. Civil Serv. Comm'n, 61 Cal. 2d 331, 392 P.2d 385, 38 Cal. Rptr. 625 (1964).

fundamental right of *employees in general* to engage in political activity without interference by *employers.*"[153] Van De Kamp failed to explicitly describe the implications of this statement, instead assuming the applicability of sections 1101 and 1102 to private employers. It might be reasoned from the statement that since "employees in general" are protected while no limitation is applied to "employers," *Fort* suggests that no distinction between public and private exists. Thus, logically, if both public and private employees are protected, then neither public nor private employers can discriminate based on an employee's political activities. However, if this logic was the basis for Van De Kamp's conclusion, he failed to include it in his analysis.

The former attorney general then stated that the most difficult interpretive issue regarding the statutes was the determination of which types of political action and affiliations would be protected from arbitrary action by a *private employer.*[154] Van De Kamp assumed, without further exploration, that private employers were prohibited from arbitrary action in regard to the political activities of their employees.[155] Rather, the bulk of the opinion focused on the protections for non-manifest homosexuals. Van De Kamp began his analysis with the realization that the California Supreme Court had already ruled that Labor Code sections 1101 and 1102 protect *manifest* homosexual employees, those that identify themselves as homosexual, from reprisal by their employers.[156] From this, he concluded that non-manifest homosexuality must also be protected since it is improbable that within the Labor Code the Legislature intended to prohibit discrimination against persons who openly express political views while condoning discrimination against persons with undeclared political beliefs.[157] According to Van De Kamp, the Legislature intended that political activities or affiliations,

153. *Fort*, 61 Cal. 2d at 335, 392 P.2d at 387, 38 Cal. Rptr. at 627 (emphasis added).
154. 69 Cal. Op. Att'y Gen. 80, 81 (1986).
155. *See id.*
156. *Id.* at 82.
157. *Id.*

whether private or public, should not be the basis for employment decisions.[158]

The former attorney general argued that sections 1101 and 1102 prohibit employer policies tending to regulate the political activities or affiliations of employees, and prohibit the employer from attempting to compel employees to adopt, follow, or refrain from certain courses of political activity.[159] He posited that if employers were to discharge employees thought to be secretly gay, this would influence employees to manifest their homosexuality in order to embrace the protections of the Labor Code as enunciated in *Gay Law Students*.[160] The former attorney general then concluded, since self-identification as a homosexual is a political act, coercing or influencing employees to declare their homosexuality on threat of termination is coercing or influencing a political activity in violation of Labor Code sections 1101 and 1102.[161] Therefore, according to Van De Kamp, by extension, non-manifest homosexuals were protected under Labor Code sections 1101 and 1102 in the same way as were manifest homosexuals.[162]

In sum, former Attorney General Van De Kamp contended that all homosexuals, manifest and non-manifest, were protected from employment discrimination based on sexual orientation whether in the public or the private sector.[163] Such protection would allow homosexuals employed in the private sector to bring a suit for discrimination despite the absence of open advocation or manifestation of homosexuality. Standing alone, though, Van De Kamp's opinion was inadequate to protect gays.[164] However, the opinion was adopted by an appellate court, whose decision subsequently became AB 2601.

---

158. *Id.* at 83.
159. *Id.*
160. *Id.*
161. *Id.*
162. *Id.* at 84.
163. *Id.* at 85.
164. *See infra* notes 210-211 and accompanying text (discussing the lack of precedential authority of an attorney general opinion).

2. Soroka v. Dayton Hudson Corporation: *The First Judicial Decision to Proscribe Sexual Orientation Job Discrimination in the Private Sector*

In *Soroka v. Dayton Hudson Corporation*,[165] three security officer applicants of a Target Department Store filed a class action challenging the requirement of Dayton Hudson Corporation (Target) that any security officer applicant pass a psychological screening test as a condition to being hired.[166] The test was ostensibly designed to screen out emotionally unstable applicants by asking questions on various topics including religious attitudes and sexual orientation.[167] Plaintiffs contended that such questions invaded their right to privacy and violated Labor Code sections 1101 and 1102.[168]

The Court of Appeal for the First District decided the case on the right to privacy claim.[169] The court stated that the California Constitution explicitly protects the right to privacy.[170] The court added that an invasion of one's privacy is prohibited unless there is a compelling interest for the invasion.[171] Target conceded the fact that its test was an invasion of an applicant's privacy, but argued that it had a compelling interest in wanting to employ emotionally stable persons as determined by this test.[172] The *Soroka* court did not agree that this was a compelling interest, and held that Target's

---

165. 7 Cal. App. 4th 203, 1 Cal. Rptr. 2d 77 (1991) *review granted and opinion superseded by* 822 P.2d 1327, 4 Cal. Rptr. 2d 180 (Jan. 31, 1992).

166. *Id.* at 207, 1 Cal. Rptr. 2d at 79.

167. *Id.* at 207-08, 1 Cal. Rptr. 2d at 79.

168. *Id.* at 209, 1 Cal. Rptr. 2d at 80. Plaintiffs also claimed a cause of action under disclosure of confidential medical information, fraud, negligent misrepresentation, intentional and negligent infliction of emotional distress, violation of the Fair Employment and Housing Act, and unfair business practices. *Id.*

169. *Id.* at 217, 1 Cal. Rptr. 2d at 86.

170. *Id.* at 211, 1 Cal. Rptr. 2d at 82. The California Constitution states: "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." CAL. CONST. art. I, § 1.

171. *Soroka*, 7 Cal. App. 4th at 215, 1 Cal. Rptr. 2d at 84-85.

