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LEGAL PROTECTIONS IN THE WORKPLACE FOR
GAYS, LESBIANS, AND BISEXUALS
STATE OF NEW HAMPSHIRE¹

Civil Rights Project

NEW HAMPSHIRE'S ANTI-DISCRIMINATION LAW

As of January 1, 1998, New Hampshire state law protects individual employees from discrimination in the workplace based on their sexual orientation. N.H. Rev. Stat. § 354-A.

Who is protected?

New Hampshire's anti-discrimination law prohibits discrimination in employment against any employee who is gay, lesbian or bisexual or who is perceived as being gay, lesbian or bisexual. You do not have to be "out" to be protected. You do not even have to be gay to be protected from discrimination based on sexual orientation.

No person can claim the protection of the law who is employed by a parent, spouse, or child. Nor does it apply to domestic workers. All state employees are covered.

Does it apply to all employers?

New Hampshire's anti-discrimination law pertains to most employers with more than five employees. It does not apply to social clubs or charitable, educational or religious associations that are not organized for private profit.

What constitutes discrimination?

Determining what constitutes discrimination can be tricky. Some actions (or inaction) are clear. **Hiring or termination** decisions cannot be based on an individual's sexual orientation or perceived orientation. New Hampshire's prohibition against discrimination

¹ This document is intended to provide general information regarding anti-discrimination law. It necessarily simplifies complex legal issues and should not be considered a comprehensive analysis of all legal issues affecting gays, lesbians, and bisexuals in the workplace. It is important to consult an attorney for advice on specific legal problems.

extends further and also includes **terms, conditions or privileges of employment**. As a result, employment decisions beyond hiring and firing may also not be based on an employee's sexual orientation or perceived sexual orientation. This prohibition includes the employer's decisions regarding compensation, promotion and transfer as well as many other terms of employment.

The scope of "terms of employment" may be quite broad. It includes denial of job promotions, benefits, and performance evaluations. For example, an employer may not discriminate in shift, holiday, or vacation preferences based on an employee's sexual orientation or perceived orientation. Nor may an employer assign a gay employee less preferable duties.

Sometimes, an employee may know an employer is discriminating but have difficulty pinpointing the source. For example, an employer may make snide or harassing comments that are rooted in the employee's sexual orientation. It is quite rare that an employer will make known that the reason for treating an employee differently is because he or she is gay or lesbian. Such cases may present difficult issues under the law.

While general comments about an employee's sexual orientation may not constitute discrimination, a pattern of targeting an employee for harassment based on the employee's sexual orientation may be discrimination where such conduct by the employer denies the gay employee of terms, conditions or privileges of employment that are comparable to those of non-gay employees. As a result, the New Hampshire law prohibits **harassment** of employees that is rooted in the employee's sexual orientation or perceived sexual orientation.

Moreover, an employer may not treat gay employees differently than other employees. Sometimes discriminatory treatment is obvious because of comments made by the employer. Other times, it must be inferred by comparing the way gay employees are treated as compared to other employees. Different treatment of gay employees amounts to discrimination. For example, if non-gay employees generally discuss details of their personal lives in the workplace, including conversations about their spouses, an employer could not discipline only gay employees for engaging in the exact same conduct. Such discipline would amount to a denial of an employment privilege based on sexual orientation.

What about sexual harassment and harassment based on sexual orientation?

New Hampshire's anti-discrimination law prohibits sexual harassment and harassment based on sexual orientation. This means that an employer may not condition any employment decisions on an employee's submission to unwelcome sexual advances or requests for sexual favors. Nor may an employer permit or create conduct that creates a hostile or offensive working environment either on the basis of sex or on the basis of sexual orientation. State prohibitions on sexual harassment apply equally to gay and straight employees. This means that prohibitions on sexual harassment pertain to men

who harass men (whether gay or straight) as well as to women who harass women (whether gay or non-gay) where that harassment is because of the person's sex.

What if I report discrimination or make a claim of discrimination and my employer retaliates against me?

