

IS HARASSMENT BASED ON SEXUAL ORIENTATION ILLEGAL?

By: Karen Sutherland

LEGAL BACKGROUND

Washington's Law Against Discrimination ("WLAD") does not protect employees from discrimination based on their sexual orientation. Also, Title VII of the Civil Rights Act, the federal law against sexual harassment, does not protect employees from harassment based on their sexual orientation. However, there are other laws and regulations that may do so, depending on where the employee is located and the nature of the employer's business.

Some cities and counties protect all employees in organizations over a certain size from discrimination based on sexual orientation, such as the cities of Seattle, Spokane, and Tacoma (as of April 2002), and unincorporated King County. Other cities have code sections that prohibit harassment based on sexual orientation for certain employers, such as the City itself (e.g., Everett), or the City's cable provider (e.g., Bellevue and Bellingham).

A recent case held that public employers (cities, counties, public hospitals, public schools, etc.) cannot discriminate against employees because of homosexuality. The case is Miguel, et al. v. Guess, et al., Washington State Court of Appeals No. 20699-8-III (July 18, 2002). Division III of the Court of Appeals decided that "a state actor violates a homosexual employee's right of equal protection when it treats that person differently than it treats heterosexual employees, based solely on the employee's sexual orientation. The violation of the right of equal protection is actionable under § 1983." Section 1983 states that "Every person who, under color of any statute, ordinance, regulation, custom or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

The Miguel decision means that public employers cannot discriminate against or harass employees based on their sexual orientation unless the employer can prove that treating homosexuals less favorably than other groups advances some legitimate governmental interest.

The Miguel case involved a sonographer who worked for a public hospital. A doctor at the hospital made negative comments about the sonographer's sexual orientation and said that she should not be doing vaginal exams. The doctor was told to stop making disparaging comments about the sonographer, especially comments about the sonographer's lifestyle, and he agreed to stop the behavior. The doctor stopped the behavior by refusing to work with the sonographer, which meant that she did not have enough work so her hours were reduced. She was subsequently fired for being disruptive and for breaching patient confidentiality while gathering information to challenge her reduction in hours. Her case was dismissed by the trial court on summary judgment. The Court of Appeals reversed the trial court decision with respect to her equal protection/Section 1983 claims and sent the case back to Superior Court.

The Court of Appeals in the Miguel case directed the Superior Court to apply the same framework for decision that is used in federal Title VII sexual harassment cases - *i.e.*, once the plaintiff has established a prima facie case, the burden of production shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse action taken against the plaintiff. If the defendant puts forth a legitimate, nondiscriminatory reason, then the plaintiff must prove by a preponderance of the evidence that the defendant's proffered reasons were not its true reasons, but were mere pretext for illegal discrimination. The Court of Appeals also found that there was no qualified immunity for the doctor, and that the Superior Court had the discretion under Section 1983 to award attorney's fees to the party who prevails in a suit to enforce Section 1983.

It is possible that the Miguel decision will be appealed and reversed on appeal; it is also possible that Division I and/or Division II of the Court of Appeals (which cover Western Washington - Division III is Eastern Washington) would ignore Division III's ruling. However, until either of those events happens, public employers should assume that an employee alleging harassment based on sexual orientation has a legal claim under Section 1983.

PRACTICAL GUIDELINES

- Be aware that the laws regarding harassment based on sexual orientation are changing, and that conduct that has been acceptable in the past may not be acceptable in the future (or in a case brought in the future regarding conduct that is occurring now).
- If you are a public employer, add sexual orientation to your policies against harassment and discrimination.
- If you have employees working in cities such as Seattle, Tacoma, or Spokane, or in unincorporated King County, add sexual orientation to your policies against harassment and discrimination.
- If you are not in a jurisdiction that currently has laws against harassment based on sexual orientation, consider adopting a policy that is broader than the law so that, if the law changes in the future or if you broaden your market to include an area that has such laws, you will not need to change your conduct or your policies.

The above suggestions are broad, general comments only, and are not legal advice. Individual situations require individual analysis. For assistance with a specific situation, contact an attorney with experience in this area, such Karen Sutherland, Chair of the Employment and Labor Law Practice Group of Ogden Murphy Wallace, P.L.L.C. Karen Sutherland can be reached at (206) 447-7000 or by e-mail at ksutherland@omwlaw.com.