172. *Id.* at 217, 1 Cal. Rptr. 2d at 86. Target stated that it had noticed an overall improvement in the quality and performance of store security officers since it implemented the test, but the court held this not to be a compelling interest. *Id.*

inquiry into the religious beliefs and sexual orientation of store security officer applicants unjustifiably violated the state constitutional right to privacy.[173]

In dictum, the court also addressed plaintiff's claim regarding violation of Labor Code sections 1101 and 1102.[174] The *Soroka* court stated the protections for political activity set forth in sections 1101 and 1102 and then remarked that applicants as well as employees were protected under these sections.[175] The court went on to cite and endorse the opinion of former Attorney General John Van De Kamp, that sections 1101 and 1102 forbid a private employer from discriminating against an employee on the basis of sexual orientation.[176]

One factor Target used in deciding whether to employ an applicant was the degree to which an individual subscribed to traditional values and mores and presumed an obligation to act in accordance with those values.[177] According to the *Soroka* court, certain questions on the psychological exam directly asked an applicant to disclose his or her sexual orientation.[178] The court concluded that applicants who expressed their homosexuality might be stigmatized as willing to defy or violate the traditional values and mores the company favored and thus those applicants would have an invalid test precluding employment.[179] As a result, the court in *Soroka* determined that the psychological screening test discriminated against applicants who identified themselves as homosexual in violation of section 1101, or alternatively, the test coerced such persons into not disclosing their homosexuality for fear of not being hired in violation of section 1102.[180] In either case, the court declared that the psychological screening test violated the Labor Code.[181]

---

173. *Id.*
174. *Id.* at 219-20, 1 Cal. Rptr. 2d at 87-88.
175. *Id.* at 219-20, 1 Cal. Rptr. 2d at 87-88.
176. *Id.; see supra* notes 149-164 and accompanying text (discussing Van De Kamp's opinion).
177. *Soroka*, 7 Cal. App. 4th at 220, 1 Cal. Rptr. 2d at 88.
178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*

The *Soroka* court held that Target's pre-employment requirement of psychological screening violated both the constitutional right to privacy and statutory prohibitions against improper pre-employment inquiries.[182] The court also held that the test constituted discriminatory conduct by inquiring into applicants' religious beliefs and sexual orientation.[183] *Soroka* was quite important in that it was the first judicial decision to recognize that a private employer could not discriminate against an employee or applicant based on his or her sexual orientation. AB 2601 codifies *Soroka* and this proposition. However, prior to AB 2601, there was other protection in the form of local ordinances.

C. *Local Ordinances Prohibiting Sexual Orientation Discrimination*

Mindful of the weaknesses in state-wide protection prior to *Soroka*, cities and counties had enacted ordinances to protect homosexuals within their jurisdictions.[184] According to a memorandum prepared by the American Civil Liberties Union Foundation of Southern California, there were only sixteen local governments in California that had some type of sexual orientation nondiscrimination ordinance.[185] Three of the sixteen prohibited only public sector

---

182. *Id.* at 221, 1 Cal. Rptr. 2d at 89.

183. *Id.*

184. *See, e.g.*, BERKELEY, CAL., MUNICIPAL CODE ch. 13.26, §§ 13.28.010–13.28.100 (1978); CATHEDRAL CITY, CAL., MUNICIPAL CODE ch. 11.66, §§ 11.88.010–11.88.130 (1987); Cupertino, Cal., Affirmative Action Policy Statement (1975); DAVIS, CAL., MUNICIPAL CODE ch. 7A, §§ 7A-1–7A-18 (1986); LAGUNA BEACH, CAL., MUNICIPAL CODE ch. 1.07, §§ 1.07.010–1.07.110 (1984); LONG BEACH, CAL., MUNICIPAL CODE ch. 5.09, §§ 5.09.010–5.09.050 (1987); LOS ANGELES, CAL., MUNICIPAL CODE ch. IV, art. 12, §§ 49.70–49.80 (1979); Mountain View, Cal., Amended Affirmative Action Program for the City of Mountain View (adopted by Res. Nos. 2060 and 2069); OAKLAND, CAL., MUNICIPAL CODE art. 20, §§ 3-20.01–3.20.08 (1984); SACRAMENTO, CAL., MUNICIPAL CODE ch. 14, §§ 14.100–14.112 (1986); SAN DIEGO, CAL., MUNICIPAL CODE div. 96, §§ 52.9601–52.9615 (1990); SAN FRANCISCO, CAL., POLICE CODE art. 33, §§ 3301–3311 (1981); San Jose, Cal., Policy No. 0-16 (1981); SANTA BARBARA, CAL., MUNICIPAL CODE ch. 9.126, 9.130, §§ 9.126.010–9.126.030, 9.130.010–9.130.030 (1972); SANTA MONICA, CAL., MUNICIPAL CODE ch. 9, §§ 4900–4910 (1984); WEST HOLLYWOOD, CAL., MUNICIPAL CODE art. IV, §§ 4200–4210 (1984).

185. Memorandum prepared by ACLU Foundation of Southern California, *Local Sexual Orientation Non-Discrimination Ordinances* (Mar. 28, 1991) [hereinafter *Ordinances*] (copy on file at the *Pacific Law Journal*). These sixteen cities are: Berkeley, Cathedral City, Cupertino, Davis, Laguna Beach, Long Beach, Los Angeles, Mountain View, Oakland, Sacramento, San Diego, San

employment discrimination against homosexuals.[186] Hence, merely thirteen cities in California prohibited sexual orientation employment discrimination in the private sector.[187]

According to the memorandum, of those thirteen cities, just eleven had reasonably comprehensive regulations prohibiting various types of sexual orientation employment discrimination.[188] The Sacramento ordinance and the San Francisco ordinance were limited by the fact that each applied to employers of six or more persons.[189] The ordinances of Cathedral City, Davis, Laguna Beach, Long Beach and San Diego applied to employers with five or more employees.[190] The ordinances of West Hollywood, Berkeley, Oakland, and Los Angeles tended to be the most comprehensive in that West Hollywood required at least one employee and the other three cities did not set a minimum on the number of employees that had to be employed to invoke the ordinance.[191]

Nevertheless, the comprehensiveness of these ordinances was questionable. As for the eleven cities having fairly comprehensive regulations, six of them provided some sort of exemption for religious organizations, thereby forcing homosexuals to rely on other protections.[192] Only Berkeley, Oakland, Sacramento, San Francisco, and West Hollywood did not have express exemptions for religious organizations.[193] Two others, Laguna Beach and Cathedral City, also exempted non-profit organizations.[194] In addition, every ordinance created an affirmative defense for employment decisions based on a bona fide occupational qualification, thereby shielding employers from liability when they failed

---

Francisco, San Jose, Santa Barbara, Santa Monica, and West Hollywood. *Id.; see supra* note 182 (specifically citing the various ordinances).

186. *Ordinances, supra* note 185, at 2. These three cities are: Cupertino, Mountain View, and San Jose. *Id.*

187. *Id.*

188. *Id.* at 3.