Some employees worry that if they exercise their right to redress sexual orientation discrimination that their employer will retaliate against them. New Hampshire's anti-discrimination law prohibits retaliation by an employer against an employee because the employee files a complaint of discrimination or assists in the prosecution of a complaint. This prohibition covers any steps taken by an employer in retaliation for an employee making efforts under the anti-discrimination law to stop unlawful discrimination including expulsion or termination.

I reported a co-worker for harassing or discriminatory conduct and now I have been accused of sexual harassment. What can I do?

Fabricated allegations of sexual harassment against a gay employee constitute discrimination. Such conduct may constitute harassment amounting to actionable discrimination in the terms, conditions, and privileges of employment (as discussed above).

What do I do if I think I have been discriminated against?

The decision of how to respond to discrimination in the workplace is a difficult and very personal one. Each case is different and you are well-advised to seek peer and legal advice before deciding how to proceed. A document as broad as this one cannot incorporate every job scenario and discrimination nuance and as a result can serve, at best, as an incomplete checklist of alternatives to consider.

A person subjected to discrimination in the workplace has a number of non-litigation alternatives which may or may not be effective removing problems attendant with being the object of discrimination. What follows is an incomplete list of options followed by some discussion of the ramifications of each alternative. When weighing the alternatives, do not ignore physical safety concerns and keep in mind that most legal recourse requires a lengthy period of litigation. Some of these options can be pursued simultaneously. The decision about how to proceed is yours. To fully consider the ramifications of all of the choices, you should consult an attorney.

You can:

Tolerate the Discrimination. People remain in jobs where they experience discrimination for a variety of reasons. Economic necessity is one of the foremost factors to consider in deciding whether or not to complain about discrimination. Some people live in small (or not so small) communities where complaining about workplace discrimination could have devastating personal repercussions which are simply not worth risking. If you choose to remain in a job where you are discriminated against, it may be advisable to seek support from friends or family to minimize the damaging effects of such discrimination.

Leave Without Challenging the Discrimination. Most employment is at-will. From the employee's perspective, this means that you may quit your current position for any reason or no reason at all. Sometimes the best option is to quickly remove yourself from a workplace where you are discriminated against and for many of the reasons discussed above, the repercussions of seeking redress are not worth the risks.

Even if your position is a contractual one, and not at-will, an employer could be persuaded not to enforce a contract term in exchange for an employee's agreement not to take legal action in pursuing a legal remedy.

Follow Internal Grievance Procedures. Many employers provide internal grievance procedures when an employee has suffered discrimination in the workplace. This is particularly true for employers that have anti-sexual harassment policies. Sometimes, curtailing discriminatory conduct of a supervisor or a co-worker is as simple as notifying human resource personnel who may be responsible for ensuring a workplace free from discrimination. There may be reasons to follow internal grievance procedures even if you are convinced an employer is unwilling to redress your concerns. A court or administrative agency that hears your claim may determine that your failure to follow internal procedures deprived your employer an opportunity to rectify the situation.

On the other hand, there may be reasons not to follow internal grievance procedures. Notifying an employer about discrimination could (where confidentiality is not adequately maintained) result in your being more "out" than you prefer as your employer could disseminate information about your sexual orientation to others in the workplace.

Again, you should consider all of the possible repercussions of your choices. Note, however, that recent caselaw suggests that an employer may successfully defend against a charge of sexual harassment if you unreasonably fail to avail yourself of opportunities provided you to notify your employer of the misconduct. An employer with a sexual harassment policy would likely vigorously defend against a charge of sexual harassment where an employee failed to follow internal grievance procedures.

Review Union Contracts, If Applicable. Employees who are union members may have contracts that detail protections and remedies for discrimination. Union employees should review their contracts to determine if there are grievance procedures that should be followed or pursued.

Take Intermediate Steps in Anticipation of Litigation.