189. *Id.* at 4.

190. *Id.* at 4-5.

191. *Id.* at 5.

192. *Id.*

193. *Id.*

194. *Id.* at 6.

to hire or terminated a homosexual for a bona fide occupational reason.[195] Although AB 2601 does not preempt these ordinances,[196] the need for them has been diminished with the passage of AB 2601.

IV. ADEQUACY OF PROTECTIONS AGAINST EMPLOYMENT DISCRIMINATION

Opponents of gay civil rights have argued that homosexuals were afforded adequate protection under the law and therefore no need for AB 2601 existed.[197] However, upon closer analysis of the case law, the local ordinances, and the constitutional provisions, it becomes clear that AB 2601 was quite necessary and vitally important in the progress toward equal rights for homosexuals. Protections against employment discrimination prior to AB 2601 were insufficient since: (1) *Gay Law Students* was limited given the quasi-governmental character of the defendant and the manifest homosexuality of the plaintiffs;[198] (2) the opinion of former Attorney General Van De Kamp had no binding authority;[199] (3) *Soroka* was limited since it discussed Labor Code protections for homosexuals in dictum, and since it has been suspended pending review;[200] and (4) the local ordinances applied to only approximately twenty-five percent of California's population[201] and those ordinances may have been preempted by the FEHA anyway.[202]

---

195. *Id.* An example of a bona fide occupational qualification which a female would fail to meet, thereby permitting discrimination, would be a prison guard in a male maximum security prison. 8 B.E. WITKIN, SUMMARY OF CALIFORNIA LAW, *Constitutional Law*, § 760 (9th ed. 1988).

196. *AB 2601 Fact Sheet, supra* note 5, at 5.

197. *See AB 2601 Fact Sheet, supra* note 5, at 1; Veto Message of Governor Pete Wilson Concerning AB 101 (1991) (discussing the adequacy of protection prior to the passage of AB 2601).

198. *See infra* notes 203-207 and accompanying text (discussing the limitations of *Gay Law Students*).

199. *See infra* notes 208-213 and accompanying text (discussing the limitations of attorney general opinions).

200. *See infra* notes 214-224 and accompanying text (discussing *Soroka*).

201. *See infra* notes 225-226 and accompanying text (discussing the limited applicability of local ordinances).

202. *See infra* notes 227-240 and accompanying text (discussing the possibility of preemption).

A. California Equal Protection Clause: Its Limitations

In *Gay Law Students*, one area of the law used to prohibit Pacific Telephone and Telegraph from discriminating against homosexuals was the equal protection clause of the California Constitution.[203] However, the equal protection clause only applies to state or governmental entities.[204] Consequently, the applicability of the equal protection clause to combat job discrimination was limited to sexual orientation discrimination by public or perhaps quasi-public employers only. *Gay Law Students* did nothing to address the discrimination perpetrated by private employers.

B. Van De Kamp's Attorney General Opinion: Not Binding Authority

Former Attorney General Van De Kamp argued that Labor Code sections 1101 and 1102 protect manifest and non-manifest gays from job discrimination by private employers.[205] However, *Gay Law Students*, the decision upon which Van De Kamp relied for his opinion, restricted the application of Labor Code sections 1101 and 1102 to *manifest* homosexuals.[206] In *Gay Law Students*, self-identification as a homosexual was defined as a political act, and thus protected by sections 1101 and 1102.[207] A problem existed, however, as to persons who did not publicly identify themselves as homosexual since persons who did not advocate or manifest homosexuality were not technically engaged in a "political activity," and thus could not invoke the protections of sections 1101 and 1102.

---

203. Gay Law Students Ass'n v. Pacific Telephone and Telegraph, 24 Cal. 3d 458, 467, 595 P.2d 592, 597, 156 Cal. Rptr. 14, 19 (1979); *see supra* notes 118-137 and accompanying text (discussing the reasoning of *Gay Law Students*).

204. *See supra* notes 118-137 and accompanying text (discussing *Gay Law Students*).

205. *See supra* notes 149-164 and accompanying text (discussing Van De Kamp's opinion).

206. *Gay Law Students Ass'n*, 24 Cal. 3d at 488, 595 P.2d at 611, 156 Cal. Rptr. at 33; *see supra* notes 126-137 and accompanying text (discussing the court's use of the Labor Code).

207. *See supra* notes 118-137 and accompanying text (discussing the reasoning of *Gay Law Students*).

Former Attorney General John Van De Kamp attempted to remedy this problem in attorney general opinion number 85-404.[208] The opinion concluded that non-manifest homosexuals should be afforded the same protections as manifest homosexuals under Labor Code sections 1101 and 1102.[209] Nevertheless, an attorney general opinion is not controlling authority.[210] An attorney general opinion serves only as an advisory opinion with no precedential value.[211] Therefore, if the former attorney general's opinion had been the only authority for applying the Labor Code to non-manifest homosexuals, courts would not have been compelled to apply such protection to persons who had not manifested their homosexuality.

Van De Kamp also attempted to include private employers within the reach of sections 1101 and 1102.[212] The opinion concluded that Labor Code sections 1101 and 1102 proscribed sexual orientation discrimination by a private employer, but the opinion did not reveal Van De Kamp's reasoning in support of this conclusion.[213] As a result, the reasoning of the opinion offers no framework upon which future plaintiffs could build an argument that private employers were prohibited by Labor Code sections 1101 and 1102 from discriminating against homosexuals. However, the decision in *Soroka v. Dayton Hudson Corporation*[214] supplemented this deficiency by

---

208. *See* 69 Cal. Op. Att'y Gen. 80 (1986); *supra* notes 149-164 and accompanying text (discussing Van De Kamp's opinion).

209. 69 Cal. Op. Att'y Gen. at 82; *see supra* note 149 and accompanying text (stating Van De Kamp's conclusion).

210. People v. Vallerga, 67 Cal. App. 3d 847, 870, 136 Cal. Rptr. 429, 441 (1977); Wenke v. Hitchcock, 6 Cal. 3d 746, 751-52, 493 P.2d 1154, 1158, 100 Cal. Rptr. 290, 294 (1972); *see* Lawe v. Chateaux & Manor Houses, Inc., No. 17-27133/188, Dept. of Industrial Relations, Division of Labor Standards Enforcement (1987) (refusing to follow Van De Kamp's opinion but instead holding that manifest or perceived homosexuality without other political activity is not protected under Labor Code §§ 1101 and 1102).