- 1) Make a chronology of events leading up to and following the discrimination. Include as much detail as possible including names, witnesses, a description of events, locations, etc. Be sure to write down all offensive comments or actions. Retain this chronology; do not provide it to your employer.
- 2) Save any written notes, articles, documents, or letters you received during the as a result of the discriminatory actions.
- 3) Try to get a letter of recommendation when appropriate. A letter of recommendation can be extremely useful if you press your case legally.
- 4) Obtain your personnel file if you can. New Hampshire law requires an employer to provide an employee the opportunity to inspect their personnel records (see below). Note that asking to see your file may tip an employer off that you are considering legal action.
- 5) Retain all written policies, procedures, and employee manuals you receive during the course of your employment.
- 6) Apply for unemployment. Even if you do not think you will be eligible because you were fired, filing for unemployment clearly signals your employer that you do not agree with the employer's actions.

Take Legal Action.

New Hampshire prohibits sexual orientation discrimination, and you do have legal recourse. The next step in exercising rights under the New Hampshire anti-discrimination law is the filing of a complaint with the New Hampshire Commission for Human Rights. This step of the process is fairly simple. You do not need an attorney to file a complaint. If you go to the Commission, a person there will help you state the case of discrimination against you. To contact the Human Rights Commission you may call (603) 271-2767 or write to the New Hampshire Human Rights Commission at 2 Channell Drive Concord, NH 03302.

Filing a complaint with the Commission triggers an investigation into the facts and circumstances of your case. Upon filing a complaint, the Commission will initiate an investigation into the matter. This means an investigator will contact your employer to obtain information and materials related to your charge of discrimination. Through the

investigation and conciliation stages, matters regarding a human rights action are confidential and not made publicly available.

If the investigator determines that probable cause exists to credit your story, the Commission will convene a conference or conciliation session in an effort to redress or halt the discrimination.

If this effort does not succeed in obtaining relief for you, the Commission will conduct a public hearing. At this hearing, you may be represented by an attorney.

After this hearing, the Commission can issue an order for your employer to cease discriminating against you and can award you monetary and other damages, including reinstatement, back pay, and attorney's fees. Alternately, the Commission may decide to dismiss the complaint. Should your employer fail to follow the Commission's decision, you can enforce the Commission's decision by an order of a court. Note also that your employer may seek a court's review of the Commission's decision.

If this effort does not succeed in obtaining relief for you, the Commission will conduct a hearing before three members of the Commission. At this hearing, you will be represented by the Commission or you may intervene on your own behalf with or without the assistance of an attorney. Your employer will be required, during this hearing, to answer the charges you filed.

After this hearing, the Commission can issue an order for your employer to cease discriminating against you and can award you monetary damages. Alternately, the panel may decide to dismiss the complaint. Should your employer fail to follow the Commission's decision, you can enforce the Commission's decision by an order of a court. Note also that your employer may seek a court's review of the Commission's decision.

When must I file a complaint with the Commission?

All complaints with the Commission must be filed within 180 days after an employee has been subjected to discrimination by the employer. This is a firm deadline. The Commission generally allows no exceptions; failure to file within 180 days of the discriminatory conduct will result in your case being dismissed.

Can I obtain my personnel records?

Yes. New Hampshire law requires that an employer provide an employee with a copy of the employee's personnel file upon written request. N.H. Rev. Stat. § 275:5.

Do any other laws protect me?

Although federal anti-discrimination law does not yet protect employees from discrimination rooted in sexual orientation, federal law provides relief for victims of sexual harassment regardless of the sexual orientation of the harasser or victim. Federal law also provides relief for sex and disability discrimination which may also be applicable in some cases. When applicable, an employee may file a complaint both with the New Hampshire Human Rights Commission and the United States Equal Employment Opportunity Commission.

In certain circumstances, promises made by employers in personnel manuals, written employment policies, and employee handbooks can be contractually binding on the employer. This contractually binding commitment can apply to anti-discrimination policies contained in such documents. The law in this area can be complicated; any aggrieved employee who believes that promises made by an employer in such documents have not been met should consult an attorney. In any case, all employees should keep copies of all personnel manuals and materials distributed during the course of their employment.

Helpful Addresses:

New Hampshire Human Rights Commission
2 Channell Drive
Concord, NH 03302
(603) 271-2767 (ph)