211. *Vallerga*, 67 Cal. App. 3d at 870, 136 Cal. Rptr. at 441; *Wenke*, 6 Cal. 3d at 751-52, 493 P.2d at 1158, 100 Cal. Rptr. at 294.

212. 69 Cal. Op. Att'y Gen. at 81; *see supra* notes 149-164 and accompanying text (describing Van De Kamp's analysis).

213. 69 Cal. Op. Att'y Gen. at 80; *see supra* notes 147-162 and accompanying text (discussing Van De Kamp's opinion).

214. 7 Cal. App. 4th 203, 1 Cal. Rptr. 2d 77 (1991).

stating that a private employer could not discriminate against a homosexuals.[215]

C. Soroka v. Dayton Hudson Corporation: *Dictum*

Soroka v. Dayton Hudson Corporation provided support for the conclusion that homosexuals were protected against discrimination by private employers as well as validated former Attorney General Van De Kamp's opinion by incorporating the opinion into the court's analysis.[216] The *Soroka* court stated that Labor Code sections 1101 and 1102 prohibited a private employer from discriminating against an employee on the basis of sexual orientation.[217] However, the usefulness of *Soroka* was doubtful because it had been suspended pending review by the California Supreme Court.[218]

The appellate court in *Soroka* prefaced its treatment of Labor Code sections 1101 and 1102 with the following: "*[I]t is not necessary* for us to address the statutory issues [i.e., sections 1101 and 1102] to resolve the question of whether the preliminary injunction should issue."[219] The court nonetheless discussed Labor Code sections 1101 and 1102 to aid the trial court on remand.[220] Since the discussion of Labor Code sections 1101 and 1102 was unnecessary to the resolution of the case, it was considered to be dictum.[221] As dictum, it had no force as precedent.[222] *Soroka* at least affirmed the constitutional right to privacy for employees and

---

215. *See supra* notes 163-181 and accompanying text (discussing *Soroka*).

216. *Soroka*, 7 Cal. App. 4th at 209-10, 1 Cal. Rptr. 2d at 88.

217. *Id.* at 209-10, 1 Cal. Rptr. 2d at 87-88; *see supra* notes 180-181 and accompanying text (stating the holding in *Soroka*).

218. *See* 822 P.2d 1327, 4 Cal. Rptr. 2d 180 (1992); CAL. R. CT. 976(d) (prohibiting the publication of opinions superseded by a grant of review); CAL. R. CT. 977(a) (prohibiting courts or parties to an action from citing or relying upon unpublished opinions); Faitz v. Ruegg, 114 Cal. App. 3d 967, 970, 171 Cal. Rptr. 149, 150 (1981) (declaring that unpublished cases may not be cited or used for precedential value).

219. *Soroka*, 7 Cal. App. 4th at 218, 1 Cal. Rptr. 2d at 86 (emphasis added).

220. *Id.*

221. 9 B.E. WITKIN, CALIFORNIA CIVIL PROCEDURE, *Appeal*, § 783 (3d ed. 1985); *see also* BLACK'S LAW DICTIONARY 409 (5th ed. 1979) (defining dictum as statements and comments in an opinion concerning some rule of law or legal proposition not necessarily involved nor essential to determination of the case in hand).

222. 9 B.E. WITKIN, CALIFORNIA CIVIL PROCEDURE, *Appeal*, § 783 (3d ed. 1985).

applicants.[223] This right to privacy could not be violated absent a compelling reason where the information sought was job-related.[224] Thus, in the hope of avoiding discrimination, a homosexual employee or applicant could have chosen not to disclose his or her homosexuality. An employer would most likely have been unable to inquire about such information and so the employee or applicant had a smidgen of protection. Of course, this tactic offered little protection for those who had manifested their homosexuality, for once an employer discovered an employee's homosexuality, the constitutional right to privacy could not prevent that employer from discharging or otherwise discriminating against that employee because of that employee's sexual orientation. However, if the employee was within the twenty-five percent of California's population protected by a local ordinance, perhaps he or she still had some legal recourse.

D. Local Ordinances: Preemption

The protections provided by local ordinances were limited given the number of such ordinances and the existence of the Fair Employment and Housing Act (FEHA). There were merely sixteen local ordinances in California dealing with employment discrimination against homosexuals, and three of those applied only to public employers.[225] These sixteen ordinances protected approximately seven million persons in California—only twenty-five percent of California's population.[226] Therefore, three-quarters of California's population could not rely on a local ordinance to protect themselves from employment discrimination based on sexual orientation.

---

223. *Soroka*, 7 Cal. App. 4th at 221, 1 Cal. Rptr. 2d at 88; *see supra* notes 165-183 and accompanying text (discussing *Soroka*). However, such affirmation is in jeopardy since the California Supreme Court granted review and suspended *Soroka* to review the constitutional right to privacy. *Soroka*, 822 P.2d 1327, 4 Cal. Rptr. 2d 180 (Jan. 31, 1992).

224. *Soroka*, 7 Cal. App. 4th at 217, 1 Cal. Rptr. 2d at 86; *see supra* notes 165-183 and accompanying text (discussing *Soroka*).

225. *See supra* notes 182-194 and accompanying text (discussing the application of local ordinances).

226. Chart prepared by Lobby for Individual Freedom and Equality (undated) (copy on file at the *Pacific Law Journal*); *The Heart of AB 101*, *supra* note 29.

Although local ordinances appeared to provide limited protection for homosexuals, this protection was illusory since the FEHA probably preempted the local ordinances.[227] California Government Code section 12993(c) states that it is the Legislature's intention to occupy the field of regulation of employment and housing discrimination with the FEHA.[228] The FEHA was to act exclusive of all other laws prohibiting employment and housing discrimination enacted by any city, county, or other political subdivision of the state.[229] This language appeared to preempt all local ordinances with the FEHA.

However, no California appellate court had yet to address squarely the issue whether the FEHA preempted local ordinances prohibiting sexual orientation discrimination in housing and employment. In October of 1991, a Los Angeles County Superior Court Judge, in a minute order, held invalid the anti-discrimination ordinance of Los Angeles on the ground that the FEHA preempted local ordinances.[230] However, in April of 1990, a superior court judge in San Francisco had held in two separate cases that San Francisco's ordinance prohibiting employment discrimination against homosexuals was not preempted by the FEHA.[231] The Los Angeles decision was appealed to the Court of Appeal for the Second District.[232] However, a recent case by the California Supreme Court may have already resolved the issue.

Rojo v. Kliger,[233] a case dealing with whether the FEHA provided the exclusive remedy for injuries relating to sex discrimination in employment, discussed the preemption issue. In *Rojo*, the

---

227. *See* Rojo v. Kliger, 52 Cal. 3d 65, 81, 801 P.2d 373, 383, 276 Cal. Rptr. 130, 140 (1990) (discussing the Legislature's intent to preempt local anti-discrimination law).

228. CAL. GOV'T CODE § 12993(c) (West 1992).

229. *Id.*

230. Delaney v. Superior Fast Freight, L.A. Super. Ct. No. C759189 (Oct. 9, 1991), *appeal filed*, No. B063458 (Cal. Ct. App. 2d Dist. 1992); Scott Harris, *City's Gay Rights Ordinance Faces Test in Court Case*, L.A. TIMES, Dec. 6, 1991, at B1.

231. Ertag v. Western Union Corp., S.F. Super. Ct. No. 907720 (Apr. 3, 1990); McComb v. AT&T, S.F. Super. Ct. No. 849144 (Apr. 3, 1990); Martha Groves, *Frequent Job Bias Leaves Little Recourse, Gays Say*, L.A. TIMES, Oct. 5, 1991, at A1.

232. Delaney v. Superior Fast Freight, L.A. Super. Ct. No. C759189 (Oct. 9, 1991), *appeal filed*, No. B063458 (Cal. Ct. App. 2d Dist. 1992).

233. 52 Cal. 3d 65, 801 P.2d 373, 276 Cal. Rptr. 130 (1990).

California Supreme Court held that the FEHA does not supplant other state laws or common law relating to discrimination in employment.[234] Nevertheless, in reviewing the history of the FEHA, the court determined that the Legislature intended that the Rumford Fair Housing Act[235] and the Fair Employment Practices Act,[236] both of which were later combined to become the Fair Employment and Housing Act,[237] excluded all other local laws banning housing discrimination and employment discrimination.[238] Thus, according to the *Rojo* court, the intent of the Legislature in enacting the FEHA was to preempt local anti-discrimination law, but not to preempt state law such as the Unruh Civil Rights Act.[239] Therefore, a strong argument existed for the proposition that the FEHA, which includes Government Code section 12993(c), preempted local ordinances proscribing sexual orientation discrimination. If this was the case, homosexuals had no direct statutory protection from employment discrimination since the FEHA did not protect sexual orientation.[240]

In the public sector, some protection was available under California's equal protection clause and under Labor Code sections 1101 and 1102.[241] However, these protections were limited to persons who manifested or expressed their homosexuality.[242] In the private sector, there was almost no protection. *Soroka* applied Labor Code sections 1101 and 1102 to private employers, but did so in dictum. In addition, *Soroka* was suspended pending review.[243] Local ordinances were of little help since they were limited in geo-graphic scope and probably preempted by the FEHA.[244] These inadequacies

---

234. *Id.* at 70, 801 P.2d at 375, 276 Cal. Rptr. at 132.

235. 1980 Cal. Stat. ch. 992, sec. 8, at 3166 (repealing CAL. HEALTH & SAFETY CODE §§ 35700-35745).

236. 1980 Cal. Stat. ch. 992, sec. 11, at 3166 (repealing CAL. LAB. CODE §§ 1410-1433).

237. CAL. GOV'T CODE §§ 12900-12996 (West 1992).

238. *Rojo*, 52 Cal. 3d at 78, 801 P.2d at 380, 276 Cal. Rptr. at 137.

239. *Id.* at 81, 801 P.2d at 383, 276 Cal. Rptr. at 140.

240. *See supra* notes 23-27 and accompanying text (discussing the FEHA). Of course Labor Code §§ 1101 and 1102 provide some protection, but they were not directly intended to protect homosexuals as were the local ordinances.

241. *See supra* notes 118-136 and accompanying text (discussing California's equal protection clause and Labor Code §§ 1101 and 1102).

242. *See supra* notes 131-133 and accompanying text.

243. *See supra* note 218 and accompanying text.

244. *See supra* notes 225-240 and accompanying text.

in the protections accorded gays from job discrimination paved the way for AB 2601.

V. ASSEMBLY BILL 2601

A. The First Statute Protecting Gays from Private Sector Job Discrimination

Prior to September of 1992, the only protection for gays from job discrimination by private employers consisted of an attorney general opinion, one appellate case, and local ordinances. However, these three bases of protection proved inadequate.[245] As a result, AB 2601 was enacted to strengthen the protections afforded homosexuals against job discrimination by private employers.[246] The bill, introduced by Assemblymember Terry Friedman on February 11, 1992, and signed by Governor Pete Wilson on September 25, 1992, performs two functions: (1) It codifies *Gay Law Students v. Pacific Telephone and Telegraph* and *Soroka v. Dayton Hudson Corp.*; and (2) it creates Labor Code section 1102.1.[247] This new Labor Code section prohibits discrimination based on sexual orientation in any

---

245. *See supra* notes 225-240 and accompanying text.

246. *See generally Review of Selected 1992 California Legislation*, 24 PAC. L.J. 969 (1993) (discussing AB 2601 and its history).

247. The new section reads in its entirety:

(a) Sections 1101 and 1102 prohibit discrimination or different treatment in any aspect of employment or opportunity for employment based on actual or perceived sexual orientation.

(b) For purposes of this section:

(1) "Employer" as used in this chapter includes any person regularly employing five or more persons, or any person acting as an agent of an employer, directly or indirectly, including the state or any political subdivision of the state.

(2) "Employer" as used in this chapter does not include a religious association or corporation not organized for private profit, whether incorporated as a religious or public benefit corporation.

(c) Nothing in this section shall invalidate any marital status classification that is otherwise valid.

(d) Nothing in this section shall require or permit the use of quotas or other such affirmative action.

(e) Nothing in this section shall interfere with whatever existing rights an employer has to base employment actions on the commission of conduct illegal in California.

(f) Section 1103 on criminal penalties shall not apply to a violation of this section.

1992 Cal. Legis. Serv. ch. 915, sec. 2, at 3771 (West) (enacting CAL. LAB. CODE § 1102.1).

aspect of employment.[248] AB 2601 codifies the protection originated in *Gay Law Students*, developed by former Attorney General John Van De Kamp, and recognized in *Soroka v. Dayton Hudson Corp.*

AB 2601 took effect on January 1, 1993.[249] The true ramifications of the bill may be minimal at first since AB 2601 simply codifies the procedures underway in the Department of Industrial Relations.[250] Since October 31, 1991, soon after the holding in *Soroka*, the Department of Industrial Relations began accepting complaints by homosexuals for job discrimination as per Governor Wilson's instructions.[251] The State Labor Commissioner, head of the subdivision of the Department of Industrial Relations known as the Division of Labor Standards Enforcement,[252] is the party who actually investigates the complaints.[253] If the Labor Commissioner determines that a violation has occurred, he or she must order the employer to cease and desist from the violation.[254] In addition, the Commissioner has the authority to reinstate an employee wrongfully terminated as well as the authority to order payment of back wages.[255] However, the Commissioner may not levy fines or award compensatory damages to victims of discrimination.[256]

AB 2601 is the culmination of some fifteen years effort to enact a statute to protect homosexuals from employment discrimination.[257] The bill is a positive step in the right direction, but it does not do enough. Homosexuals are still treated differently from other groups discriminated against such as women, minorities, the

---

248. 1992 Cal. Legis. Serv. ch. 915, sec. 2, at 3771 (West).

249. Greg Lucas & David Tuller, *Surprise After Earlier Veto of Stronger Legislation*, S.F. CHRON., Sept. 26, 1992, at A1.

250. George Skelton, *Wilson Signs Bill On Gay Job Rights*, L.A. TIMES, Sept. 26, 1992, at A1; Amy Chance, *Governor Signs Gay Rights Bill*, SACRAMENTO BEE, Sept. 26, 1992, at A1.

251. Lucas & Tuller, *supra* note 249, at A1.

252. CAL. LAB. CODE §§ 79, 82 (West 1989).

253. *See id.* § 98.7(a) (West 1989); Chance, *supra* note 250, at A1.

254. CAL. LAB. CODE § 98.7(c) (West 1989).

255. *Id.*

256. Chance, *supra* note 250, at A1.

257. *Id.*

handicapped, and divorced persons, all of whom are included within the Fair Employment and Housing Act while gays are not.[258]

B. Inadequacies of AB 2601

In light of the inadequate protection prior to AB 2601, the Legislature enacted AB 2601 making great strides towards fully protecting homosexuals from job discrimination. AB 2601 creates Labor Code section 1102.1, which prohibits discrimination or different treatment in any aspect of employment or opportunity for employment based on actual or perceived sexual orientation.[259] However, the bill is inadequate when compared to the other possible means of protecting homosexuals from employment discrimination. Specifically, the procedures and principles of the Fair Employment and Housing Act (FEHA) make protection under the Labor Code insufficient.

Governor Pete Wilson signed AB 2601 because it was less onerous and less costly to employers than any prohibition under the FEHA.[260] In essence, he is correct. The Labor Code differs procedurally from the FEHA in limiting the opportunity for claimants to seek full compensation for job discrimination.

Under AB 2601, the Department of Industrial Relations, through the State Labor Commissioner, handles complaints of sexual orientation employment discrimination.[261] However, the main concern of the Labor Commissioner is the enforcement of laws regarding wages, hours, and benefits and the investigation of certain job-related safety and environmental violations—not to investigate job discrimination.[262] Under the FEHA, the Department of Fair Employment and Housing investigates job discrimination complaints by those

---

258. *See supra* notes 24-26 and accompanying text (discussing the FEHA).

259. 1992 Cal. Legis. Serv. ch. 915, sec. 2, at 3771 (West).

260. Letter from Governor Pete Wilson to the members of the California Assembly regarding AB 2601 (Sept. 25, 1992) (on file at the *Pacific Law Journal*); Skelton, *supra* note 250, at A1.

261. *See* 1992 Cal. Legis. Serv. ch. 915, sec. 1, at 3771 (West); CAL. LAB. CODE § 98.7 (West 1989).

262. *See* CAL. LAB. CODE §§ 96, 98 (West 1989); David Link, *Mixed Victory for Gays*, L.A. DAILY J., Oct. 9, 1992, at 4.

protected thereunder, which does not include homosexuals.[263] A wasteful duplicity of function exists between these two state departments. The Department of Fair Employment and Housing should be the governmental department responsible for investigating all job discrimination complaints.[264]

Besides defining the entity actually investigating the complaint, the Labor Code and the FEHA differ procedurally in its respective approach to the timing of the complaints and the timing of the subsequent investigations. Under the Labor Code, a complainant only has *thirty days* from the occurrence of the alleged discrimination in which to file a complaint with the Division of Labor Standards Enforcement.[265] Under the FEHA, a complainant has up to *one year* in which to file a complaint.[266] This difference puts homosexuals at a disadvantage in that they must decide to file a complaint for discrimination within a much shorter time frame than a person protected by the FEHA.

In addition, once a complaint is filed with the respective department or division, the Labor Commissioner, investigating the complaint brought by a homosexual, only has *sixty days* in which to complete the investigation.[267] The Department of Fair Employment and Housing, investigating the complaint brought by a racial minority or woman, has up to *one year* in which to complete its inquiry.[268] Consequently, those persons protected by the FEHA potentially receive ten extra months of investigation just by the fact that they are included in the FEHA, while homosexuals are limited to one-sixth the investigatory time merely because they are protected by the Labor Code and not the FEHA.

Finally, the most important procedural difference lies in the conclusiveness of the Labor Code. Once an employee files an administrative complaint with the Labor Commissioner, that employee may

---

263. *See* CAL. GOV'T CODE § 12930(f) (West 1992); Skelton, *supra* note 250, at A1.

264. Link, *supra* note 262, at 4.

265. *See* CAL. LAB. CODE § 98.7(a) (West 1989); Lucas & Tuller, *supra* note 249, at A1; Letter from Governor Pete Wilson to the members of the California Assembly regarding AB 2601 (Sept. 25, 1992) (on file at the *Pacific Law Journal*).

266. *See* CAL. GOV'T CODE § 12960 (West 1992); Lucas & Tuller, *supra* note 249, at A1.

267. *See* CAL. LAB. CODE § 98.7(e) (West 1989); Lucas & Tuller, *supra* note 249, at A1.

268. CAL. GOV'T CODE § 12965(a) (West 1992).

not then sue his or her employer in a court of law, unless the Commissioner dismisses the complaint.[269] In contrast, a claimant under the FEHA has the right to sue his or her employer directly if unsatisfied with the administrative remedy.[270] Thus, a racial minority, woman, divorced person, or handicapped person, all protected by the FEHA, gets two bites at the remedial apple—the administrative hearing and a court of law—while a homosexual is left with the apple core of the administrative hearing. This in and of itself seems unjust.

Procedural inequity is not the only deficiency underlying AB 2601. The principles behind the FEHA recognize that certain minority populations within society are subject to discrimination by the majority, and are thus deserving of protection.[271] Surely homosexuals qualify as one of these minority populations who have been subject to discrimination.[272] The California Supreme Court has stated "[t]he 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."[273] But instead of acknowledging homosexuals as coequal with blacks, women, and other minorities through the FEHA, AB 2601 relegates the gay community to the Labor Code, a section of the law not totally designed to combat employment discrimination.[274] The District of Columbia and five other states—Connecticut, Hawaii, Massachusetts, New Jersey, and Wisconsin—proscribe sexual orientation discrimination in employment within their respective anti-discrimination

---

269. *See* CAL. LAB. CODE § 98.7(d) (West 1989); Link, *supra* note 262, at 4; Skelton, *supra* note 250, at A1; Letter from Governor Pete Wilson to the members of the California Assembly regarding AB 2601 (Sept. 25, 1992) (stating that the procedures provided by the Labor Commissioner are an exclusive administrative remedy). *But see* DAILY LAB. REP., Oct. 2, 1992, at 4 (stating that Governor Wilson erred in his statement that AB 2601 offers an exclusive administrative remedy).

270. *See* CAL. GOV'T CODE § 12965(b) (West 1992); Link, *supra* note 262, at 4.

271. *See* CAL. GOV'T CODE § 12921 (West 1992) (recognizing and declaring to be a civil right the opportunity to seek, obtain and hold employment without discrimination for those minority groups within society subject to discrimination because of race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or age).

272. *See supra* notes 6-11 and accompanying text (listing statistics regarding employment discrimination against homosexuals).

273. Gay Law Students Ass'n v. Pacific Telephone and Telegraph, 24 Cal. 3d 458, 488, 595 P.2d 592, 610, 156 Cal. Rptr. 14, 32 (1979).

274. Link, *supra* note 262, at 4.

statutes.[275] These states treat discrimination against homosexuals equally with discrimination against women and racial minorities.[276] Why does California not do the same? Some commentators have asked, "[i]f gays are protected from job discrimination like everyone else, why not give them access to the same process?"[277] The protection afforded homosexuals under AB 2601 is a great step forward in the fight for equal rights for gays. But unequal remedies may perpetuate unequal rights.[278] By failing to amend the FEHA to expressly include sexual orientation, the government tacitly concedes that homosexuals are less deserving of protection than racial minorities, women, divorced persons, handicapped persons, and the other individuals protected by the FEHA.

VI. SUGGESTED IMPROVEMENTS IN THE LAW

Mindful of the previously discussed deficiencies in protection for homosexuals, even those existing in AB 2601, two alternative proposals to AB 2601 would better protect gays: Amend the California Constitution and/or amend the Fair Employment and Housing Act.

Article I, section 8 of the California Constitution speaks directly to employment discrimination. It states "[a] person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, or national or ethnic origin."[279] Section 8 should be amended to expressly list sexual orientation as a protected category, thereby recognizing the right of homosexuals to the same protection from job discrimination

---

275. *See* 1991 Conn. Acts 91-58 (Reg. Sess.); D.C. CODE ANN. § 1-2512 (1981); HAW. REV. STAT. § 378-2 (Supp. 1991); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West Supp. 1992); N.J. STAT. ANN. § 10:5-12 (West Supp. 1992); WIS. STAT. ANN. §111.31-111.395 (West 1988 & Supp. 1992). In addition, discrimination based on sexual orientation is prohibited in the Canadian provinces of Quebec, Ontario, Manitoba and the Yukon. Peter O'Neil, *Some Tory MPs Feel Bible Tells Them to Oppose Gay Rights*, VANCOUVER SUN, May 1, 1992, at A4.

276. *See, e.g.*, HAW. REV. STAT. § 378-2 (Supp. 1991) (stating that it shall be unlawful to discriminate in employment because of race, sex, sexual orientation, age, religion, color, ancestry, disability, marital status, or arrest and court record).

277. Link, *supra* note 262, at 4.

278. *Id.*

279. CAL. CONST. art. I, § 8.

as enjoyed by women and racial minorities. Article I, section 8 of the California Constitution should be amended to read: "A person may not be disqualified from entering or pursuing a business, profession, vocation, or employment because of sex, race, creed, color, national or ethnic origin, or *sexual orientation.*" Additionally, such an amendment would prohibit employment discrimination against gays in both public and private employment, obviating the dichotomy between public and private protection.[280]

In addition to amending the California Constitution, an amendment to the Fair Employment and Housing Act is needed to expressly protect gays from employment as well as housing discrimination.[281] Protection under the FEHA would also recognize that discrimination against homosexuals is akin to discrimination against racial minorities, women, and the other groups protected in the FEHA.[282]

Government Code section 12940, part of the FEHA, should be amended to expressly mention sexual orientation. Section 12940 prohibits employment discrimination based on those categories listed in the statute.[283] Sexual orientation should be placed alongside race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, and sex as grounds upon which one may not discriminate in employment. Government Code section 12940 should be amended to read:

> It shall be an unlawful employment practice . . . (a) For an employer, because of the race, religious creed, color, national origin, ancestry, physical handicap, medical condition, marital status, sex, or *sexual orientation* of any person, to refuse to hire or employ the person or to refuse to select the person for a training program leading to employment, or to bar or to discharge the person from employment or from a training

280. Gay Law Students Ass'n v. Pacific Telephone and Telegraph, 24 Cal. 3d 458, 495, 595 P.2d 592, 615, 156 Cal. Rptr. 14, 37 (1979) (Richardson, J., dissenting). Granted, AB 2601 also applies to both public and private employers. 1992 Cal. Legis. Serv. ch. 915, sec. 2, at 3771 (West).

281. AB 101 would have accomplished this goal. *See* A.B. 101, 1991-1992, Calif. Leg. Reg. Sess. (Dec. 4, 1990) (listing sexual orientation as a protected class under the Fair Employment and Housing Act).

282. *See supra* note 273 and accompanying text (describing the comparison between the struggle for homosexual rights and the struggle for minority rights recognized by the California Supreme Court).

283. *See supra* notes 110-113 and accompanying text (discussing the scope of the FEHA).

> program leading to employment, or to discriminate against the person in compensation or in terms, conditions or privileges of employment.

Express statutory inclusion within the FEHA is the only way to insure that homosexuals are granted the full right to protection enjoyed by other minority groups in society.

Gays also need additional protection from discrimination in housing. AB 2601 has no application to housing discrimination. Therefore, Government Code section 12955, also part of the FEHA, should be amended to explicitly list sexual orientation as an unlawful grounds upon which to discriminate in housing. Government Code section 12955 should be amended to say: "It shall be unlawful: (a) For the owner of any housing accommodation to discriminate against any person because of the race, color, religion, sex, marital status, national origin, ancestry, familial status, disability or *sexual orientation* of any person seeking to purchase, rent or lease any housing accommodation." As a supplementary measure, the Unruh Civil Rights Act should also be amended to expressly enumerate sexual orientation so as to further solidify protection for homosexuals against housing discrimination. Civil Code section 51 should be amended to read:

> All persons within the jurisdiction of this state are free and equal, and no matter what their sex, race, color, religion, ancestry, national origin, blindness or other physical disability, or *sexual orientation* are entitled to the full and equal accommodations, advantages, facilities, privileges, or services in all business establishments of every kind whatsoever.

Only after such amendments will gays truly be protected from housing discrimination.

VII. CONCLUSION

Sexual orientation discrimination is a problem that affects all persons in California—whether homosexual, bisexual or heterosexual. As Martin Luther King, Jr. said, "[w]e are caught in an inescapable network of mutuality, tied in a single garment of destiny. Whatever

affects one directly, affects all indirectly."[284] Discrimination against homosexuals not only taints those involved, but denigrates society as a whole. Fortunately, the courts, the Legislature, and society have seen fit to act to ameliorate the plight of gays subject to housing and employment discrimination.

Courts have construed the Unruh Civil Rights Act to protect homosexuals from housing discrimination.[285] *Hubert v. Williams* held that homosexuals are protected from arbitrary discrimination in rental housing by the Unruh Act.[286] In *Harris v. Capital Growth Investors XIV,* the California Supreme Court implicitly affirmed this proposition by using homosexuality to demonstrate that categories protected by the Unruh Act are all based on personal characteristics.[287] Of course, the holding in *Harris* never explicitly stated that homosexuals are protected by the Unruh Act and *Hubert* is only a decision by the appellate department of a superior court with little or no precedential value.

In the past, homosexuals were protected from employment discrimination, at least in the public sector, by *Gay Law Students Association v. Pacific Telephone and Telegraph.*[288] The monumental decision of *Soroka v. Dayton Hudson Corporation* provided additional protection for those working in the private sector, but the opinion was suspended pending review by the California Supreme Court.[289] Local ordinances were enacted to augment the scant statewide protection which existed for homosexual employees.[290] However, these ordinances were geographically disparate, varying from city to city, and they only protected one-quarter of California's

284. KING, *supra* note 1, at 77.

285. *See supra* notes 29-72 and accompanying text (discussing the Unruh Civil Rights Act).

286. 133 Cal. App. 3d Supp. 1, 184 Cal. Rptr. 161 (1982).

287. 52 Cal. 3d 1142, 1161, 805 P.2d 873, 883, 278 Cal. Rptr. 614, 624 (1991); *see supra* notes 91-109 and accompanying text (discussing *Harris* and its application).

288. *See* Gay Law Students Ass'n v. Pacific Telephone and Telegraph, 24 Cal. 3d 458, 488, 595 P.2d 592, 610-11, 156 Cal. Rptr. 14, 32-33 (1979) (creating a strained interpretation of the Labor Code to protect homosexuals in the public sector).

289. 7 Cal. App. 4th 203, 1 Cal. Rptr. 2d 77 (1991) *review granted and opinion superseded by* 822 P.2d 1327, 4 Cal. Rptr. 2d 180 (Jan. 31, 1992).

290. *See supra* notes 184-196 and accompanying text (describing the local ordinances).

population. Besides, the FEHA, which does not protect homosexuals, probably preempted these ordinances.[291]

Growing out of this confusion, lack of uniformity, and overall lack of protection, the California Legislature enacted AB 2601 which codified both *Gay Law Students* and *Soroka,* and expressly stated that an employer may not discriminate on the basis of sexual orientation.[292] The enactment of AB 2601 is heralded as a great advancement in the struggle for gay civil rights, but at least one commentator has had less enthusiasm.[293] "AB 2601 is a step forward. But it's nowhere near enough."[294]

Existing state law may be adequate to protect gays from housing discrimination and employment discrimination. But adequacy is not fruition in the struggle for gay civil rights. As Martin Luther King, Jr. said, "[i]njustice must be rooted out by strong, persistent and determined action."[295] Those directly involved in the gay civil rights movement must not stop with their moderate victory, but persevere until homosexuals are accorded the same recognition and the same protection as other minority groups in society.

Thomas Weathers

---

291. *See supra* notes 227-240 and accompanying text (discussing possible preemption).

292. 1992 Cal. Legis. Serv. ch. 915, sec. 1-2, at 3771 (West).

293. *See* Link, *supra* note 262, at 4; *see also* Stephen G. Hirsch, *Governor Signs Watered-Down Gay Rights Bill,* RECORDER, Sept. 28, 1992, at 4 (describing AB 2601 as a pro-employer bill and a more moderate version of the vetoed AB 101).

294. Link, *supra* note 262, at 4.

295. KING, *supra* note 1, at 89.